PRAGMATISM, POSITIVISM, AND PRINCIPLES IN FOURTH AMENDMENT THEORY

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INTRODUCTION

The fragmentation of constitutional theory in law school curricula and academic scholarship is nowhere more evident than in the isolation of the fourth amendment from broad currents of contemporary jurisprudence. Along with the other provisions of the Bill of Rights linked to the criminal justice system, the fourth amendment has been consigned to a category labeled "criminal procedure" that is generally treated as distinct from "constitutional law."[1] Courses are taught and scholarly articles written by criminal procedure specialists who work within the evolving but limited domain of fourth amendment doctrine. With a few notable exceptions,[2] this insular analysis does not incorporate many of the issues debated by scholars who specialize in other parts of the Constitution. Conversely, scholars who teach and write about broader jurisprudential themes in the context of the first or fourteenth amendments, federalism, the separation of powers, and other topics commonly associated with the rubric of "constitutional law," are unlikely to apply these same concepts to the fourth amendment,[3] nor are they likely to look to fourth amendment literature for more general insights.

This isolation has impoverished both fourth amendment theory and general constitutional theory alike. I address both sides of this problem, because they cannot be separated from one another. I believe we can arrive at a new and better understanding of the fourth amendment by scrutinizing it with the aid of broader jurisprudential theories that are often applied to other areas of constitutional law. I am equally convinced that analysis of the fourth amendment can in turn enrich the broader jurisprudential theories, as well.

The theory commonly referred to as pragmatism serves as the primary vehicle for pursuing these two goals, and it is an ideal laboratory for the inquiry. Judicial acceptance of the main tenets of pragmatist theory is the source of much that has been confusing about the Supreme Court's recent opinions interpreting the fourth amendment. The Court's critics have complained vigorously about the chaotic state of search and seizure law, and

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1. *See* Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1131 (1991) (describing these divisions in the typical law school curriculum).

2. The most ambitious recent attempt to incorporate fourth amendment theory into broader themes of constitutional interpretation is Silas J. Wasserstrom & Louis M. Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19 (1988). Occasionally scholars have included the fourth amendment in their analyses of various portions of the Constitution. *See, e.g.*, Amar, *supra* note 1.

3. For two recent exceptions, see T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987); Amar, *supra* note 1.

have linked the confusion to the absence of any theoretical basis for these decisions. The analysis in this Article demonstrates that the Court's seeming inconsistency results not from the lack of a theory, but from the very nature of the pragmatist theories that generate the Justices' opinions. By scrutinizing fourth amendment cases under the lens of pragmatism, we discover what the Justices have been doing, and why.

The analysis of fourth amendment case law in turn provides insights into legal pragmatism. These insights are particularly timely because legal pragmatism, long the working theory of many—perhaps most—lawyers and judges,[4] has again become a theory touted by many legal academics.[5] Yet when we identify its impact on fourth amendment theory, we discover that

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4. *See infra* note 18. This is not to suggest that practicing lawyers and judges would describe themselves as philosophical pragmatists. Rather, the analysis presented in this Article suggests a pragmatist legal consciousness in the sense used by Professor Kennedy: as something shared even by actors believing they disagree profoundly about important substantive matters. *See* Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RES. LAW & SOC. 3 (1980). These are underlying premises that amount to

> something more influential than a checklist of facts, techniques, and opinions. They can share premises about the salient aspects of the legal order that are so basic that actors rarely if ever bring them consciously to mind . . . . These underlying premises concern the historical background of the legal process, the institutions involved in it, and the nature of the intellectual constructs which lawyers, judges, and commentators manipulate as they attempt to convince their audiences.

Id. at 6; *see also* H.S. Thayer, *Pragmatism*, *in* THE ENCYCLOPEDIA OF PHILOSOPHY 430, 435 (1967) (a measure of the success of the philosophical pragmatist reaction to nineteenth century conceptualism is that pragmatism has "disappeared as a special thesis by becoming infused in the normal and habitual practices of intelligent inquiry").

5. For a sampling of the recent scholarly discussion of legal pragmatism, see RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990); ROBERT S. SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 12 (1982) [hereinafter SUMMERS, INSTRUMENTALISM]; Lynn A. Baker, *"Just Do It": Pragmatism and Progressive Social Change*, 78 VA. L. REV. 697 (1992); Jennifer G. Brown, *Posner, Prisoners, and Pragmatism*, 66 TUL. L. REV. 1117 (1992); Thomas C. Grey, *What Good is Legal Pragmatism?*, *in* PRAGMATISM IN LAW AND SOCIETY 9 (Michael Brint & William Weaver eds., 1991) [hereinafter Grey, *What Good is Legal Pragmatism?*]; Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989) [hereinafter Grey, *Holmes and Legal Pragmatism*]; Frederic R. Kellogg, *Legal Scholarship in the Temple of Doom: Pragmatism's Response to Critical Legal Studies*, 65 TUL. L. REV. 15 (1990); Dennis M. Patterson, *Law's Pragmatism: Law as Practice & Narrative*, 76 VA. L. REV. 937 (1990); Richard Rorty, *What Can You Expect From Anti-Foundationalist Philosophers?: A Reply to Lynn Baker*, 78 VA. L. REV. 719 (1992); Symposium, *Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990); Mark V. Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502 (1985); Roberto M. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 564-65 (1983); Stanley Fish, *Almost Pragmatism: Richard Posner's Jurisprudence*, 57 U. CHI. L. REV. 1447 (1990) (book review); Robert S. Summers, *Judge Richard Posner's Jurisprudence*, 89 MICH. L. REV. 1302 (1991) (reviewing RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990)). For earlier descriptions of legal pragmatism, see 1 ROSCOE POUND, JURISPRUDENCE 91 (1959); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 606-12 (1958).

implementation of pragmatist theories and methods has profound—and troubling—implications for constitutional decisionmaking, particularly in cases involving stark conflicts between individual autonomy and government authority.[6] Specifically, fourth amendment pragmatism produces outcomes that diminish the scope of individual liberty while increasing government power; it utilizes methods—interest balancing is one example—that undervalue rule-based decisionmaking while exaggerating the importance of substantive reasons for decisions; and within the institutions of criminal justice, it has tended to redistribute power from the judiciary to the executive branch.

Case analysis produces these insights into pragmatism because the fourth amendment is a particularly provocative source of materials for developing and applying legal theory. 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.[7]

No text in the Constitution defines more sharply the conflict between individual autonomy and government authority. No other provision is grounded more dramatically in the events that led to the creation of this nation.[8] No other pair of clauses in the Bill of Rights, except the religion clauses of the first amendment, is more susceptible to inherently contradictory interpretations than are the two clauses of the fourth.[9] No body of case law presents more provocative examples of the factually complex and diverse transactions between citizen and government to which the Constitution frequently must be applied—transactions which routinely involve a

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6. *See, e.g., infra* notes 198–204, 366–369, and 399–400 and accompanying text.

7. U.S. CONST. amend. IV.

8. *See* NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 23–105 (1937). Remembering James Otis's famous courtroom argument opposing the issuance of new writs of assistance in Massachusetts, John Adams wrote: "Mr. Otis's oration against the Writs of Assistance breathed into this nation the breath of life." *Id.* at 59 (citing WORKS OF JOHN ADAMS, X, 276). Referring to Otis's argument, Adams concluded: "Then and there the child Independence was born." *Id.* (citing WORKS OF JOHN ADAMS, X, 247-48); *see also* Warden v. Hayden, 387 U.S. 294, 312 (1966) (Fortas, J., concurring) (stating that general searches pursuant to writs of assistance "were one of the matters over which the American Revolution was fought"); Harris v. United States, 331 U.S. 145, 159 (1947) (Frankfurter, J., dissenting) (asserting that the fourth amendment "sought to guard against an abuse that more than any one single factor gave rise to American independence").

9. The text of the first clause of the fourth amendment can be interpreted as establishing a general standard of reasonableness, while the second clause can be construed as announcing restrictions more readily characterized as rules. The Supreme Court's treatment of the relationship between the two clauses is discussed in Part II.

regular cast of institutional actors (citizens, police officers, magistrates, trial judges, appellate judges, prosecutors, and defense lawyers). As a result, the fourth amendment serves as fertile ground for exploring fundamental questions commonly addressed by scholars of other parts of the document. For example, at the point of application the fourth amendment almost always requires decisions about the appropriate allocation of power between the executive and judicial branches of government. The behavior of judges and police officers as decisionmakers—particularly as rule-makers and rule-appliers—is a central topic of fourth amendment theory.

These two interrelated themes—that broader jurisprudential theories have much to teach us about the fourth amendment and that the fourth amendment can supply fresh insights into those broader theories—are developed in the remaining sections of the Article. Part I sets the stage by describing a fundamental complaint raised by critics of the Supreme Court's contemporary fourth amendment case law, then presenting the main pragmatist ideas about law and its uses—ideas that help explain why that complaint is misdirected. This issue is addressed directly in Part II, which explores the impact of pragmatism on fourth amendment theory by examining contemporary decisions in which the Supreme Court has replaced a rule-based interpretive model—grounded in the Warrant Clause—with pragmatist methods emphasizing a malleable standard of reasonableness derived from the amendment's first clause. This analysis demonstrates that the decisions described by the Court's critics as theoretically incoherent in fact reveal legal pragmatism at work. It also lays the groundwork for the conclusion that pragmatist theories and methods are inadequate for the task of interpreting this part of the Constitution.

Part III reverses the analytical direction. Fourth amendment pragmatism serves as a device for examining more fundamental jurisprudential questions, including the functions of rules, the contrasting ways in which rule-based and nonformal decisionmaking allocate power among institutional actors within the justice system, and the implicit value choices embodied in the selection of decisionmaking theories. This discussion also clarifies the relationship between the emergence of fourth amendment pragmatism and the transfer of power within the criminal justice system from the judiciary to the executive branch. In light of these observations, Part IV concludes the analysis by presenting an argument for rejecting pragmatist theories and methods and replacing them with a rule-based interpretive theory of the fourth amendment that I label *principled positivism*. This theory asserts that the fourth amendment embodies a normative choice favoring individual autonomy over government authority, and it builds upon the earlier analysis

of pragmatism, rules, and the fourth amendment to establish that only a rule-based interpretive theory can preserve that choice.

I. THE PROBLEM AND LEGAL PRAGMATISM

A. What is Wrong with the Fourth Amendment?

Critics of the Supreme Court's contemporary fourth amendment jurisprudence regularly complain that the Court's decisions are illogical, inconsistent, unprincipled, ad hoc, and theoretically incoherent.[10] They

10. Authorities are numerous, for the "disorder in fourth amendment jurisprudence has been a boon to legal commentators, who have been quick to criticize and point out inconsistencies in discrete cases." Brian J. Serr, *Great Expectations of Privacy: A New Model for Fourth Amendment Protection*, 73 MINN. L. REV. 583, 587 (1989). For a sample of the recent literature, see Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468 (1985) ("The Fourth Amendment is the Supreme Court's tarbaby: a mass of contradictions and obscurities that has ensnared the 'Brethren' . . . ."); Morgan Cloud, *Search and Seizure by the Numbers: The Drug Courier Profile and Judicial Review of Investigative Formulas*, 65 B.U. L. REV. 843, 845 (1985) (criticizing a group of Supreme Court opinions "for reaching contradictory results in spite of remarkably similar facts"); Serr, *supra*, at 587 ("[T]he entire course of recent Supreme Court fourth amendment precedent . . . is misguided and inconsistent with the spirit of the fourth amendment."); Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173 (1988) (criticizing fourth amendment balancing as a methodology because it dilutes liberty); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 383 (1988) (arguing that the Court has failed "to develop a coherent analytical framework" for the fourth amendment); Wasserstrom & Seidman, *supra* note 2, at 20 ("[T]here is virtual unanimity . . . that the Court simply has made a mess of search and seizure law.")(footnote omitted); *id.* at 21 (One of the authors' goals is to use a "backdrop of broader currents in constitutional theory" to explain "the unsatisfactory state of search and seizure law."); Richard G. Wilkins, *Defining the "Reasonable Expectation of Privacy": An Emerging Tripartite Analysis*, 40 VAND. L. REV. 1077, 1080 (1987).

Dissenting Supreme Court Justices have frequently complained that specific decisions are inconsistent with a proper theory of the amendment. *See, e.g.*, National Treasury Employees Union v. Von Raab, 489 U.S. 656, 679–80 (1989) (Marshall, J., dissenting) ("[T]he Court's abandonment of the fourth amendment's express requirement that searches of the person rest on probable cause is unprincipled and unjustified."); Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 637 (1989) (Marshall, J., dissenting) (arguing that abandonment of the probable cause standard for search and seizures in favor of a standard of reasonableness renders the fourth amendment "virtually devoid of meaning"); Florida v. Riley, 488 U.S. 445, 466–67 (1989) (Brennan, J., dissenting) (comparing the police surveillance method upheld by the Court to surveillance methods described in George Orwell's *1984*); Dow Chem. Co. v. United States, 476 U.S. 227, 251 (1986) (Powell, J., dissenting and concurring in part) (claiming that the Court's consideration of the manner of surveillance rather than reasonable expectations of privacy puts fourth amendment privacy rights "seriously at risk as technological advances become generally disseminated and available in our society"); California v. Ciraolo, 476 U.S. 207, 223 (1986) (Powell, J., dissenting) (asserting that the Court erred by focusing upon the manner of surveillance rather than upon the interests of the individual and of a free society); United States v. Montoya de Hernandez, 473 U.S. 531, 566 (1985) (Brennan, J., dissenting) (contending that the Court erred by permitting extensive detention and body search of an alien crossing the border without requiring either probable cause or a judicial warrant).

parse the Court's decisions to demonstrate that this is now a body of law ungoverned by any unifying theory.[11] The critics cry out for coherence, proposing alternatives designed to bring order to the theoretical chaos of search and seizure law.[12]

My first goal is to demonstrate that the Court's current approach to deciding fourth amendment cases is not atheoretical, and in fact lies within the boundaries of a theory now fundamental in our legal culture. That theory, legal pragmatism, provides a jurisprudential pedigree for what otherwise appears to be a theoretically unjustifiable assortment of decisions.

Identifying the philosophical foundations of these decisions does not demonstrate that they are sound. But, whatever one may think of the Court's decisions in individual cases, the Justices are engaged in a legitimate interpretive exercise, applying theories and methods inherent in pragmatist ideas about law that are now common to our legal culture. Of greater significance to students of the Constitution, this analysis changes our understanding of the sources of the theoretical inconsistency of these opinions. Simply put, the Court's inconsistency is the inevitable product of the pragmatist assumptions that drive the decisionmaking process.

This critique produces a fundamental dilemma for some of the most trenchant critics of the Court's recent decisions. Pragmatism frequently has been associated with liberal political theories and causes,[13] although from time to time scholars have suggested that pragmatism is inherently conservative.[14] If we associate the term "conservative" with theories favoring government or social authority at the expense of individual

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11. *See, e.g.*, Bradley, *supra* note 10, at 1469 ("Professor LaFave recently engaged in the game, so dear and familiar to fourth amendment scholars, of demonstrating that the nine search and seizure decisions rendered in the 1982-83 Term were illogical, inconsistent with prior holdings and, generally, hopelessly confusing."); *see also* Bruce A. Green, *"Power, Not Reason": Justice Marshall's Valedictory and the Fourth Amendment in the Supreme Court's 1990 Term*, 70 N.C. L. REV. 373 (1992) (demonstrating that the Court's five decisions interpreting the fourth amendment issued during the October 1990 term were illogical and inconsistent).

12. *See, e.g.*, Bradley, *supra* note 10; Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1 (1991); Sundby, *supra* note 10; Wasserstrom & Seidman, *supra* note 2.

13. *See, e.g.*, RICHARD HOFSTADTER, THE AGE OF REFORM, FROM BRYAN TO F.D.R. 154 (1955); SUMMERS, INSTRUMENTALISM, *supra* note 5, at 29–30, 49, 84, 255–56; MORTON G. WHITE, SOCIAL THOUGHT IN AMERICA, THE REVOLT AGAINST FORMALISM 5–7, 57–58, 64–65, 128–29 (1976).

14. *See, e.g.*, Grey, *What Good is Legal Pragmatism?*, *supra* note 5, at 10, 18 (pragmatism can be criticized for tending to preserve the status quo).

liberty,[15] fourth amendment case law supplies a provocative example of pragmatism's inherent conservatism. In practice, the application of pragmatist ideas to interpret the fourth amendment has produced decisionmaking theories and methods that tend to favor government authority.

This revelation creates an interesting set of political and theoretical problems for many of the most effective critics of the Court's recent fourth amendment decisions. A number of these critics have proposed alternative interpretive theories—intended to enhance the protection of individual liberties—that are themselves grounded in pragmatist ideas.[16] If legal pragmatism inherently favors collective authority, then advocates of

15. The label "conservative" can be associated with theories espousing limited government and "liberal" with theories favoring government power. *See, e.g.*, ARNOLD BRECHT, POLITICAL THEORY: THE FOUNDATIONS OF TWENTIETH-CENTURY POLITICAL THOUGHT 151–52, 156 (1970). In the contemporary fourth amendment context, however, the term "conservative" is more likely to be linked with those favoring expansive executive branch authority to search and seize and "liberal" with those favoring individual liberty. *See, e.g.*, DAVID G. SAVAGE, TURNING RIGHT, THE MAKING OF THE REHNQUIST SUPREME COURT 230–33 (1992).

16. In contemporary academic literature, it is common even for critics who attack the manner in which the Supreme Court employs balancing and other nonformalist theories to themselves advocate the use of pragmatist methods to correct the errors and defects they identify in fourth amendment jurisprudence. A good example can be found in Slobogin, *supra* note 12. Professor Slobogin proposes a new combination of theory and method to replace the existing body of fourth amendment jurisprudence. Professor Slobogin criticizes the Court's current theories and methods, and offers proposals to correct, or at least ameliorate, the effects of these theoretical, methodological, and analytical errors. *See, e.g.*, Slobogin, *supra* note 12, at 43–44, 53–54, 56, 60 (citing cases in which the Supreme Court's reasoning is haphazard, inadequate, or flawed). Yet his proposals generally rest upon the same pragmatist assumptions about law and legal decisionmaking that drive the very decisions that he criticizes. For example, one of his central proposals is that the current hodgepodge of fourth amendment doctrine be replaced with a sliding scale approach requiring proportionality between the likelihood of success and the intrusiveness of searches and seizures. *Id.* at 75. This model implicitly rests upon the types of balancing and cost benefit analyses that exemplify pragmatist ideas about law that are common in contemporary fourth amendment jurisprudence. Elsewhere the antiformalism of his proposals is even more explicit. He argues, for example, that clear legal rules are impossible. *Id.* at 71–73. He also exhibits a faith in social science methods common in both pragmatist theory and recent Supreme Court decisions. *Id.* at 86–92 (accepting the Supreme Court's reliance upon statistical data and empirical research to resolve fourth amendment issues, but disagreeing with the Court's interpretation of that data in some instances).

Professor Slobogin's argument apparently rests upon a value choice in which individual liberty is maximized to the limits consistent with the legitimate needs of law enforcers and the concomitant institutional choice about the allocation of institutional power. The clearest example is his proposal for requiring *ex ante* review by an independent, neutral decisionmaker for all nonexigent searches and seizures. *Id.* at 37, 75. This requirement apparently rests upon a basic assumption favoring individual autonomy over government authority. *Id.* at 33 ("[E]ven 'minimal' intrusions . . . should be prevented if they are unnecessary."). It also allocates more decisionmaking power to judges and others making these decisions, and less to the police, than does the Court's current doctrine.

individual autonomy are engaged in a self-defeating enterprise when they develop interpretive theories resting on pragmatist ideas.[17]

The critics' reliance upon pragmatist ideas should not surprise anyone who agrees with the assertion that those aspects of legal pragmatism discussed in this Article are pervasive in contemporary legal thought in this country,[18]

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17. Other commentators share Professor Slobogin's concern that balancing and related notions of "reasonableness" have eroded the rights (or, in the language of balancing, the interests) protected by the fourth amendment, while still adopting nonformal theories and methods themselves. Some are explicit in their value choices. For example, Professor Strossen has vigorously attacked fourth amendment balancing on the grounds that it is the basic analytical tool by which recent Supreme Court opinions "have steadily reduced the scope of the privacy and liberty rights that the fourth amendment protects." Strossen, *supra* note 10, at 1174. Nonetheless, she attempts to rehabilitate balancing by proposing a least intrusive alternative requirement. *Id.* Professor Strossen does not favor the use of balancing, but accepts it as an inevitable part of contemporary constitutional interpretation. *Id.* at 1177, 1266.

See also Cloud, *supra* note 10, at 845 (criticizing a group of opinions in which the Supreme Court utilized many of the pragmatist theories and methods discussed in the present Article, but employing statistical analysis to support that criticism); Melvin Gutterman, *A Formulation of the Value and Means Model of the Fourth Amendment in the Age of Technologically Enhanced Surveillance*, 39 SYRACUSE L. REV. 647, 681 (1988) (supporting a value-based interpretive theory by resort to a pragmatist argument rooted in social context); Sundby, *supra* note 10 (criticizing the Supreme Court's balancing methods, yet proposing a new approach expressly incorporating an interest-based reasonableness model).

18. Perhaps the scope of legal pragmatism's influence is best expressed anecdotally by the fact that thinkers as diverse in their views as Richard Posner and Stanley Fish can find a home within its flexible boundaries. *See* POSNER, *supra* note 5, *passim*; Fish, *supra* note 5, at 1458. It would hardly be surprising, however, that readers would demand more evidence. I offer two kinds. The first is cursory, and consists of no more than statements made by others sharing the view that pragmatism permeates contemporary legal thought in this country.

Here are a few examples drawn from recent legal scholarship. First from a leading pragmatist scholar: "I am convinced that pragmatism is the implicit working theory of most good lawyers." Thomas C. Grey, *Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory*, 63 S. CAL. L. REV. 1569, 1590 (1990). Next from a well-known judge: "[M]ost American judges have been practicing pragmatists . . . ." Richard A. Posner, *What Has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1653, 1666 (1990). Professor Summers has written (using his label for pragmatism) that pragmatic instrumentalism's "influence in America exceeded that of any other general body of thought about the law . . . ." SUMMERS, INSTRUMENTALISM, *supra* note 5, at 35; *see also id.* at 19 ("During the middle decades of this century this body of ideas . . . was our most influential theory of law in jurisprudential circles, in the faculties of major law schools, and in important realms of the bench and bar. Many of its tenets continue to be influential in the 1980s."). Professor Summers expressed concern that readers would find his discussion of pragmatic instrumentalism "banal." *Id.* at 137.

Other commentators recently have described the broad influence of legal realism in ways consistent with my thesis. For example, Professor Peller has written that he was working "in the context of a legal world in which 'we are all realists now.'" Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1152 (1985). His use of the term realist apparently includes leading pragmatist thinkers. *Id.* at 1225 nn.149–50 (Pound and Holmes); *see also* Gary Peller, *The Classical Theory of Law*, 73 CORNELL L. REV. 300, 308 (1988) (Pound and Felix Cohen) [hereinafter Peller, *The Classical Theory of Law*]. For additional discussion, see Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871 (1989):

constituting an integral part of our contemporary legal consciousness.[19] The Article does not trace the influence of pragmatism on legal theory through the century,[20] but instead demonstrates how pragmatist ideas about law have shaped fourth amendment theory in recent years. This discussion does require a definition of legal pragmatism, which is the subject of the next section.

B. Legal Pragmatism

Legal pragmatism has not been, and cannot be, defined precisely in a simple maxim.[21] Disagreement even exists about the appropriate label for the body of ideas comprising pragmatist theory.[22] The following discussion

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> In law, for example, those badly misnamed "Legal Realists" have changed significantly the way we now theorize about and practice law. Indeed, the Legal Realists have so thoroughly applied their brand of philosophical antirealism to legal entities and qualities that it is difficult for us post-Realist generations even to understand what a metaphysical realist about law could believe.

Id. at 872.

These recent attributions of influence to legal realism reflect the significance of legal pragmatism, either indirectly, because the former is a direct descendant of the latter, or directly, because the legal realist label frequently may be a misnomer for pragmatism. *See, e.g.*, SUMMERS, INSTRUMENTALISM, *supra* note 5, at 36–37.

The second, and more important argument in favor of pragmatism's ubiquity is presented in the analysis of contemporary caselaw where we find a shared set of assumptions about the nature and uses of law and legal decisionmaking. That argument follows in large part from the discussion presented in Part II of this Article.

For other authorities on pragmatism's pervasive influence, see generally POUND, *supra* note 5, at 91; Thomas C. Arthur, *Workable Antitrust Law: The Statutory Approach To Antitrust*, 62 TUL. L. REV. 1163, 1169 n.21, 1178–85 (1988); Hart, *supra* note 5, at 606–12; Tushnet, *supra* note 5; Unger, *supra* note 5, at 564–65.

19. *See supra* note 4.

20. *See infra* note 27, 52–59, 72–77, 90–93 and accompanying text.

21. *See* POSNER, *supra* note 5, at 28 (noting that "the core of pragmatism, if there is such a thing, is too variform to make pragmatism a single philosophy . . . in a useful sense," and praising it for various characteristics, particularly its emphasis upon "scientific virtues" including the "process of inquiry").

22. *See, e.g.*, SUMMERS, INSTRUMENTALISM, *supra* note 5, at 20–22 (arguing for the label "pragmatic instrumentalism" to describe the coalescence of philosophical pragmatism, sociological jurisprudence, and some tenets of legal realism); *id.* at 36–37 (criticizing as inaccurate and inappropriate the common use of the term "legal realism" for this body of ideas); *see also* W.V. Quine, *The Pragmatists' Place in Empiricism*, *in* PRAGMATISM: ITS SOURCES AND PROSPECTS 21 (Robert J. Mulvaney & Philip M. Zeltner eds., 1981) (arguing for the label "empiricism"). Some critics would argue, particularly in light of pragmatism's open disavowal of foundational theories that it is more accurate to describe legal pragmatism as a body or collection of related ideas than as an integrated, fully developed theory of law. Nonetheless, the ideas collected under the label pragmatism are sufficiently coherent and influential to warrant use of the term "theory" to describe them, and I will do so in this Article. *See generally* H. S. THAYER, MEANING AND ACTION, A CRITICAL HISTORY OF PRAGMATISM (1968).

is not intended to serve as a comprehensive survey of the diverse ideas offered by legal pragmatism's numerous proponents over the course of the past century.[23] Instead it provides a summary of core ideas common to legal pragmatist thinkers, ideas that permeate the contemporary fourth amendment debate.[24]

The core ideas of pragmatism were enunciated by a number of writers working primarily in the years between 1880 and 1940.[25] Among the most influential of the early pragmatists thinkers were those who focused upon the law, including Oliver Wendell Holmes and Roscoe Pound, and those whose emphasis lay in other areas, but who influenced the growth of legal pragmatism, including Charles Sanders Peirce, William James, and John Dewey.[26] The following discussion stresses the ideas of these seminal thinkers, primarily because their work continues to supply the central statements of pragmatist theory. This focus is useful for other reasons, as well. It establishes the philosophical pedigree—and the historical tradition—for the Court's current fourth amendment theories. It also allows us to examine the nature of legal pragmatism, yet retain analytical distance from contemporary political and jurisprudential controversies, including those generated by theories that descended from pragmatism during the middle and later decades of this century (legal realism and critical legal studies, for example).[27]

A central tenet of legal pragmatism is a renunciation of foundational theories. Law is not some idealized "brooding omnipresence,"[28] not some abstraction whose meaning awaits discovery; it is something that judges, law-

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23. No single definition can capture the ideas of pragmatist thinkers. *See, e.g.*, CHARLES S. PEIRCE, PHILOSOPHICAL WRITINGS OF PEIRCE 251–74 (Justus Buchler ed., 1955) (reasserting his original formulation of pragmatism; comparing it to and distinguishing it from the work of James, Schiller and others who subsequently adopted his terminology).

The lack of universal agreement is captured anecdotally by the following statement by Holmes, one of the most significant of the legal pragmatists. Pollock wrote to Holmes of a visit by William James to Oxford and concluded: "But, as the man at his lecture said, 'What *is* pragmatism?'" Holmes replied: "*I* think pragmatism an amusing humbug . . . ." 1 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874-1932, at 138–39 (Mark DeWolfe Howe ed., 1941) (correspondence of May 29, 1908 & June 17, 1908).

24. Some important pragmatist concepts are not relevant to the present inquiry. For example, the notion that "ideas are the first step to action," is significant in pragmatist theory, but unnecessary for this discussion. *See* OLIVER W. HOLMES, *Introduction to the General Survey*, *in* COLLECTED LEGAL PAPERS 298 (1920); Grey, *What Good is Legal Pragmatism?*, *supra* note 5.

25. *See* SUMMERS, INSTRUMENTALISM, *supra* note 5, at 22–26.

26. *See infra* note 35 and accompanying text.

27. The analysis does not ignore contemporary pragmatist scholars, but uses their work as a complement rather than a centerpiece.

28. Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

yers, and legislators make.[29] Law should not be treated as the product of immutable principles;[30] it should be viewed instrumentally, as a tool to be used to achieve social or policy goals.[31] These goals derive from present wants, needs, and interests, and not from ideal, eternal, abstract conceptions.[32]

Pragmatism's instrumentalism commands that social actors charged with solving problems should work as "social engineers."[33] This duty falls directly upon decisionmakers within the legal system, including judges,[34] and it is not an insignificant obligation. The plasticity of social reality allows people to willfully transform the conditions of their existence, and law is an instrument to be employed in that task.[35]

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29. Holmes's prediction theory, of course, posited that the formalist definition of law was erroneous. *See* OLIVER W. HOLMES, *The Path of the Law*, *in* COLLECTED LEGAL PAPERS, *supra* note 24, at 167, 172 [hereinafter *The Path of the Law*]:

> Take the fundamental question, What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions.

30. *See, e.g.*, OLIVER W. HOLMES, *Natural Law*, *in* COLLECTED LEGAL PAPERS, *supra* note 24, at 310, 312 ("The jurists who believe in natural law seem to me to be in that naive state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere."). This remains a fundamental idea in contemporary legal pragmatism. *See, e.g.*, Fish, *supra* note 5, at 1457–58 (asserting that a pragmatist who answers the question "'what follows from the pragmatist account?'" is unfaithful to pragmatism's "own first principle (which is to have none) and then turns unwittingly into the foundationalism and essentialism it rejects").

31. Holmes also argued that social policy in fact drove legal interpretation and decisionmaking. *See, e.g.*, OLIVER W. HOLMES, THE COMMON LAW 35–36 (1881):

> Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy[ ] . . . . And as the law is administered by able and experienced men, who know too much to sacrifice good sense to a syllogism, it will be found that, when ancient rules maintain themselves . . . new reasons more fitted to the time have been found for them . . . .

32. *See, e.g.*, *The Path of the Law*, *supra* note 29, at 181:

> Such matters really are battle grounds where the means do not exist for determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place. We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind. No concrete proposition is self evident, no matter how ready we may be to accept it . . . .

33. SUMMERS, INSTRUMENTALISM, *supra* note 5, at 22, 30.

34. *See, e.g.*, *The Path of the Law*, *supra* note 29, at 184 (arguing that judges had failed to adequately recognize their duty to weigh issues of social policy); *see also* Norman Barry, *The Classical Theory of Law*, 73 CORNELL L. REV. 283, 290 (1988) ("If judges are the real 'authors' of the law, then why should they not create a legal order which reflects social conditions and meets social demands?").

35. *Cf.* JOHN DEWEY, *Contributions to a Cyclopedia of Education, Volumes 3, 4, and 5*, *in* ESSAYS ON PHILOSOPHY AND PSYCHOLOGY, 1912-1914, at 327 (Jo Ann Boydston ed., 1985) [hereinafter ESSAYS ON PHILOSOPHY AND PSYCHOLOGY] ("So, by a natural extension, pragmatism was widened from a theory of the purposive character of knowledge and a theory of truth as the successful

Pragmatism also views law contextually.[36] Because social goals issue from experience, they are necessarily contextual.[37] Solutions to social problems, therefore, also are contextual, and their efficacy depends upon the specific conditions in which they arise.[38] Because physical reality in general, and social life in particular, are in a constant state of change, solutions to problems cannot be fixed; they must be malleable to meet the requirements of changing conditions.[39] Accordingly, the complexity and multiplicity of social life require the creation of multiple solutions to social problems; no single solution can solve all problems, for all time.[40] Implicit in this

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working out of knowledge, to the theory that reality itself is plastic and is in course of construction through the cognitive efforts of man.").

36. Pragmatist theory emphasizes the significance of the interaction between the individual organism and its context or environment. *See, e.g.*, JOHN DEWEY, ART AS EXPERIENCE 3–4, 13–14 (1934). This concern has persisted in our antiformalist legal thought. *See, e.g.*, JEROME FRANK, LAW AND THE MODERN MIND 271–76 (1963).

Contemporary legal scholars have begun to stress not only pragmatism's instrumental attributes, but also its contextual side. Professor Grey has asserted that contextualism "led to pragmatism's most important philosophical innovation—its Deweyan critique of the quest for certainty, the long-standing Western project of placing solid and impersonal *foundations* under human beliefs." Grey, *What Good is Legal Pragmatism*, *supra* note 5, at 13.

Pragmatism's contextual basis also empowers its instrumental impulses. For example, Professor Grey describes the pragmatist idea that "thought always comes embodied in practices—culturally embedded habits and patterns of expectation, behavior, and response." *Id.* at 12. This historically rooted contextualism supplies pragmatism with a ready social justification for its instrumentalism—and together they make pragmatism potentially a conservative theory. *Id.* at 10.

37. The emphasis placed upon experience was common to the pragmatist thinkers of the era. *See, e.g.*, WILLIAM JAMES, *Pragmatism's Conception of Truth*, *in* PRAGMATISM AND OTHER ESSAYS 87 (1963).

38. The passage containing Holmes's famous aphorism, "[t]he life of the law has not been logic: it has been experience," not only rejects mathematical logic as the sole tool for legal analysis, it also captures the pragmatist emphasis upon experience and context, as well as Holmes' views about the role of history and custom in the development of the law. HOLMES, *supra* note 31, at 1.

39. *See* DEWEY, *supra* note 35, at 328 (arguing that pragmatism's instrumentalism included the theory that standards and ideals are "not fixed and *a priori*, but are in a constant process of hypothetical construction and of testing through application to the control of particular situations.").

40. Holmes often rejected the notion of using logic to identify immutable principles from which permanent solutions to problems could be derived. *See The Path of the Law*, *supra* note 29, at 181 ("The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man."). For a contemporary account, see Fish, *supra* note 5, at 1457 (asserting that legal pragmatism operates "not by identifying and hewing to some overarching set of principles, or logical calculus, or authoritative revelation, but by deploying a set of ramshackle and heterogeneous resources").

rejection of fixed truths is the notion that rights, too, must be less than absolute.[41]

Given these basic tenets, it is not surprising that pragmatism argues for an experimental method for solving problems and for discovering what is true. The early pragmatists espoused empirical theories consistent with their faith in scientific methods. Developments in science, including the emergence of theories of evolution, influenced the development of pragmatist ideas.[42] Many of the seminal legal pragmatists were enamored of the social sciences[43] and advocated the use of experimental methods to solve individual problems, and as a means of searching for the truth. Pragmatist theory rejects notions of fixed truths, instead urging that "something is true if it proves to be useful in the appropriate human activity in the long run."[44]

To some, these pragmatist ideas may seem sensible, perhaps almost irrefutable. But even pragmatism's advocates should recognize that difficulties appear when we attempt to use these ideas to resolve concrete legal problems. For example, pragmatism commands that decisionmakers should not be bound by antecedent principles or rules; they should make decisions grounded in social and physical realities. In practice this means that decisionmakers, including judges, should base decisions on the *consequences*

41. One of the best known examples is Holmes' interpretation of the scope and nature of free speech rights protected by the first amendment, an interpretation in which a pragmatist emphasis upon context played a central role. *See, e.g.*, Schenck v. United States, 249 U.S. 47, 52 (1919) ("But the character of every act depends upon the circumstances in which it is done.").

42. *See, e.g.*, SUMMERS, INSTRUMENTALISM, *supra* note 5, at 22, 90–91.

43. *See, e.g.*, *The Path of the Law*, *supra* note 29, at 187 (explaining that for the rational study of law, "the man of the future is the man of statistics and the master of economics"); *id.* at 195 (lamenting the "present divorce between the schools of political economy and law" and urging that every lawyer should seek to understand economics); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908). These ideas persisted as pragmatist theories became more common in legal discourse. *See, e.g.*, Ray A. Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 HARV. L. REV. 943, 966 (1927) ("The work of examining, valuing and balancing all these varied and conflicting claims cannot be based on logical deduction from abstract legal principles, but rather will find its dynamics in economics, sociology, and philosophy.").

44. SUMMERS, INSTRUMENTALISM, *supra* note 5, at 32; *see also*, WILLIAM JAMES, *The One and the Many*, *in* PRAGMATISM AND OTHER ESSAYS, *supra* note 37, at 57, 57 ("[T]he pragmatic method, in its dealings with certain concepts, instead of ending with admiring contemplation, plunges forward into the river of experience with them . . . ."). James wrote that pragmatism's "only test of probable truth is what works best in the way of leading us, what fits every part of life best and combines with the collectivity of experience's demands." WILLIAM JAMES, *What Pragmatism Means*, *in* PRAGMATISM AND OTHER ESSAYS, *supra* note 37, at 22, 38 [hereinafter JAMES, *What Pragmatism Means*].

of the choices made.[45] Logically, of course, pragmatists seek the consequence, the result, that is "best."[46]

But how are judges to determine which result in a particular case is "best?" Pragmatism proposes no theory of value to answer this fundamental question,[47] but exhorts us to proceed empirically, and to pursue beneficial goals by focusing upon objective reality and social needs, rather than upon misleading abstractions. Ultimately the results obtained over time will teach us what is, and what has been, best.[48]

This approach offers little guidance to judges searching for the optimal outcomes in particular disputes.[49] How are judges to identify the best outcomes without some values or principles or rules to guide them, and to

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45. *See also* DEWEY, *supra* note 35, at 326 (defining pragmatism in terms of Peirce's notion that any idea's meaning "lies in the consequences that flow from an existence having the meaning in question, so that the way to get a clear conception is to consider the differences that would be made if the idea were true or valid").

46. James concluded:

> It is astonishing to see how many philosophical disputes collapse into insignificance the moment you subject them to this simple test of tracing a concrete consequence . . . to find out what definite difference it will make to you and me . . . if this world-formula or that world-formula be the true one.

JAMES, *What Pragmatism Means*, *supra* note 44, at 25; *see also* WILLIAM JAMES, *Humanism and Truth*, *in* PRAGMATISM AND OTHER ESSAYS, *supra* note 37, at 163, 163 ("All that the pragmatic method implies, then, is that truths should *have* practical consequences. In England the word has been used more broadly still, to cover the notion that the truth of any statement *consists* in the consequences, and particularly in their being good consequences.") (citation omitted); EDWIN W. PATTERSON, JURISPRUDENCE 488 (1953) (pragmatism's instrumental logic was "a logic relative to consequences rather than to antecendents"); SUMMERS, INSTRUMENTALISM, *supra* note 5, at 21; Grey, *Holmes and Legal Pragmatism*, supra note 5, at 806–07, 826–27 (1989).

47. Pragmatism's instrumentalism suggests the problem. If law exists to serve proper ends, then some theory of value seems necessary to identify and organize those ends. Pragmatism offers no such foundation. At times the literature hints at a utilitarian theory of value. Holmes wrote, for example, that the "first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong." HOLMES, *supra* note 31, at 41. For a general discussion of the utilitarian attributes of pragmatism, see SUMMERS, INSTRUMENTALISM, *supra* note 5, at 43–52. It is interesting to note that James dedicated the publication of his seminal lectures on pragmatism to the memory of John Stuart Mill "from whom I first learned the pragmatic openness of mind and whom my fancy likes to picture as our leader were he alive to-day [sic]." PRAGMATISM AND OTHER ESSAYS, *supra* note 37, at 1. Pragmatism's renunciation of any foundational theory, however, argues against a utilitarian basis, and at times the leading pragmatists explicitly rejected utilitarianism. For a brief discussion of the anti-utilitarian positions staked out by Dewey, Holmes and others, see WHITE, *supra* note 13, at 14–15.

48. SUMMERS, INSTRUMENTALISM, *supra* note 5, at 32.

49. Professor Moore captures this problem in his critique of Richard Rorty's "pragmatist interpretivism":

> When someone reaches this position we know that we are reaching the end of our conversation with him. Telling us we must choose and that some choices will *seem* better than any other, without giving any reasons why we should choose one way or the other or why the "seeming-better" should be taken to *be* better, does not engage us.

Moore, *supra* note 18, at 904.

provide a measure against which to gauge their conclusions? One fourth amendment issue addressed later in the Article exemplifies the problem: Is it best that police officers can listen to private telephone conversations to detect criminal behavior, or that private citizens are free to share their words without fearing that government agents are listening?

Pragmatism provides no answers to this question; it offers a general method for exploring it.[50] As a practical matter the pragmatist exhortation that judges should consider the consequences of their choices, or that they should use the law instrumentally to serve social needs, or that they should recognize the facts of each case to be of greater import than are elegant deductions from antecedent rules, leaves judges adrift in individual cases. Indeed, if the definition of legal pragmatism stopped with the exegesis of its affirmative program, the theory would be an empty vessel, waiting to be filled with substantive content—a theory that not only allows, but encourages, judges to make ad hoc decisions based upon their subjective beliefs about social needs, rather than upon pre-existing legal rules.[51]

But pragmatists frequently do not define their theory solely on its own terms. Pragmatism often takes form most clearly when used to criticize another theory, particularly one asserting some absolute foundational theory or value.[52] In other words, the pragmatist critique of competing theories can serve to define pragmatism itself.

The turn of the century revolt against foundational or conceptual theories in philosophy, religion, science, and law served precisely this definitional function for pragmatism.[53] Pragmatism of that era should be

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50. *See* JAMES, *What Pragmatism Means*, *supra* note 44, at 25 ("[Pragmatism] does not stand for any special results. It is a method only."); *id.* at 27 ("No particular results then, so far, but only an attitude of orientation, is what the pragmatic method means. *The attitude of looking away from first things, principles, 'categories,' supposed necessities; and of looking towards last things, fruits, consequences, facts.*").

51. This is a familiar concern in post-legal realist discourse. *See* FRANK, *supra* note 36; KARL N. LLEWELLYN, THE BRAMBLE BUSH (3d ed. 1960).

52. *See, e.g.*, Grey, *What Good is Legal Pragmatism?*, *supra* note 5, at 9 ("The main job of the pragmatist theorist is critique of more ambitious (nonpragmatist) theories.").

53. The legal antiformalists were, of course, only part of a larger intellectual movement encompassing science, religion, philosophy, politics, and other social sciences. *See, e.g.*, WHITE, *supra* note 13, at 11 (asserting that antiformalist theories of the era "cannot be fully understood without some sense of their relation to the ideas which dominated the nineteenth century"). Pragmatism is pervasive in contemporary legal thought in part because of the success of the broader "revolt against formalism" waged by scholars in many fields at the end of the last century and during the early decades of this century. *See* P. S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 26–27 (1987); POUND, *supra* note 5, at 15–16; WHITE, *supra* note 13; Arthur, *supra* note 18, at 1176–85; Robert S. Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought—A Synthesis and Critique of Our Dominant General Theory About Law and Its Use*, 66 CORNELL L. REV. 861, 867 n.4 (1981). The impact of pragmatist theory

understood not only as an affirmative program, but also as a reaction against theories resting upon foundational principles.[54] In law, for example, advocates of pragmatism did not limit themselves to claims that their theories offered legitimate methods of legal decisionmaking. They argued vigorously that adoption of their new theories was necessary to correct the defects inherent in the formalist judicial decisionmaking of the era. One of their goals was to supplant a formalist jurisprudence they claimed was both different from pragmatism and wrong.[55] The content of their antiformalist critique served an obvious polemical function,[56] but it also supplied substantive content to pragmatism. One of the problems facing contemporary legal pragmatists is that the formalist theories of the nineteenth century no longer dominate our legal culture, leaving pragmatists with the burden of attempting to define the theory on its own terms.

This is not the place for an extended discussion of the pragmatist revolt against formalism,[57] but a brief review of turn of the century formalist ideas is useful, if only to describe the contrasting consciousness and model of legal decisionmaking against which pragmatist thinkers acted. Like pragmatism, the term formalism has no single, no simple definition.[58] I use the term

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has not, of course, been limited to the world of the law. For example, although John Dewey was not one of the founders of the pragmatist movement, through his "profound influence on American public education and its teachers he has probably done more than any of the founders to make it the typically American way of thinking." PATTERSON, *supra* note 46, at 486.

54. ATIYAH & SUMMERS, *supra* note 53, at 251 (arguing that the "instrumentalist" revolt in American legal theory "was in large part a reaction to the formalism of the preceding period").

55. *See, e.g.*, Grey, *supra* note 18, at 1569:

> While accepting this reduced conception of theory, pragmatist jurisprudence also puts itself forward for acceptance, in competition with other general legal theories, as important, useful, even (as the term is used in the theoretical context) true. It is not just one theory among others, but . . . the right theory, the best theory.

56. *See, e.g.*, WILLIAM JAMES, *The Present Dilemma in Philosophy*, *in* PRAGMATISM AND OTHER ESSAYS, *supra* note 37, at 5; JAMES, *What Pragmatism Means*, *supra* note 44.

57. *See* ATIYAH & SUMMERS, *supra* note 53, at 246 (describing the tendency in the American legal system in later nineteenth century to adopt formalistic excesses, which, "in due course, provoked the twentieth-century instrumentalist revolution in American legal theory, with its realist offshoots"); *see also* Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945 (1977).

58. *See* WHITE, *supra* note 13, at 12 ("very hard to give an exact definition"); Hart, *supra* note 5, at 610 (literature denouncing the vices of formalism never makes its meaning clear in concrete terms); David Lyons, *Legal Formalism and Instrumentalism—A Pathological Study*, 66 CORNELL L. REV. 949, 950 (1981) (formalism difficult to define because "no one ever developed and defended a systematic body of doctrines that would answer to that name"); Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, 63 S. CAL. L. REV. 1811, 1812 (1990) (comparing Posner's and Unger's definitions of "formalism"); Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y. 645, 664 (1991) [hereinafter Schauer, *Rules*]; Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988) [hereinafter Schauer, *Formalism*]. Arguably "formalism" was not itself a "general theory of law." SUMMERS, INSTRUMENTALISM, *supra* note 5, at 137; *see also* Grey, *Holmes and Legal*

parochially in this Article. Formalism and variants like "formalist" here serve as the label for a body of ideas about law prominent in this country during the nineteenth century and the early decades of this century.[59]

Nineteenth century legal formalism emphasized formal reasoning, particularly the deductive application of rules to decide legal issues.[60] Formalism is identified closely with an extreme reliance upon formal reasoning, but the two are not identical. Formalism encompassed a collection of ideas compatible with—but severable from—formal reasoning, and which were characteristic of views about society and law prominent in that particular place and time.[61] Formalism presumed that legal rules were the product of a priori, immutable principles,[62] frequently discovered in theories of natural law or natural rights, which often were embodied in the Constitution and common law.[63] Fundamental legal principles, and the rules derived from them, governed the outcomes of individual disputes, even if the results they produced conflicted with important social goals, such as

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Pragmatism, *supra* note 5. Others pin the label of classical legal thought on this body of ideas, or at least certain of the ideas upon which this Article focuses. *See, e.g.*, Kennedy, *supra* note 4; Peller, *The Classical Theory of Law*, *supra* note 18, at 301.

59. *See, e.g.*, ATIYAH & SUMMERS, *supra* note 53, at 250; SUMMERS, INSTRUMENTALISM, *supra* note 5, at 20–22, 36–37; Hart, *supra* note 5, at 611; Schauer, *Formalism*, *supra* note 58, at 511–14.

60. *See, e.g.*, ATIYAH & SUMMERS, *supra* note 53, at 250.

61. *Id.* (listing eight ideas about law characteristic to American formalism of this era).

62. *See, e.g.*, 1 C. C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS viii-ix (2d ed. 1879), *quoted in* Grey, *Holmes and Legal Pragmatism*, *supra* note 5, at 817 ("Law, considered as a science, consists of certain principles or doctrines . . . . If these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable from their number."). This point was made frequently by commentators engaged in the debate during the early years of this century. *See, e.g.*, Felix Frankfurter, *Hours of Labor and Realism in Constitutional Law*, 29 HARV. L. REV. 353, 364, 366 (1916) (prior to 1908 the courts decided cases involving regulation of labor by utilizing "a priori theories, or abstract assumptions" but the emergence of pragmatist ideas about law altered this behavior); *see also* Robert E. Cushman, *The Social and Economic Interpretation of the Fourteenth Amendment*, 20 MICH. L. REV. 737, 744 (1922):

> it was the recognized theory of the judicial function that courts do not *make* law, they merely *find* or discover law . . . . [T]he judge is merely a vocal medium through which the preexisting legal principles are given expression. These principles are absolute and immutable and the judge has no responsibility for them except to see that they are applied in pertinent cases.

63. *See, e.g.*, Brown v. Walker, 161 U.S. 591, 600 (1896) ("[T]he object of the first eight amendments to the constitution was to incorporate into the fundamental law of the land certain principles of natural justice which had become permanently fixed in the jurisprudence of the mother country . . . ."); *see also* Note, *supra* note 57, at 948 ("Nineteenth century legal formalism in America was exemplified by the view that adjudication proceeds by deduction from virtually absolute legal principles rooted in . . . both the common law and the Constitution.").

efficient law enforcement.[64] This was precisely the kind of foundational conceptualism rejected by pragmatists.[65]

Formalist theory posited that the rules governing any dispute could be discovered in the corpus of existing legal materials,[66] including legal rules, which were comprehensive and complete, leaving no gaps in the law.[67] The law functioned as a closed system. Operating within this system, legal professionals analyzed and resolved problems by the deductive application of rules,[68] and decisionmaking according to rule appropriately excluded from consideration social policies, goals, and values extrinsic to the legal system.[69] Judges, for example, were characterized more as discoverers of the law than as its creators. In the decisionmaking process, however, the background justifications for rules could play a significant role both in the process of

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64. *See* ATIYAH & SUMMERS, *supra* note 53, at 250.

65. *See* PATTERSON, *supra* note 46, at 472 ("[P]ragmatists . . . have generally emphasized the dependence of value-propositions upon fact-propositions, and hence the contingency of the latter inheres in the former. This is the negation of Kant's position that moral laws are non-empirical (a priori) and hence absolute . . ."); *see also* Grey, *Holmes and Legal Pragmatism*, *supra* note 5, at 799. Grey contrasts pragmatists with Enlightenment philosophers who

> had followed a much older tradition in presuming that knowledge, if it is to be trustworthy at all, must be grounded in a set of indubitable truths. . . . [T]he foundationalist procedure is to strip away habitual and conventional ways of thought and to build a new structure of knowledge based on logically unimpeachable inferences from certifiably indubitable premises.

Grey, *What Good is Legal Pragmatism?*, *supra* note 5, at 13.

66. To some formalists, this meant that the general rules of law were located in the written repositories of legal materials. In the words of Dean Langdell (taken somewhat out of context) "law is a science and . . . all the available materials of that science are contained in printed books." Christopher C. Langdell, Address at the 'Quarter-millenial' Celebration of Harvard University (Nov. 5, 1886), *reprinted in Harvard Celebration Speeches*, 3 L.Q. REV. 123, 124 (1887) (asserting the necessity of establishing these two points as part of his efforts to make the law school and legal education worthy to be part of the university); *see also* ATIYAH & SUMMERS, *supra* note 53, at 250 (one characteristic of formalism was a belief that "'the true law' consists of the rules of law in books").

67. *See* Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 6–11 (1983) (discussing Langdell's "classical orthodoxy" according to a taxonomy of five possible goals of legal systems: comprehensiveness, completeness, formality, conceptual order, and acceptability); Lyons, *supra* note 58, at 950; *see also* ATIYAH & SUMMERS, *supra* note 53, at 250–51.

68. *See* ATIYAH & SUMMERS, *supra* note 53, at 250 (describing formalist beliefs "in resort to the inner logic of legal concepts appearing in rules as the primary tool of legal reasoning," and "that judicial decisions must be justified by subsuming their outcome under general concepts embodied in the relevant legal rules").

69. For a pragmatist critique, see Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 812 (1935) ("When the vivid fictions and metaphors of traditional jurisprudence are thought of as reasons for decisions . . . [then we are] apt to forget the social forces which mold the law and the social ideals by which the law is to be judged."). *See also* Arthur, *supra* note 18, at 1176 (describing the formalist idea of "'true' legal concepts" that existed independently of the "factual and social contexts in which they were applied").

identifying controlling rules, and in the act of applying them.[70] For example, the Supreme Court's most important formalist opinion interpreting the fourth amendment relied upon the amendment's history, natural law, and property law to discover (rather than create) the substantive justifications which produced this constitutional provision. The Court then crafted rules based upon this non-literalist interpretive approach, and applied these rules to protect the values embodied in those justifications.[71]

Contemporary scholarship typically treats nineteenth century formalism as an archaic and dysfunctional theory of law.[72] Scholars may discuss the positive attributes of formal legal reasoning,[73] but the label "formalism" remains an epithet in legal discourse.[74] Formalism lies in disrepute not only because of its intrinsic deficiencies, but also because the turn of the century "revolt against formalism" succeeded at discrediting this body of ideas about law.[75] One measure of that success is that within the American legal system today ideas about formalism are more likely to derive from a familiarity with the pragmatist critique of formalism[76] than from reading either the original

70. *See infra* notes 94–97, 113–116 and accompanying text.

71. Boyd v. United States, 116 U.S. 616 (1886).

72. *See, e.g.*, ATIYAH & SUMMERS, *supra* note 53, at 29 ("[T]he term 'formalism' is today often used in American . . . legal writing and legal theory, to refer to such vices as conceptualism, over-emphasis on the inherent logic of legal concepts, the over-generalization of case-law, and the like.").

73. *See, e.g., id.* at 7 (One of the authors' "principal purposes is to rehabilitate formal legal reasoning, because we are convinced that formal reasons are central to law . . . ."); H.L.A. HART, THE CONCEPT OF LAW 132 (1982); Schauer, *Formalism*, *supra* note 58, at 510 (there is much to be said in favor of formalism as decisionmaking according to rule).

74. *See, e.g.*, HART, *supra* note 73, at 126 (describing formalism as a "vice"); Duncan Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351, 355 (1973); Lyons, *supra* note 58, at 949 (explaining that Holmes and subsequent theorists rejected formalism as a "rigid and impoverished conception of the law"); Schauer, *Formalism*, *supra* note 58, at 509 (formalist legal decisions and theories condemned with accelerating frequency); Tushnet, *supra* note 5, at 1506–07; Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 950 (1988) (formalism is "like a heresy driven underground" in current academic discourse).

75. *See, e.g.*, Barry, *supra* note 34, at 289 ("[C]ertain developments in twentieth century American thought created an atmosphere in which such departures from the classical ideal of law could become intellectually respectable. In jurisprudence, America's major contribution to positivism, realist legal theory, has some quite damaging implications for classical law."); Kennedy, *supra* note 4, at 5 (asserting that the triumph of certain economic theories "and the appearance of American philosophical pragmatism undermined the analytic apparatus, leading to the dissipation of faith in the intrinsic justice of the rules, and discrediting the notion that they could be objectively developed or applied").

76. Professor Summers has noted that: "The instrumentalists agreed more on their negations than on their affirmations; indeed few devoted systematic effort to constructing an alternative methodology. But their overall criticisms of formalism were so influential that some, perhaps much, of what follows will seem *banal to today's well-trained lawyer*." SUMMERS, INSTRUMENTALISM, *supra* note 5, at 137.

works of scholars like Langdell and Beale, or the judicial opinions of the formalist era.[77]

Pragmatists complained that formalist jurisprudence over-emphasized deductive analytical methods and "sterile logic,"[78] which produced a "mechanical jurisprudence" stressing the "beauty of its logical processes or the strictness with which its rules proceed from the dogmas it takes for its foundation,"[79] rather than the results the theory produced.[80] To pragmatists the formalist emphasis upon metaphysical principles and deductive logic obscured the policy judgments which generated specific rules,[81] and prevented the proper use of law as an instrument that could be employed to attain social goals.[82]

This alleged disagreement about the significance of logic in decision-making[83] was coupled with conflicting ideas about the sources of valid

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77. *See, e.g.*, JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS (1935); CHRISTOPHER C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS (2d ed. 1880).

78. *See* Hart, *supra* note 5, at 610.

79. Pound, *supra* note 43, at 605.

80. Dewey wrote, for example, that "the chief working difference between moral philosophies in their application to law is that some of them seek for an antecedent principle by which to decide; while others recommend the consideration of the specific consequences that flow from treating a specific situation this way or that . . . ." JOHN DEWEY, *Nature and Reason in Law*, *in* ESSAYS ON PHILOSOPHY AND PSYCHOLOGY, *supra* note 35, at 61.

For additional discussions about the differences between formalist and pragmatist theories of legal decisionmaking, see Brown, *supra* note 43, at 960; Cushman, *supra* note 62, at 744, 753–56; Frankfurter, *supra* note 62, at 362–67.

81. In *The Path of the Law*, *supra* note 29, at 182–83, Holmes asserted that a particular rule was the product of

> a concealed, half conscious battle on the question of legislative policy, and if any one thinks that it can be settled deductively, or once for all, I only can say that I think he is theoretically wrong, and that I am certain that his conclusion will not be accepted in practice *semper ubique et ab omnibus*.

82. Holmes concluded:

> I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious . . . .

Id. at 184. He also criticized the view of law as "a system of reason, . . . a deduction from principles of ethics or admitted axioms or what not." *Id.* at 172; *see also* SUMMERS, INSTRUMENTALISM, *supra* note 5, at 20 (describing the pragmatist idea that the task for legal theorists was to provide a "coherent body of ideas about law which will make law more valuable in the hands of officials and practical men of affairs").

83. I describe the disagreement as alleged in part because pragmatists accepted the use of the standard "legal syllogism" inherent in decisionmaking according to rules, and explicit in formalist theory. For discussions of the legal syllogism, see NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY (1978); David Lyons, *Justification and Judicial Responsibility*, 72 CAL. L. REV. 178, 180 (1984). While formalist logic emphasized the major premise (the dispositive rule), however, pragmatism emphasized the importance of the "minor premise" (the facts). *See* PATTERSON, *supra* note 46, at 488–91. Substantive reasoning inevitably produced an antiformalist jurisprudence in

reasons for legal decisionmaking. Formalism emphasized the legal system as a source of these reasons. Law possessed an internal coherence, an "internal intelligibility,"[84] so law could be understood—and legal problems properly resolved—from an internal perspective, and not by relying upon goals or standards extrinsic to the law.[85]

Formalism thus sought to base decisions upon *formal reasons*, by which I mean legally authoritative reasons on which judges and other legal decisionmakers are "empowered or required to base a decision or action, and such a reason usually excludes from consideration, overrides, or at least diminishes the weight of, any countervailing substantive reason arising at the point of decision or action."[86]

Formal reasons for decision contrast with extra-legal *substantive reasons*: "moral, economic, political, institutional, or other social consideration[s]"[87] upon which a decision can be based. Formalist judicial decisionmaking exhibited a "marked tendency . . . to avoid the discussion of substantive grounds whenever possible,"[88] and instead emphasized formal reasons for decision. While a rule inevitably incorporates some substantive reasons, and decisionmakers in individual cases may well consider substantive factors, formal legal reasoning according to rules "operates as a sort of barrier which insulates the decisionmaking process from the reasons of substance not incorporated in the rule, either explicitly or implicitly."[89]

Pragmatists argued that substantive reasons deserved more emphasis,[90] and inevitably this produced a less formal theory of legal decisionmaking in which the deductive application of rules was de-emphasized.[91] It is no accident that "the American version of instrumentalist legal theory which has flourished since the middle decades of this century is vigorously

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which pre-existing legal rules became less important.

84. Weinrib, *supra* note 74, at 952.

85. Grey, *Holmes and Legal Pragmatism*, *supra* note 5, at 818–19 (1989); Grey, *What Good is Legal Pragmatism?*, *supra* note 5, at 16 (describing pragmatists' instrumental view that "law is not a self-contained system but rather a set of human directives aimed at socially desired ends"); Lyons, *supra* note 58, at 949; Weinrib, *supra* note 74, at 951.

86. ATIYAH & SUMMERS, *supra* note 53, at 2.

87. *Id.* at 1 (footnote omitted).

88. PATTERSON, *supra* note 46, at 465.

89. ATIYAH & SUMMERS, *supra* note 53, at 2.

90. *See The Path of the Law*, *supra* note 29, at 184.

91. *See, e.g.*, Barry, *supra* note 34, at 289 (describing "dramatic shift from a jurisprudence concerned with the *meaning* of rules to one in which rules have no objective existence at all").

antiformalistic."[92] The theory and the method go together. In practice pragmatist legal theories produce nonformal methods for achieving substantive goals.[93]

C. Formalism and the Fourth Amendment

At the turn of the century, however, the Supreme Court frequently employed formalist theories to interpret the fourth amendment. In a series of important decisions, the Court deduced rules governing searches and seizures from first principles, including assumed notions about the relationship between property rights and constitutional rights, and often applied these rules "mechanically." The first of these opinions, *Boyd v. United States*,[94] is the classic example of fourth amendment formalism. The Court identified foundational liberty principles not explicitly stated in the text of the Constitution, deduced legal rules from those principles, and applied the rules to resolve the constitutional dispute. The *Boyd* Court ruled that the enforcement of a subpoena ordering the production of business records violated the fourth and fifth amendments. The decision rested upon broad notions of natural rights and natural law, an expansive view of the nature of private property rights, and reliance upon the values revealed in the historical events giving rise to the adoption of the fourth amendment. The Court's opinion embodied a value choice favoring individual liberty and rejecting the government's asserted policy interests in efficient tax collection and effective law enforcement. That choice was implemented by a nonliteralist interpretive theory vigorously applied to protect the values from which the amendments arose.

In *Weeks v. United States*,[95] the Supreme Court followed *Boyd* and announced an explicit exclusionary rule for illegally seized evidence that

92. SUMMERS, INSTRUMENTALISM, *supra* note 5, at 21 ("[A]n instrumentalist theory is naturally antiformalistic in method . . . . [And] the American version of instrumentalist legal theory which has flourished since the middle decades of this century is vigorously antiformalistic."); *see also* WHITE, *supra* note 13, at 19 ("Dewey was even more anti-formalist than Holmes."); Randy E. Barnett, *Foreword: Unenumerated Constitutional Rights and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y. 615 (1991) (legal realists of the 1920s and 1930s favored a particularist and antiformalist jurisprudence).

93. *See* ATIYAH & SUMMERS, *supra* note 53, at 251 (describing a number of leading American antiformalists who pursued highly substantive reasoning and were so critical of formalism and formal reasoning that they failed to recognize the distinction between appropriate formal reasoning and formalism).

94. 116 U.S. 616 (1886).

95. 232 U.S. 383 (1914).

survives today. *Gouled v. United States*[96] represents the broadest—and arguably the most mechanical—application of the *Boyd* and *Weeks* rules. In *Gouled* the Court established the mere evidence rule, holding that the government could search for and seize only property with a certain legal "character."[97] It could never lawfully seize property unless the public or government could demonstrate some legally cognizable property interest in the items. The government could demonstrate such an interest in stolen or forfeited property, contraband, criminal instrumentalities, and counterfeit currency, but not in anything seized merely for use as evidence against the accused. The broad protections applied to writings in *Boyd* had been extended to all property.

Olmstead v. United States[98] embodied mechanical rule application with a very different result. The Court held that electronic surveillance that violated State law did not implicate the fourth amendment because the government agents had not trampled on any of the defendants' property rights. The wiretapping of telephone lines had required no physical trespass on real property, and the conversations overheard were not tangible property that could be seized. The *Olmstead* majority applied the rules linking private property and constitutional rights established in *Boyd* and *Gouled*, but abandoned the earlier opinions' expansive vision of individual liberty.

In *Boyd*, *Weeks*, and *Gouled*, deductive rule application produced decisions favoring individual freedom. In *Olmstead* and other cases, however, formal reasoning based on the same rules grounded in property law led to government victories. What was notable about these opinions was not that formalist ideas automatically favored either the individual or the government. What was significant was the formalist reliance upon rules—often derived from areas of substantive law extrinsic to the fourth amendment—to draw the line between government power and individual autonomy. In reaching these formalist opinions, the Justices often explicitly rejected arguments of social policy,[99] instead justifying their decisions by strict formal reasoning. In contemporary fourth amendment theory we find a very different kind of decisionmaking.

96. 255 U.S. 298 (1921), *overruled by* Warden v. Hayden, 387 U.S. 294 (1967).
97. *Id.* at 308.
98. 277 U.S. 438 (1928), *overruled by* Katz v. United States, 389 U.S. 347 (1967).
99. *See Boyd*, 116 U.S. 616.

II. PRAGMATISM AND THE FOURTH AMENDMENT

In the abstract we would expect a pragmatist jurisprudence of the fourth amendment to look something like this. It would be antiformalist in every analytical dimension. It would reject *a priori* foundational principles, and focus instead upon social needs, wants, and goals as the sources of reasons for decision. It would reject the substantive formalism of *Boyd* and its progeny, including the integration of natural law, constitutional law, and common law property rights and powers. Privacy, liberty, and property would not be conceived of as absolute rights, but rather as interests to be considered along with an expansive array of factors relevant to deciding each case. Decisionmakers would act not as neutral interpreters of pre-existing legal principles and legal rules, but as social engineers utilizing various tools, including the social sciences,[100] to help them shape the law to fit society's needs. Decisionmaking would be particularistic, and not rule-based. Rules would not be treated as opaque to their background justifications or as entrenched against extrinsic substantive reasons; non-rule-based reasons would dictate outcomes in individual cases, even when this forced decisionmakers to jettison longstanding rules. When rules were cited to justify decisions, they would not be deduced from foundational principles, but instead would be created or retained instrumentally, to achieve social goals. Concomitantly, nonformal methods justified by reference to the standard of reasonableness implicit in the first clause of the amendment would become more important than the comparatively rigid rules derived from the explicit language of the second clause of the text.

This precis in fact describes the Supreme Court's contemporary treatment of some of the most fundamental issues in fourth amendment law. The following discussion confirms this conclusion by examining three important groups of recent opinions. The first two groups are those employing balancing methodologies to determine whether government conduct was reasonable and those utilizing the "reasonable expectation of privacy" standard to determine whether government conduct even constitutes a search or seizure. These two groups of opinions address a pair of issues central to all fourth amendment theory: Did government conduct violate the constitution, and was it even conduct regulated by the amendment? The third group of cases defines the constitutionality of searches and seizures by employing a general standard of "objective reasonableness" to judge the

100. *See, e.g.*, Aleinikoff, *supra* note 3, at 961–62 (linking developments in the social sciences in the 1930s and 1940s to the rise of balancing as a method of constitutional decisionmaking).

conduct of police officers. Taken together these cases demonstrate the central role that pragmatist ideas about law and its uses have come to play in fourth amendment jurisprudence.[101]

These cases generally share a unifying standard. They measure the constitutionality of government action against the ambiguous and manipulable standard of "reasonableness." This is a recent development.[102] In the decades following its decision in *Olmstead*, the Supreme Court developed a system of rules that harmonized the two clauses of the fourth amendment. In its first clause the fourth amendment prohibits searches and seizures only if they are "unreasonable." Particularly in the years following the Second World War, the Court settled upon a rule-based model that defined "unreasonableness" by referring to the specific requirements for warrants set forth in the amendment's second clause.[103] Searches and seizures were unreasonable unless conducted pursuant either to a valid warrant or one of a few "jealously and carefully drawn" judicially created exceptions to the warrant requirement.[104] Whether authorized by a warrant

101. The examination of cases is selective in scope. I do not attempt to analyze the entire host of recent Supreme Court opinions interpreting the fourth amendment, or even all in which pragmatist ideas permeate the Court's reasoning. This daunting task is unnecessary because the cases studied here demonstrate that in recent decades fundamental concepts in fourth amendment theory have come to rest upon pragmatist theories. To analyze only the cases decided since 1980 would require a treatise, and perhaps only Professor LaFave's multi-volume work possesses sufficient breadth to do so. WAYNE R. LAFAVE, SEARCH AND SEIZURE, Vols. I, II, & III (1978 & Supp. 1986).

102. The time period referred to as "recent" begins with the post-World War II era. Earlier decisions of the Supreme Court had at least suggested the possibility of nonformal interpretive approaches, even when strictly imposing the warrant requirements of the amendment. *See, e.g.*, Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931) ("There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances.").

103. The emergence of this model as central to fourth amendment theory is often traced to a series of dissents by Justice Frankfurter. *See* United States v. Rabinowitz, 339 U.S. 56, 70 (1950) (dissenting opinion); Harris v. United States, 331 U.S. 145, 157–64 (1947) (dissenting opinion); Davis v. United States, 328 U.S. 582, 605 (1946) (dissenting opinion); *see also* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 466–67 nn.426, 437–40, 444–54 (1974). Arguably the theory is traceable to much earlier decisions, extending at least as far back as United States v. Lefkowitz, 285 U.S. 452, 464–65 (1932).

104. Jones v. United States, 357 U.S. 493, 499 (1958). This principle has been reiterated by the Supreme Court many times. Perhaps its most cited formulation is this: "The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" United States v. Ross, 456 U.S. 798, 825 (1982) (quoting Mincey v. Arizona, 437 U.S. 385, 390 (1978), and Katz v. United States, 389 U.S. 347, 357 (1967)); *see also* Camara v. Municipal Court, 387 U.S. 523, 528 (1967).

or an exception, searches and seizures had to be justified by the probable cause standard articulated in the Warrant Clause.[105]

This rule-based model tended to allocate power to the judicial branch. The warrant process maximizes judicial authority by requiring prior judicial approval of searches and seizures. Even in the majority of cases, where searches and seizures are conducted without warrants,[106] the requirements of probable cause and a warrant or exception provided objective tests against which judges could measure the police conduct in post-intrusion proceedings. In both pre- and post-intrusion proceedings, the rule-based model enhanced judicial review of police conduct.

Over the years the warrant and probable cause rules may well have been overwhelmed by judicially created exceptions,[107] but until the past decade this rule-based system survived as the centerpiece of fourth amendment theory.[108] The emergence of nonformal methods and theories as fundamental tools in fourth amendment jurisprudence thus parallels the emergence of "conservative" majorities (on law enforcement issues) in the Burger and Rehnquist courts,[109] but fourth amendment antiformalism cannot be attributed to "conservative" political or legal ideology.[110] These ideas transcend categorization in these terms—they are shared by "liberals" and "conservatives" alike.

The evolution of pragmatism in contemporary fourth amendment theory illustrates how adherence to its tenets transcends political ideology. The main currents of nonformalist theory utilized by recent "conservative" majorities on the Court build upon a series of opinions written by Chief Justice Warren and other members of a "liberal" majority working at the

105. "Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information, [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." Brinegar v. United States, 338 U.S. 160, 175–76 (1949) (alterations in original) (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)). The probable cause test also applied to searches of places and things and to the seizure of property as contraband, instrumentalities of crimes, and evidence.

106. For a summary of some of the countless encounters between police officers and citizens that are likely to remain free from judicial review, see Terry v. Ohio, 392 U.S. 1, 13–14 & nn.9–10 (1968). Commentators have noted that warrants are sought and used only in a minority of investigations. *See, e.g.*, Bradley, *supra* note 10, at 1475.

107. Professor Bradley has compiled a list of more than twenty exceptions to either the probable cause standard, the warrant requirement, or both. *See* Bradley, *supra* note 10, at 1473–74. For a different formulation of these exceptions, see Slobogin, *supra* note 12, at 18–29.

108. *See infra* Part II.A–C.

109. For such an argument, see Strossen, *supra* note 10, at 1174–75.

110. Indeed, balancing, the prototypical pragmatist method, has been employed in Supreme Court opinions for over half a century. *See, e.g.*, Aleinikoff, *supra* note 3, at 948 n.33, 953–54; *see infra* Part II.A.1–2; *see also infra* note 297 and accompanying text.

apogee of its power in the years 1966-68. Fourth amendment balancing exemplifies this pattern. Three decisions issued by the Warren Court laid the foundation for this most dramatic example of fourth amendment pragmatism.

A. Fourth Amendment Balancing

1. Balancing by the Warren Court

The rule-based model emphasizing the probable cause and warrant requirements produced a "monolithic"[111] theory of the fourth amendment. All government activities regulated by the amendment—all searches and seizures—were subjected to the same restrictions as those imposed "upon physical entries into dwellings."[112] But government conduct not classified as a full search or seizure remained unregulated by the fourth amendment's proscription of unreasonable searches and seizures. The Warren Court began to dismantle this monolith with a triad of decisions issued in a twenty-four month period.

The first was *Schmerber v. California*.[113] *Schmerber* represents a cautious step toward the pragmatist decisionmaking that has become prevalent in fourth amendment theory. The opinion attempted to operate within the constraints imposed by the warrant, probable cause, and mere evidence rules, while adopting a primitive balancing method that allowed the decisionmaker to characterize the interests at stake without being bound by the commands of antecedent authorities. In *Schmerber*, the Court abandoned interpretive theories central to its decision in *Boyd v. United States*.[114] Unlike the earlier formalist opinion, *Schmerber* did not construe the fourth and fifth amendments expansively in order to fulfill their underlying values and purposes. It interpreted them narrowly and separately, and rejected arguments grounded in property law and natural law.[115] Instead, the opinion rested upon the government's policy arguments,[116] which were the

111. Amsterdam, *supra* note 103, at 388.
112. *Id.*
113. 384 U.S. 757 (1966).
114. 116 U.S. 616 (1886); *see supra* notes 94-97 and accompanying text.
115. *Schmerber*, 384 U.S. at 767-70. The types of natural law concepts discussed in *Boyd* were addressed—and rejected—most directly in the context of the fifth amendment issues. In ruling that the government conduct did not implicate the privilege against self-incrimination because the blood sample was not "testimonial" in nature, the majority held that the scope of the privilege does not coincide with the "complex of values it helps to protect," including the government's obligation to respect "the dignity and integrity of its citizens." *Id.* at 762.
116. *Id.* at 770-71.

kinds of arguments rejected by the Court in *Boyd* and other formalist era decisions.

A report of the analysis of a sample of Schmerber's blood was admitted into evidence at his trial on criminal charges of driving under the influence of alcohol. The blood sample had been extracted by medical personnel at the direction of a police officer, and over the defendant's objections.[117] In an opinion written by Justice Brennan, a bare majority of the Court held that this intrusion did not violate the fourth amendment.[118] The Court recognized that the forcible extraction of blood was an "intrusion into the human body" that constituted a search of "persons" within the meaning of the fourth amendment.[119] Although the search unquestionably was for evidence of criminal behavior, the majority held that the mere evidence rule derived from *Boyd* and adopted in *Gouled* did not apply to this search of a person.[120] Instead, the Court engaged in a two-step analysis.

First, it concluded that the police were justified in requiring the driver to submit to the test because they possessed probable cause, and the inevitable diminishing of his blood alcohol level as time passed created an exigency that justified noncompliance with the warrant rule.[121] Second, it employed an analytical process the Court later would label the "*Schmerber* balancing test"[122] and concluded that the means used to obtain the blood sample satisfied the fourth amendment's standard of reasonableness.

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117. *Id.* at 758–59.

118. The Court also rejected Schmerber's claims that the government had violated his fifth and sixth amendment rights, as incorporated against the states, and his right to due process. The fifth amendment holding rested upon the conclusion that only testimonial communications are protected by the privilege against self-incrimination. *Id.* at 760–65. Justice Brennan specifically distinguished the subpoena for papers in *Boyd* on these grounds. *Id.* at 764. This holding permitted the Court to finesse the rule of *Boyd* that the fourth and fifth amendments run together to protect personal privacy. In dissent, Justice Black vigorously criticized the Court's narrow interpretation of the scope of the fifth amendment and repeatedly cited *Boyd* as an example of the appropriate liberal construction the amendment should receive. *Id.* at 774–77 (Black, J., dissenting).

119. *Id.* at 767.

120. Justice Brennan avoided the mere evidence rule by distinguishing searches related to property, to which the rule applied, from intrusions into the human body. The opinion baldly asserts that the property-based limitations on searches "are not instructive in this context" without citation to any authority and without justifying this dispositive conclusion. *Id.* at 768. Justice Black argued in dissent (on fifth amendment grounds) that "[i]t is a strange hierarchy of values that allows the State to extract a human being's blood to convict him of a crime . . . but proscribes compelled production of his lifeless papers." *Id.* at 775. The problem of finessing the mere evidence rule became moot the following term when the Court overruled *Gouled* and discarded the rule in Warden v. Hayden, 387 U.S. 294 (1967), in an opinion also written by Justice Brennan.

121. *Schmerber*, 384 U.S. at 768–71.

122. Winston v. Lee, 470 U.S. 753, 763 (1985).

Despite the Court's later characterization of the opinion, the balancing in *Schmerber* was only crudely articulated. On the government side of the scales, the Court noted the exigency posed by the passage of time and the effectiveness of blood testing as a "means of determining the degree to which a person is under the influence of alcohol."[123] On the other side of the scales, the Court classified blood tests as minor intrusions upon an individual's privacy interests. The Court reasoned that blood tests are commonplace in modern life and involve little risk or trauma, particularly when performed by trained medical personnel in a hospital setting, as occurred in the case before it.[124] Although not explicitly justified in these terms, the majority apparently decided that even a slight government interest was sufficient to outweigh any threat to privacy and bodily integrity posed by this minor medical procedure. The opinion's use of balancing methods, however, was undeveloped and barely articulated. The Warren Court's subsequent balancing opinions were more explicit, more expansive, and more significant for the evolution of contemporary fourth amendment theory.

The next significant balancing decision, *Camara v. Municipal Court*,[125] did not involve an investigation of criminal behavior. Nonetheless, it is the case upon which the Court's balancing theories and methods ultimately rest. *Camara* involved a challenge to a San Francisco ordinance by a resident who refused to permit city housing inspectors to examine the interior of his home.

The Court adhered to part of the rule-based model of the fourth amendment, holding that a health and safety inspection of private property conducted over the resident's objection was unconstitutional unless the search was authorized by a valid warrant. The Court transformed the traditional model, however, by permitting an administrative search warrant to be based upon a watered-down notion of probable cause.

If probable cause has meant anything as a practical standard, it is that the police must have *particularized* suspicion before they can conduct searches and seizures. *Camara* authorized the issuance of warrants on the basis of information insufficient to provide probable cause to believe that any particular dwelling violated health and safety regulations. As a result, a warrant to search a dwelling could be based on less than the usual quantum

123. *Schmerber*, 384 U.S. at 771.
124. *Id.* at 771.
125. 387 U.S. 523 (1967).

of information necessary to establish probable cause in traditional cases involving investigations of criminal activities.[126]

This important innovation was coupled with another: the explicit adoption of a balancing methodology. Although ostensibly adhering to the commands of the Warrant Clause, the Court stressed that "our holding emphasizes the controlling standard of reasonableness."[127] From this point Justice White made a monumental leap of logic, writing that "there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails."[128]

The opinion's description of this balancing process is far from satisfactory. The Court cited four factors justifying its conclusion that a housing inspection program of the sort it described was reasonable: (1) the long history of acceptance of inspection programs by the judiciary and the public; (2) the great public interest in preventing and abating dangerous housing conditions; (3) the impossibility of establishing traditional probable cause for an individual residence (e.g., for faulty wiring) without first conducting an inspection; and (4) the inspections are not "personal in nature" and not "aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy."[129]

It is impossible to tell just how the Court balanced these factors because no weights were assigned to any of the interests at stake. The Court simply concluded that when taken into account, these factors led to the conclusion that such searches were reasonable. We cannot know, for example, the relative importance of any of the factors, or the comparative strength attributed to any of the competing interests by the Justices in the majority. This lack of information takes on even greater significance when, as with the first factor, the supporting evidence cited by the Court is scanty at best.[130]

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126. *Id.* at 534–38. The kind of information satisfying this lesser standard of probable cause included the nature of the building, the age and condition of buildings in the area, and other generalized information not sufficient to meet the traditional standard of particularized suspicion. *Id.* Ironically, a watered-down standard of probable cause was unnecessary to justify the issuance of a search warrant to inspect Camara's apartment because the building inspector possessed information sufficient to satisfy the traditional probable cause standard. The building manager had informed the inspector that Camara was living on the ground floor, which violated the city occupancy permit for the building. *Id.* at 526.

127. *Id.* at 539. Earlier in his opinion, Justice White noted that the "warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable government interest. But reasonableness is still the ultimate standard." *Id.*

128. *Id.* at 536–37.

129. *Id.* at 537.

130. *See id.*

It is apparent that the Court was using the law instrumentally, engineering for the collective social good.[131]

The theoretical innovations adopted in *Camara* have provided the authority for many of the Court's subsequent opinions. None is more important than *Terry v. Ohio*,[132] where the Court irrevocably rended the monolithic theory of the amendment. The Court for the first time directly addressed the application of the fourth amendment to a common police activity, the "stop and frisk" of a person whom the police suspect of criminal activity, yet lack probable cause to arrest.[133] Chief Justice Warren's opinion not only confirmed the validity of warrantless searches and seizures, but also established for the first time that probable cause was not required to justify all searches and seizures regulated by the amendment.[134]

Adherence to the rule-based monolithic model dictated that the Court treat "stops and frisks" either as minimal intrusions unregulated by the fourth amendment, or subject them to the traditional requirements derived from the Warrant Clause. Chief Justice Warren chose a third course, holding that "stops and frisks" constituted an intermediate category of searches and seizures lying somewhere between consensual encounters ungoverned by the fourth amendment and intrusions amounting to arrests and full-blown searches.[135] Because they were less intrusive than full-blown arrests and searches, the Court decided that stops and frisks could be justified by a degree of knowledge or certainty less than that required for greater intrusions.[136]

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131. This is reflected in the Court's initial decision to extend the coverage of the fourth amendment to health and safety inspections. Prior to *Camara* the Court's fourth amendment opinions generally had been restricted to searches and seizures in criminal cases. *Boyd* was a notable exception. Only eight years before *Camara* the Court had held that a defendant's conviction for refusing a warrantless health inspection of his house did not violate the fourth amendment. Frank v. Maryland, 359 U.S. 360 (1959). The *Frank* Court adhered to the traditional definition of probable cause, and declined to extend the warrant requirement to this noncriminal investigation, in part because to do so would frustrate the noncriminal goals of the inspections. *Id.* at 373. By extending the reach of the fourth amendment to noncriminal searches, *Camara* not only began the process of dismantling the traditional model of the amendment, it virtually ensured that this would occur because in many instances it is impossible for noncriminal searches to satisfy the requirements of the Warrant Clause. *See infra* notes 161–180 and accompanying text.

132. 392 U.S. 1 (1968).

133. *Id.* at 9–10.

134. *Id.* at 20.

135. *Id.* at 19 ("We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest' or a 'full-blown search.'").

136. From this we might extrapolate that reasonableness ultimately might be determined not according to the three-step model adopted in *Terry*, but according to a virtually infinite continuum of possibilities. On such a sliding scale, reasonableness might be determined on a case by case basis by balancing the knowledge possessed by the police against the severity of their intrusion upon protected interests. If there can be three categories of police encounters, why not four, or five, or

The opinion established an intermediate category of knowledge, labeled *reasonable suspicion*, which was sufficient to justify searches and seizures intrusive enough to implicate fourth amendment interests, yet not as intrusive as full-blown arrests and searches.

As a constitutional standard, reasonable suspicion is even more ambiguous than is probable cause. The reasonable suspicion standard requires that to justify "the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[137] This definition in part describes a quantum of information located on a continuum of knowledge somewhere between probable cause and a mere hunch, but it also incorporates a balancing methodology. The Court not only examined the nature and quality of the information possessed by the police—as it would in deciding whether probable cause existed—but also balanced the quality of that information against the nature and extent of the government intrusion upon privacy and liberty interests.[138]

The decision to abandon the probable cause standard, coupled with the reality that in many street encounters it is impossible for police officers to obtain prior judicial approval, forced the Court to retreat from the traditional model that defined reasonableness according to the commands of the Warrant Clause. Chief Justice Warren asserted that "the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures."[139]

The method for determining reasonableness, even in criminal cases, was not measured against the traditional standards. Instead, citing *Camara* as its only authority, the Court reasserted the debatable principle announced in that opinion. "[T]here is 'no ready test for determining reasonableness,'" Chief Justice Warren quoted, "'other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.'"[140]

In this passage Chief Justice Warren secured one of the theoretical foundations for the overt use of pragmatist theories in fourth amendment

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an infinite number? The Court's analysis suggested the possibility of a sliding scale, but did not embrace such a radical reworking of traditional doctrine. Professor Slobogin has proposed precisely adoption of such a model. *See* Slobogin, *supra* note 12.

137. *Terry*, 392 U.S. at 21.

138. The Court described its analysis of the reasonableness of the seizure and search as entailing a dual inquiry that determined "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* at 20.

139. *Id.*

140. *Id.* at 21 (alteration in original) (quoting Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967)).

decisionmaking. Balancing of the sort he described commands that the decisionmaker consider not rules, but social interests. The opinion explicitly directed that in balancing, "it is necessary 'first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen.'"[141]

Interest balancing is the quintessence of nonformal decisionmaking and is a logical way to implement the pragmatist idea that law should be employed instrumentally to achieve social goals.[142] *Terry* relied upon social policies, although it apparently weighted those policies according to the nature and quality of the information possessed by the investigating officer.

Once again, the Court's discussion of its balancing method is confusing. The Court defined one of the government's interests as "that of effective crime prevention and detection."[143] In judging whether Terry's seizure was reasonable, the countervailing force was his interest in "personal security."[144] Although it claimed to be using a balancing methodology, the Court approved the seizure without purporting to measure the weight of Terry's interests, and the opinion does not describe any act of balancing. The opinion instead concludes that the information possessed by the officer amounted to reasonable suspicion, and, therefore, the initial intrusion—the investigative seizure—was reasonable.[145]

But it was the search, not the seizure, that was the crux of the case.[146] The search in question was a frisk, the pat down of the suspect's exterior clothing to look for weapons. The government interest here was more than merely investigating possible criminal activity.[147] The safety of the public and the officer conducting the investigation were potentially at risk, because

141. *Id.* at 20–21 (quoting Camara v. Municipal Court, 387 U.S. at 534–35).

142. Professor Aleinikoff notes:

> To be put into action, a jurisprudence needs an interpretive methodology. While a pragmatic, instrumental view of law does not compel a balancing approach, balancing was certainly a logical doctrinal application of the new jurisprudence. Balancing openly embraced a view of the law as purposeful, as a means to an end; and it demanded a particularized, contextual scrutiny of the social interests at stake in a constitutional controversy. Thus balancing seemed to be just what the academic doctors would have ordered. Indeed it was.

Aleinikoff, *supra* note 3, at 958.

143. *Terry*, 392 U.S. at 22.

144. *Id.* at 19.

145. *Id.* at 21–23.

146. *Id.* at 23.

147. In a companion case the Court emphasized that a frisk violated the fourth amendment if not conducted as a search for weapons. Sibron v. New York, 392 U.S. 40 (1968) (frisk for narcotics violated the fourth amendment).

the officer suspected that the three suspects were armed.[148] Balanced against this was Terry's interest in his personal security.[149] Because the intrusion was limited to a frisk for weapons, the Court treated his interests as less weighty than those threatened by a full-blown search. The Court apparently balanced on a three-sided scale in which the quantum of evidence possessed by the officer, the nature of the potential threat to society, and the scope of the intrusion all were weighed.[150] As is typically true when the Court engages in fourth amendment balancing, its calculation favored the government; the search was reasonable.

The *Terry* opinion reveals a strong pragmatist approach to interpreting the fourth amendment. The Court had available to it a well-developed system of rules, yet it eschewed rule-based decisionmaking according to that system.[151] Instead it opted for a particularistic approach measured against an undifferentiated standard of reasonableness. Rather than reach its decision by deductive application of the rules derived from the Warrant Clause, it employed a nonformal method—balancing—that permitted it to base its decision overtly on considerations of social policy.[152] To the extent that it relied on antecedent authorities, the Court employed them instrumentally. It ignored the most relevant authorities—those involving searches and seizures in criminal cases—and instead relied upon *Camara*, a precedent of marginal relevance, to justify a radical departure from traditional theory. Each of these attributes of the *Terry* opinion became even more pronounced in subsequent decisions.

2. Balancing Supplants the Warrant Rule

Since 1980 the Supreme Court has employed the central theoretical innovations of *Terry*—the three-tiered model of police-citizen encounters and

148. *Terry*, 392 U.S. at 23–24.

149. *Id.* at 24.

150. *Id.* at 27.

151. Avoiding the warrant rule produced a redistribution of power among actors within the criminal justice system. *Terry* not only approved a broad category of intrusions that inevitably occurred without prior judicial approval, *id.* at 20, but it also condoned police searches and seizures in situations where a judge could not issue a warrant because probable cause did not exist. *Id.* at 36–37 (Douglas, J., dissenting). The opinion thus provided a constitutional justification for allocating more discretionary authority to the police. From an institutional perspective, the rejection of a rule-based model of the amendment and the adoption of models utilizing pragmatist theories and nonformal methods has led to a redistribution of power in which the executive branch—usually the police—has gained authority. *See infra* Parts III, IV.

152. In addition to its discussion of law enforcement needs and the need to preserve police and public safety, the Court also was concerned with issues of race and poverty, law enforcement in the nation's ghettoes, and other issues of social policy. *Terry*, 392 U.S. at 13–15 & nn.9–11.

the use of balancing—to determine whether a wide variety of government activities are reasonable within the meaning of the fourth amendment. Compared to these later opinions, *Terry* was narrowly crafted. It was limited on its facts to investigative detentions and weapons searches related to crimes of violence. The cases that have followed it confirm Justice Cardozo's admonition that "[t]he tendency of a principle to expand itself to the limit of its logic may be counteracted by the tendency to confine itself within the limits of its history."[153] *Terry*'s progeny have not been so confined.

In cases involving investigations of suspected drug trafficking and other criminal behavior, the Court has upheld the investigative detention of travelers in airports,[154] the seizure of air travelers' luggage,[155] the detention of automobile travelers,[156] and the search of the passenger compartments of automobiles for weapons,[157] so long as government agents possess a quantum of information at least amounting to reasonable suspicion. In each of these decisions the Court judged the government conduct against the standard of reasonableness, and in most explicitly engaged in balancing to determine whether government conduct was reasonable within the meaning of the fourth amendment.

But these opinions only scratch the surface; balancing has been used to justify investigations of suspected criminality in a variety of other factual settings. The Court has balanced the state's interest in eradicating drunk driving against the "slight" intrusion sobriety checkpoints impose on motorists, and has held that these suspicionless seizures of all motorists do not violate the fourth amendment.[158] Balancing the interests of the sovereign against those of individuals crossing its international borders, the Court has authorized warrantless seizures in which the travelers can be held incommunicado for extensive periods of time without a warrant or probable

153. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 51 (1921).

154. *See, e.g.*, United States v. Sokolow, 490 U.S. 1 (1989); Florida v. Rodriquez, 469 U.S. 1 (1984); Florida v. Royer, 460 U.S. 491 (1983); Reid v. Georgia, 448 U.S. 438 (1980); United States v. Mendenhall, 446 U.S. 544 (1980). The Court also relied upon the *Terry* line of cases in reaching the conclusion that a search warrant for contraband "implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." Michigan v. Summers, 452 U.S. 692, 705 (1981).

155. *See, e.g.*, United States v. Place, 462 U.S. 696 (1983).

156. *See, e.g.*, United States v. Sharpe, 470 U.S. 675 (1985); United States v. Hensley, 469 U.S. 221 (1985).

157. *See, e.g.*, Michigan v. Long, 463 U.S. 1032 (1983).

158. Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990). Exhibiting a pragmatist emphasis upon social needs and policies, the Court rested its opinion upon the harms caused society by drunk driving and upon the utility of roadblocks as a means of controlling this social problem. It also utilized statistical evidence to explore both issues. *Id.* at 451–55; *id.* at 456 (Blackmun, J., concurring in the judgment) (stressing the need to end the "slaughter on the highways").

cause, so long as reasonable suspicion exists.[159] The Court has also articulated an express "*Schmerber* balancing test" to determine when suspects in criminal cases can be forced by the state to submit to invasive medical procedures, including surgery, to reveal evidence of their innocence or guilt.[160]

Other balancing decisions have involved searches potentially related to criminal activities, but have been treated by the Court as involving administrative or other goals unrelated to criminal prosecutions.[161] The Court has upheld as reasonable warrantless searches of the offices of public employees[162] and the personal property of students in public schools,[163] in part because these cases involved "special needs, beyond the normal need for law enforcement, [that] make the warrant and probable-cause requirement impracticable."[164] The Court has employed similar reasoning to affirm the

159. United States v. Montoya de Hernandez, 473 U.S. 531 (1985) (suspect held in humiliating circumstances for perhaps as long as 24 hours based on reasonable suspicion that she was transporting illegal narcotics in her alimentary canal). The Court had earlier utilized the *Terry* model to define the scope of border-related seizures and searches of automobiles. *See* United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (government interest in stopping illegal immigration, coupled with difficulties of enforcement, justified minimal intrusion resulting from suspicionless detention of motorists at fixed checkpoints located long distances from the border; but probable cause required for search of vehicle); United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (similar interest analysis found to justify stops of vehicles travelling near international border by roving patrols if officers possessed articulable facts indicating the vehicle contained illegal aliens); Almeida-Sanchez v. United States, 413 U.S. 266 (1973) (search of automobiles travelling near the border by immigration officers in roving patrols must be based on probable cause).

160. Winston v. Lee, 470 U.S. 753 (1985) (holding that on the facts of that case the proposed surgery would be unreasonable under the fourth amendment).

161. The contrast between these decisions and the Court's formalist decision in *Boyd* could hardly be sharper. In *Boyd* the relevant statute permitted criminal charges, but the government only instituted a noncriminal forfeiture proceeding. The Supreme Court not only applied the fourth amendment fully, it also held that the protected constitutional rights could not be defeated even by lawful means. *See supra* note 94 and accompanying text. Subsequent decisions in the formalist era emphasized that even probable cause and a warrant could not justify the search for and seizure of certain kinds of property. *See supra* notes 95–97 and accompanying text. The Court's contemporary analysis, on the other hand, permits some searches and seizures even in the absence of probable cause and a warrant.

162. O'Connor v. Ortega, 480 U.S. 709 (1987) (stating that an employee had a reasonable expectation of privacy in his office desk and file cabinets, but whether a search of those areas was reasonable was tested by "'balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'") (citations omitted) (alteration in original) (quoting United States v. Place, 462 U.S. 696, 703 (1983)).

163. New Jersey v. T.L.O., 469 U.S. 325 (1985).

164. *Id.* at 351 (Blackmun, J., concurring in judgment).

validity of warrantless government searches of probationers' homes[165] and certain business premises as long as they are conducted pursuant to regulatory schemes satisfying "reasonable legislative or administrative standards."[166]

The cumulative weight of these decisions has led the Court to a startling rejection of the rule-based model that dominated fourth amendment theory for a generation. The warrant rule no longer is the central conceptual tool for determining whether government conduct is reasonable for fourth amendment purposes.[167] The rule now is the exception, limited to criminal investigations, particularly searches of homes. Nonformal interest balancing has replaced the monolithic model as the basic method for determining whether searches and seizures are unreasonable.[168] The Court's treatment

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165. Griffin v. Wisconsin, 483 U.S. 868, 876 (1987) (special needs of state probation system "make the warrant requirement impracticable and justify replacement of the standard of probable cause by 'reasonable grounds'"); *id.* at 880 (search conducted "pursuant to a valid regulation governing probationers").

166. In New York v. Burger, 482 U.S. 691, 722 (1987), the Court held that a warrantless search of an automobile junkyard was administrative in nature, satisfied the three criteria necessary to justify warrantless searches under the relevant state statute, and did not violate the fourth amendment. The Court upheld the search although the statute's ultimate purpose was to deter criminal behavior and the defendant was prosecuted under state criminal statutes, and despite the fact that the highest state court had held that the sole purpose of the statute authorizing the search was to discover criminality and not to enforce a comprehensive regulatory scheme. In Donovan v. Dewey, 452 U.S. 594, 602–05 (1981), the Court found warrantless inspections reasonable because of the substantial government interest in improving health and safety conditions in mines, the reduced privacy expectations of owners of closely regulated industries, and the procedural protections included in the Act. *But see* Marshall v. Barlow's, Inc., 436 U.S. 307, 323 (1978) (requiring consent or a warrant for OSHA safety inspections because the statute "devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search").

167. One indication of the increased judicial acceptance of and reliance upon pragmatist theories and methods can be found by comparing the dissents in cases in which balancing has been used to resolve fourth amendment issues. During the 1960s, in cases like *Schmerber* and *Terry*, the dissenters did not assume the legitimacy of balancing or employ it to justify their arguments. Instead they stressed the centrality of the warrant and probable cause requirements and relied upon precedent and constitutional history, not social policy, to support their analyses. In recent years, however, dissenters have frequently agreed that balancing supplies the proper method for resolving many fourth amendment issues. Their complaints do not challenge the inherent legitimacy of this pragmatist method, but rather criticize its application in particular cases. For example, in Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990), Justice Brennan agreed with the majority that the constitutionality of roadblock seizures can be judged by balancing, and that the fourth amendment did require the probable cause standard in this context. His complaint was that the majority had misapplied the test, particularly by attributing too much weight to the government's interests, and too little to the motorists', 496 U.S. at 456 (Brennan, J., dissenting), a complaint echoed by Justice Stevens, *id.* at 460–63, 469–72 (Stevens, J., dissenting).

168. In other contexts the Court has stated that the "'balancing of competing interests [is] the key principle of the Fourth Amendment.'" Tennessee v. Garner, 471 U.S. 1, 8 (1985) (quoting Michigan v. Summers, 452 U.S. 692, 700 n.12 (1981)) (balancing of interests employed to strike down a state statute authorizing use of deadly force against nondangerous, fleeing felony suspect).

of mandatory drug-testing programs affirms these conclusions, and also highlights problems inherent in balancing as a method of constitutional interpretation.[169]

In *Skinner v. Railway Labor Executives' Association*,[170] the Court held that blood, breath, and urine tests conducted pursuant to a mandatory drug testing program were searches regulated by the fourth amendment. The program did not require warrants, and called for mandatory testing without individualized suspicion of wrongdoing. Nonetheless, the Court held that the testing program satisfied the fourth amendment's command of reasonableness, and its opinion confirmed the fundamental reworking of fourth amendment theory that has occurred in recent years. The opinion assumed that the reasonableness of a search or seizure now is "judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests,"[171] treated the warrant and probable cause rules as examples of balancing applicable only to a subset of criminal cases,[172] and emphasized that those rules are jettisoned when "special needs" make compliance with the warrant and probable cause requirements "impracticable."[173]

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169. From this perspective, one of the most significant passages in any of the post-*Terry* cases appears in New Jersey v. T.L.O., 469 U.S. 325 (1985). After holding that searches conducted by school officials of students and their private property are regulated by the fourth amendment, the opinion asserts:

> Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place. The determination of the standard of reasonableness governing any specific class of searches requires "balancing the need to search against the invasion which the search entails." On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order.

Id. at 337 (citation omitted). This passage is remarkable for its implicit assumption that interest balancing, and not the traditional warrant rule, is the starting point for fourth amendment jurisprudence. It might be possible to attribute this passage to inadvertence or sloppy drafting but for the fact that in his concurring opinion, Justice Blackmun pointedly scolded the majority for its rewriting of fundamental theories. He noted that previous cases established that "[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers." *Id.* at 351 (Blackmun, J., concurring in the judgment). If that complaint were not clear enough, he then objected that "[t]he Court's implication that the balancing test is the rule rather than the exception is troubling for me because it is unnecessary in this case." *Id.* at 352; *see also id.* at 356–58 (Brennan, J., dissenting).

170. 489 U.S. 602 (1989).

171. *Id.* at 619 (quoting Delaware v. Prouse, 440 U.S. 640, 654 (1979)).

172. *Id.* ("In *most* criminal cases, we strike this balance in favor of the procedures described by the Warrant Clause . . . .") (emphasis added).

173. *Id.* (quoting Griffin v. Wisconsin 483 U.S. 868, 873 (1987), and New Jersey v. T.L.O., 469 U.S. 325, 351 (1985)) (Blackmun, J., concurring in the judgment).

The majority readily concluded that the government's interest in deterring and detecting drug and alcohol use by railroad employees was a special need beyond the normal needs of law enforcement, and that warrants were unnecessary in this context.[174] It even rejected the baseline requirement of individualized suspicion. The opinion acknowledged that the Court's precedents establish that usually "some quantum of individualized suspicion" is a prerequisite for a reasonable search.[175] It then made a critical assertion for which it cited not a single authority:

> In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion. We believe this is true of the intrusions in question here.[176]

This conclusion was essential, since the mandatory drug tests of railway workers generally were conducted without any particularized suspicion of wrongdoing by the tested employees.

In explaining its conclusions, the majority opinion described the elements of a logical balancing process.[177] It defined competing interests. On one side was the government's need, even absent individualized suspicion, to force railroad workers to submit to searches of their persons.

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174. The majority asserted, for example, that warrants serve the functions of assuring that the intrusion is authorized by law and that there is an objective determination that the intrusion is justified. It concluded that in the circumstances before the Court, warrants "would do little to further these aims" because the regulations narrowly define the justifications for, and the limits on, the tests, and are well known to the affected employees. The Court was swayed by the idea that "in light of the standardized nature of the tests and the minimal discretion vested in those charged with administering the program, there are virtually no facts for a neutral magistrate to evaluate." *Id.* at 622. The Court thus took the facially illogical position that an extremely intrusive search was justified because investigators had no discretion, but were required to intrude in all cases. The Court has relied on the same argument in other recent opinions. *See, e.g.*, Colorado v. Bertine, 479 U.S. 367 (1987). The defect in this argument, as applied in *Skinner*, is that the fourth amendment prohibits not only arbitrary but also unjustified intrusions, and a hallmark of both is that they are conducted without individualized suspicion. *See infra* notes 406–408 and accompanying text. The drug testing program at issue in *Skinner* permitted searches without the justification of particularized suspicion.

175. *Skinner*, 489 U.S. at 624 (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1976)).

176. *Id.* Arguably the watered down version of probable cause adopted in *Camara* serves as one precedent. The regulations also established a program of permissive urine and breath testing, which could be triggered in some instances by "reasonable suspicion" of drug or alcohol use. *Id.* at 611–12.

177. *See, e.g., id.* at 633 ("[T]he Government's compelling interests outweigh privacy concerns.").

Aligned on the other side were the employees' interests in privacy and bodily security.[178] The opinion attributed crude "weights" to these interests. The employees' interest in bodily security was "minimal," in large part because they worked in an industry regulated to ensure safety, and in which they were subjected to fitness tests.[179] The government's interest in "testing without a showing of individualized suspicion [was] compelling,"[180] because of both the need to protect the public from drug and alcohol impaired employees in the railway industry and the impracticability of conducting the testing program pursuant to the requirements of the Warrant Clause.

The Court's discussion of safety issues is a paradigm of pragmatist analysis, ultimately resting not on legal authorities but upon historical and statistical information about the railroad industry and the needs of society in this particular context.[181] The Court's reasoning reveals judges engaged in the pragmatist activity—described best by an unavoidable pun—of engineering policy for the public good.[182] It also illustrates some of the problems facing those who would employ balancing to decide constitutional issues.

Perhaps the most obvious problem is this: How will the decisionmaker calculate the appropriate weights for each of the competing interests? The very concept of balancing suggests that the Court must develop some objective measure for this task. It has never done so, leaving these opinions open to the criticism that the Justices are imposing their subjective preferences, while pretending that these judgments are the product of some neutral, objective, almost scientific process.[183]

The *Skinner* opinion exemplifies this problem. It defined the value of the competing interests qualitatively, without adducing any quantifiable

178. *See, e.g., id.* at 628.
179. *Id.* at 624–25, 627.
180. *Id.* at 628.
181. *Id.* at 628–631.
182. *See also* New Jersey v. T.L.O., 469 U.S. 325, 356 (1985) (Brennan, J., concurring in part and dissenting in part) ("The Warrant Clause is something more than an exhortation to this Court to maximize social welfare as *we* see fit."); *id.* at 370 ("[T]he presence of the word 'unreasonable' in the text of the Fourth Amendment does not grant a shifting majority of this Court the authority to answer *all* Fourth Amendment questions by consulting its momentary vision of the social good."); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 686 (1989) (Scalia, J., dissenting) (contending that the apparent reason for the majority's unjustified opinion is a desire to make a symbolic statement against illegal drug use in United States).
183. *See, e.g.*, T.L.O., 469 U.S. at 369 (Brennan, J., concurring in part and dissenting in part) (arguing that the Court's fourth amendment balancing tests "amount to brief nods by the Court in the direction of a neutral utilitarian calculus while the Court in fact engages in an unanalyzed exercise of judicial will"); Strossen, *supra* note 10, at 1184–85 (warning that the "veneer of objectivity" associated with balancing "masks the extent to which it depends on judicial value judgments").

measures, while using nonlegal data to justify its weighting of interests. The majority asserted, for example, that the government interest in promoting railroad safety by enforcing the testing program was "compelling." Obviously this is a nonempirical valuation, but the majority relied upon statistics to cover its nonempirical judgment with the patina of mathematical objectivity. It cited studies reporting that over an eleven year period "'the nation's railroads experienced at least 21 significant train accidents . . . result[ing] in 25 fatalities, 61 non-fatal injuries, and property damage estimated at $19 million,'" in which alcohol or drug abuse by railroad employees was "'a probable cause or contributing factor.'"[184]

These data demonstrate that a problem exists, but do not necessarily support the Court's conclusion that the government interest is compelling. These statistics could just as logically lead to the opposite conclusion. The number of railway accidents causing deaths, injuries, and property damage are minuscule when compared to the daily carnage drunk drivers cause on the nation's highways,[185] and the states extensively regulate the operation of motor vehicles,[186] yet the Court still requires probable cause before the government can compel an unwilling DUI suspect to submit to a blood alcohol test.[187] Despite the great societal interest in controlling drunk driving, the Court has never approved a program of suspicionless blood alcohol testing for truck and automobile operators. From this broader perspective of transportation safety, it is a fair inference that the interest in suspicionless testing of railroad employees is comparatively minimal rather than compelling.

Conversely, another part of the majority's opinion could easily justify the conclusion that the employees' privacy interests were substantial, not minimal. The majority reasoned that the gathering and testing of blood, urine, and even breath samples are so intrusive upon the employees' reasonable expectations of privacy that they constitute searches governed by the fourth amendment.[188] The same reasoning could support the conclusion that the employees possess compelling privacy interests in their

184. *Skinner*, 489 U.S. at 607.

185. Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 451 (1990); *id.* at 455–56 (Blackmun, J., concurring).

186. *See id.*; United States v. Ross, 456 U.S. 798 (1982); Cardwell v. Lewis, 417 U.S. 583 (1974); Chambers v. Maroney, 399 U.S. 42 (1970).

187. *Skinner*, 489 U.S. at 616 (citing Schmerber v. California, 384 U.S. 757, 767–68 (1966)). The weight attributed to the government interests in *Skinner* inferentially could justify not merely the suspicionless DUI roadblocks approved in *Michigan Dept. of State Police v. Sitz*, but also a program of mandatory suspicionless DUI testing of the nation's automobile drivers.

188. *Skinner*, 489 U.S. at 616–18.

body parts, and that therefore the fourth amendment requires probable cause to justify the testing, as it did in *Schmerber*.[189]

This analysis does not demonstrate that the Court erred in assigning values to the interests it balanced in *Skinner*. It does demonstrate, however, that no objective standard—certainly no mathematical one—justified the majority's attribution of weights to the competing interests it defined.[190] This is precisely the problem; no quantitative answer exists for what is essentially a problem of choosing among values.[191] The reasoning in an

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189. *See id.* at 647 (Marshall, J., dissenting) (asserting that the majority's ability to discuss the great privacy expectation in our society for the act of urinating "in the context of deciding that a search has occurred, and then ignore it in deciding that the privacy interests this search implicates are 'minimal,' underscores the shameless manipulability of its balancing approach").

190. The subjectivity involved in attributing weights to the interests at stake in fourth amendment disputes is emphasized by *Skinner*'s companion case, National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989). In *Von Raab*, the Court upheld a program that mandated drug-testing by urinalysis for all people applying for certain positions in the United States Customs Service. Individualized suspicion of drug use was irrelevant; all employees who qualified for a position in one of the affected job categories had to submit to testing. *Id.* at 661. The Court held that neither warrants nor individualized suspicion were prerequisites for constitutionally reasonable searches because the government interests outweighed the privacy interests of two of the three categories of affected employees. The Court upheld the mandatory, suspicionless testing of employees "directly involved in drug interdiction or required to carry firearms," but remanded the case for further proceedings on the question of mandatory suspicionless tests of applicants for positions involving the handling of classified materials. *Id.* at 664–65.

The majority could not justify its weighting of the interests by pointing to statistics demonstrating that drug use by the affected employees was a social problem. The government official responsible for establishing the testing program acknowledged that "Customs is largely drug-free," *id.* at 660, an opinion supported by the results of the drug-testing program. Of 3,600 people tested, "no more than 5" tested positive for drugs. *Id.* at 673. Justice Scalia also noted in dissent that the government did not identify even one incident in which lawbreaking or misconduct by a Customs Service employee was attributed to drug use. *Id.* at 683 (Scalia, J., dissenting). It is also noteworthy that Justice Scalia, who was part of the majority in *Skinner*, dissented precisely because he disagreed with the weight the majority attributed to the government interests in *Von Raab*. *Id.* at 680–87.

191. Professor Aleinikoff describes balancing cases like *New Jersey v. T.L.O.* as the most troubling, because the Court identifies interests and declares a winner, but it provides little discussion of the valuation standards. Some intuitive or personal preference scale appears to be at work. Aleinikoff, *supra* note 3, at 976. Justice Stevens stressed the clash of values at work in his dissent in *Michigan Dept. of State Police v. Sitz*: "In my opinion, unannounced investigatory seizures are . . . the hallmark of regimes far different from ours . . . . On that issue, my difference with the Court may amount to nothing less than a difference in our respective evaluations of the importance of individual liberty, a serious, albeit inevitable source of constitutional disagreement." 496 U.S. at 468–69 (footnote omitted). See also Lawrence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971), which discusses problems of valuing intangible benefits. Professor Aleinikoff has argued, however, that competing interests in fact may be comparable:

> The problem for constitutional balancing is the derivation of the scale needed to translate the value of interests into a common currency for comparison. The balancer's scale cannot simply represent the personal preferences of the balancer . . . .
>
> . . . .

opinion like *Skinner* seems based upon subjective value choices, yet the Court purports to be employing some neutral, objective calculus. Critics of fourth amendment balancing frequently conclude that this disguised value choice has had the effect of devaluing individual rights and promoting government power.[192]

Another unavoidable problem for those who balance is this: How does the decisionmaker identify and define the interests to be balanced? The answer to the question is critical, because it can dictate the outcomes in individual cases. *Skinner* again provides a useful example. On one side of the metaphorical scales the Court placed the privacy interests of the railroad employees who would be required to submit to drug tests. Aligned on the other side was the government—treated as the proxy for all other members of society—whose claimed interest was deterring a comparatively small group of railroad employees from engaging in improper behaviors, including the illegal use of drugs, behaviors that threaten injury to innocent people and their property.

With the issues so characterized, it is hardly surprising that a decisionmaker would "discover" that the balance favors the government. The interest all members of society share in being protected from drug and alcohol

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> Balancing, therefore, must demand the development of a scale of values external to the Justices' personal preferences.

Id. at 973. One could extend this argument to support *Skinner*, *Von Raab*, *Sitz*, and other balancing decisions in which the Court at least implicitly deferred to the judgments made by other branches of government. One might argue that the executive and legislative branches are better equipped to make these calculations, or that executive and legislative decisions provide a persuasive measure of the relevant values.

192. *See, e.g.*, *Sitz*, 496 U.S. at 456 (Brennan, J., dissenting) ("[T]he Court misapplies that test by undervaluing the nature of the intrusion and exaggerating the law enforcement need to use the roadblocks to prevent drunken driving."); *id.* at 462 (Stevens, J., dissenting) ("[I]t seems evident that the Court today misapplies the balancing test . . . . The Court overvalues the law enforcement interest in using sobriety checkpoints, undervalues the citizen's interest in freedom from random, [and] unannounced investigatory seizures . . . ."); *id.* at 473 (claiming that the Court's decision "appears to give no weight to the citizen's interest in freedom from suspicionless unannounced investigatory seizures . . . [but] places a heavy thumb on the law enforcement interest"); United States v. Sharpe, 470 U.S. 675, 720 (1985) (Brennan, J., dissenting) (stating that fourth amendment balancing is done with the "judicial thumb . . . planted firmly on the law-enforcement side of the scales").

Professor Strossen concludes that balancing tends to devalue fundamental rights because judges are required to consider, and often defer to, the conclusions of the other governmental branches. It also deprives fundamental rights of the special protections they were intended to receive. Strossen, *supra* note 10, at 1185. Professor Sundby adds that the differences in the nature of individual and government interests dictate that balancing naturally favors the government's interests over the individual's privacy interests, because governmental interests are tangible and visible, while privacy interests are less tangible and pale in comparison. Sundby, *supra* note 10, at 439.

induced accidents easily outweighs any interest a small class of individuals may have in engaging in illegal behaviors. Defined this way, the legitimate collective interest overwhelms the illegitimate individual or minority interest. As one commentator has trenchantly observed: "After all, what price is a small intrusion on one's time and space given the enormity of the government's interests?"[193]

This type of definitional imbalance is nowhere more likely to arise than in a criminal prosecution where typically an individual defendant is attempting to suppress evidence of her guilt by arguing that the government conducted an illegal search. To prevail, this person must persuade the Court to disregard probative evidence of her guilt, and then decide that her individual privacy interests outweigh the government's—that is society's—interest in detecting and prosecuting the crime she is accused of committing.[194] By aligning society's collective interests against those of the affected individuals, the interest definer strongly influences the outcome in favor of the government.[195]

Obviously this dichotomy between the individual and society is one legitimate way to characterize the interests to be balanced, but it is far from the only one. For example, privacy could be defined not as an interest possessed by solitary individuals, but as a collective interest held by all members of society. In *Skinner* the Court might have concluded that the privacy interest at stake was held not merely by a small group of railroad employees, but instead was the interest that all people have in being free from government intrusions absent individualized suspicion indicating that we are guilty of some wrongdoing. This point has been made by others,[196] but

193. Sundby, *supra* note 10, at 439 (footnote omitted).

194. For example, Professor Strossen suggests that since people asserting fourth amendment rights are often guilty, it is easy for the courts to conclude that the interest in protecting criminal misconduct is slight. Strossen, *supra* note 10, at 1195.

195. For further analysis and criticism of the Court's definition of fourth amendment interests, see *id.* at 1200–01, which argues that the Supreme Court treats the privacy interest as individual but the government interest as collective; its interest is not merely in catching this law violator, but in apprehending all violators in the same classification.

Balancing need not inherently favor one side in a dispute. In other areas of constitutional interpretation the use of balancing methods has led both to the expansion and contraction of individual liberties. *See* Aleinikoff, *supra* note 3, at 966–74; Strossen, *supra* note 10, at 1187 (claiming that subjective decisionmaking is accentuated in fourth amendment decisions when compared to other subjects of interpretation); *infra* notes 201–204 and accompanying text.

196. *See, e.g.*, Aleinikoff, *supra* note 3, at 981 (describing the dichotomy between individual and state interests as a false one); Strossen, *supra* note 10, at 1176 ("The Court does not accurately identify or compare the relevant competing concerns. It regularly undervalues the fourth amendment interests jeopardized by every search and seizure, while overvaluing the countervailing law enforcement interests.") (footnote omitted); Sundby, *supra* note 10, at 439–40 (proposing that the Supreme Court should consider the cumulative effect of intrusions on the rights of individuals).

nowhere more powerfully than in Justice Scalia's dissent in *Von Raab*, the companion case to *Skinner*. After protesting that the real justification for the Court's decision was the desire to make a symbolic statement in support of the "war on drugs," he wrote:

> Those who lose because of the lack of understanding that begot the present exercise in symbolism are not just the Customs Service employees, whose dignity is thus offended, but all of us—who suffer a coarsening of our national manners that ultimately give the Fourth Amendment its content, and who become subject to the administration of federal officials whose respect for our privacy can hardly be greater than the small respect they have been taught to have for their own.[197]

Defining the interest asserted by one individual as a society-wide interest in preserving privacy, liberty, autonomy, and freedom from unwarranted searches and seizures might alter the balance drawn in particular cases, but it would not solve the underlying problem. The Court simply cannot accurately identify and weigh all possible interests arising in cases involving disputes about constitutional rights.[198] We may disagree with the Court's definition of interests in a given case,[199] but there is little reason to believe that a different group of decisionmakers would succeed at defining interests in a way that is so obviously correct as to be unassailable. The problem is both insoluble and intrinsic to the method.[200]

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197. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 687 (Scalia, J., dissenting).

198. *See, e.g.*, Aleinikoff, *supra* note 3, at 977, 989 (explaining how the Supreme Court never really considers all the interests relevant to a dispute).

199. Dissenting Justices regularly criticize the majority's definition of the interests at stake in a particular case. For only one more example, see New Jersey v. T.L.O., 469 U.S. 325 (1985), in which Justice Brennan disagreed with the majority that the interest to be weighed on one side of the balance is "'the government's need for effective methods to deal with breaches of public order' . . . . Rather, it is the costs of applying probable cause as opposed to applying some lesser standard that should be weighed on the government's side." *Id.* at 363 (Brennan, J., dissenting) (footnote omitted). Later he argued that "[o]n the other side of the balance would be the serious privacy interests of the student." *Id.* at 367.

200. Perhaps the most discouraging assessment of the possibility of achieving such a method of evaluating interests was offered by Roscoe Pound, one of the seminal pragmatists and a frequent advocate of substantive reasoning in decisionmaking. Late in his career he wrote:

> Philosophical jurists have devoted much attention to deducing of some method of getting at the intrinsic importance of various interests so that an absolute formula may be reached in accordance with which it may be assured that the intrinsically weightier interests shall prevail. If this were possible it would greatly simplify the task of legislators, judges, administrative officials and jurists and would conduce to greater stability, uniformity and certainty in the administration of justice . . . . But however common and natural it is for philosophers and jurists to seek such a method, we have come to think today that the quest is futile. Probably the jurist can do no more than recognize the problem and perceive that

This critique of fourth amendment balancing has implications for other areas of constitutional theory. Balancing "now dominates major areas of constitutional law."[201] If fourth amendment balancing inevitably undervalues the claims of citizens, while overvaluing the arguments made by government, the same phenomenon may occur in disputes arising under other parts of the Constitution. This is particularly likely to occur in disputes in which we find stark conflicts between claims of individual autonomy and government authority—that is, in conflicts as sharply drawn as we find in the fourth amendment setting.[202] Later in the Article, I argue that nonformal methods like balancing are inadequate, and a rule-based decisionmaking system is necessary for interpretation of the fourth amendment.[203] That claim would be relevant to other areas of constitutional law in which individual-government conflicts are as crystallized as those arising under the fourth amendment.

This does not mean that balancing is automatically subject to the same criticisms in all areas of constitutional adjudication. Some disputes—even those in which government acts directly against individuals—may involve a web of interest groups and values so complex that balancing's inability to accurately assess the competing claims raised by the state and the individual in the fourth amendment context may not preclude the use of the method in these multi-faceted situations.[204] But the critique of fourth amendment balancing presented here suggests that this is an inquiry constitutional

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> it is put to him as a practical one of securing the whole scheme of social interests so far as he may; of maintaining a balance or a harmony or adjustment among them compatible with recognition of all of them.

3 ROSCOE POUND, JURISPRUDENCE 330–31 (1959), *quoted in* Aleinikoff, *supra* note 3, at 973–74.

201. Aleinikoff, *supra* note 3, at 965 (identifying numerous areas of constitutional law in which balancing is employed, including interpretation of provisions of the first, fourth, fifth, sixth, eighth, and fourteenth amendments, as well as the Commerce, Contracts, and Privileges and Immunities Clauses).

202. The other provisions of the Bill of Rights directly addressing aspects of the criminal justice system—found in the fifth, sixth, and eighth amendments—are obvious candidates. But disputes of this sort might arise under other provisions, as well. For example, a citizen might claim that government action directly violates her individual rights under the due process or takings clauses in ways raising a straightforward conflict between her claims of independence and the government's assertion of power.

203. *See infra* parts III, IV.

204. The free speech clause of the first amendment may supply the most ready examples. *See, e.g.*, STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 133–34 (1990) (asserting it is error to assume that balancing connotes a dualism because frequently balancing involves variables of multi-faceted character); Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1639–47 (1987) (discussing the complex of values relevant to free speech analysis); Steven Shiffrin, *The First Amendment and Economic Regulation: Away From a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1251–55 (1983) (proposing an eclectic general balancing approach for interpreting the first amendment).

interpreters should pursue before settling on a balancing methodology instead of employing a rule-based approach.

Another problem with balancing appears at what I characterize as the intersection of esthetics and constitutional values.[205] Balancing is unsatisfactory because it is an ineloquent way to decide fundamental constitutional issues. From the perspective of those advocating maximum individual autonomy, its lifeless, technocratic dialogue about statistics and social interests is an inadequate replacement for the eloquent proclamations favoring liberty—grounded in the history of the Republic, the struggle for independence, and the inherent value of individual freedom—relied upon by the Court in earlier eras. Those who favor expansive government power may also find balancing to be a dispiriting way of conceptualizing their goals. Government efforts to control destructive human behaviors take on a comparable grandeur when phrased, not as one part of a technocratic analysis of sociological interests, but as the timeless struggle of people gathered together in society to impose some level of decency and order upon the inherent anarchy of life, a condition always exacerbated by the exercise of individual freedom.

Balancing presents one problem that is particularly vexing for those who attribute importance to legal texts. Balancing devalues the text of the Constitution. In a regime of balancing, the constitutional document no longer embodies the fundamental statement of law governing all members of society, including the government. Instead, the text is merely one source among many of the legitimate interests to be considered in the process of particularistic decisionmaking. The balancer's ultimate goal need not be to reach a conclusion consistent with the commands of an authoritative text. The balancer's goal is to achieve the best substantive outcome for society, after considering all factors relevant to the dispute. This kind of all-things-considered decisionmaking, the hallmark of a pragmatist approach to law, inevitably diminishes the power and significance of the constitutional text. We may reach different conclusions about whether this is a positive or

205. Professor Aleinikoff has described a related but separate issue. He has noted that some commentators "see balancing as any method of resolving conflicts among values." Aleinikoff, *supra* note 3, at 945 (citing Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1249 (1983)). To these commentators, balancing "is nothing more than a metaphor for the accomodation of values." *Id.* Aleinikoff argues, accurately I believe, that "choices may be made among values in ways that are not based on an assessment of the 'weights' of the values at stake." *Id.* He distinguishes balancing from other decisionmaking methods. For example, totality of circumstances models "ask questions about how one ought to characterize particular events." *Id.* Balancing differs because it focuses on the interests and weights explicitly or implicitly attributed to those interests. *Id.*

negative development, but we should recognize that this is a by-product of constitutional balancing.

Taken together, balancing's inherent shortcomings bring us to an ironic conclusion. Practitioners of this most pragmatist of methods are subject to the same criticism that pragmatists leveled at formalist decisionmakers nearly a century ago. Because balancing provides no objective criteria for selecting, defining, and comparing interests, but permits decisionmakers to make those choices arbitrarily, balancing decisions frequently appear to be the product of nothing more than judges' subjective preferences. We have reached the point where—like the formalist jurisprudence the early pragmatists sought to replace—"[b]alancing has become mechanical jurisprudence. It has lost its ability to persuade."[206]

B. Reasonable Expectations of Privacy

The central question asked in the next group of cases is not whether a search was reasonable, but whether a search even occurred. The Court now answers that question by employing a test that rests upon pragmatist theories and methods. This is another recent development. Until the 1960s the Court generally relied upon the residue of the formalist linkage between property and privacy interests to resolve this issue.[207] For example, a search was an intrusion entailing a physical trespass upon a constitutionally protected area.[208] This rule-based approach had advantages: It was generally consistent with the text of the amendment,[209] and provided an "objective" measure of protected interests derived from sources extrinsic to fourth amendment case law. The most obvious shortcoming of the property-based approach was its failure to regulate the use of new technologies to achieve nontrespassory seizures of intangible evidence—including conversations. This

206. *Id.* at 983; *see id.* at 1005.

207. In subsequent decisions the Supreme Court continued to use property law concepts to define fourth amendment theory, but the Court severed this attribute of formalist theory from the related foundational beliefs in natural law, individual rights, and their embodiment in constitutional and common law. *See, e.g.*, Silverman v. United States, 365 U.S. 505 (1961); Goldman v. United States, 316 U.S. 129 (1942), *overruled by* Katz v. United States, 389 U.S. 347 (1967). In other words, the Court excised one constituent element from an integrated legal worldview. Within the legal ideology of that era, the decision in Lochner v. New York, 198 U.S. 45 (1905), "could be seen as the constitutional manifestation of a broader, integrated view of law." *See* Peller, *The Classical Theory of Law*, *supra* note 18, at 302.

208. *Goldman*, 316 U.S. 129; Olmstead v. United States, 277 U.S. 438 (1928), *overruled by* Katz v. United States, 389 U.S. 347 (1967). For a discussion of the evolution of property-based ideas from *Boyd* to *Katz*, see Gutterman, *supra* note 17, at 651–61.

209. *See Katz*, 389 U.S. at 364–69 (Black, J., dissenting).

shortcoming ultimately propelled the Court to adopt a new theory, and once again an opinion issued by the Warren Court during the 1960s established the doctrinal bases for the new interpretive theories grounded in legal pragmatism.

1. *Katz* and Privacy

At the beginning of the decade, the Court hinted that it was ready to jettison the property-privacy nexus,[210] but the doctrine survived until the Court's 1967 decision in *Katz v. United States*.[211] The case revisited issues first resolved nearly forty years earlier in *Olmstead v. United States*.[212] FBI agents acting without a warrant attached an electronic listening and recording device to the outside of a public telephone booth from which *Katz* placed interstate telephone calls. *Katz* subsequently was charged with violating a federal antiwagering statute, and at his trial the government introduced evidence of his end of those conversations.[213]

The Court's line of decisions extending back at least to *Olmstead* led the parties to frame their arguments in terms of property-based concepts. They disputed, for example, whether a phone booth was a constitutionally protected area, and debated the significance of the absence of a physical penetration into the telephone booth.[214] The Court rejected the parties' conventional characterization of the issues as "misleading,"[215] and announced a new formula.[216]

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210. *See, e.g.*, *Silverman*, 365 U.S. 509–11 (holding that intangible conversation could be seized but not deciding whether a trespass into a constitutionally protected area was necessary because such an intrusion had actually occurred); Jones v. United States, 362 U.S. 257 (1960) (visitor in apartment had standing to challenge the search of the apartment although he had no legally enforceable interest as owner or tenant), *overruled in part on other grounds by* United States v. Salvucci, 448 U.S. 83 (1980).

211. 389 U.S. 347.

212. 277 U.S. 438.

213. *Katz*, 389 U.S. at 348.

214. *See id.* at 349–52. The trespass doctrine had been reaffirmed in Goldman v. United States, 316 U.S. 129 (1942).

215. *Katz*, 389 U.S. at 351.

216. Perhaps to disguise the radical break it was making with the past, the majority chided the parties as if the Court's precedents did not exist: "Because of the misleading way the issues have been formulated, the parties have attached great significance to the characterization of the telephone booth . . . ." *Id.* On the same page of the opinion the Court acknowledged that "[i]t is true that this Court has occasionally described its conclusions in terms of 'constitutionally protected areas,'" but went on to assert that "we have never suggested that this concept can serve as a talismanic solution to every Fourth Amendment problem." *Id.* at 351 n.9 (citations omitted). The caveat attacked a straw man. Every fourth amendment problem was not at issue, but the issue

The new formulation explicitly abandoned the idea that property law defined the interests protected by the fourth amendment. Justice Stewart, writing for the majority, asserted that "'[t]he premise that property interests control the right of the government to search and seize has been discredited.'"[217] His opinion overruled the trespass doctrine and reaffirmed the Court's more recent decision that the fourth amendment protects intangible conversations as well as tangible property from unconstitutional seizures. Ultimately the opinion shifted the focus of the basic inquiry, concluding that the fourth amendment protects people and not places.[218]

How this replacement for property rights would operate in future cases was unclear from the majority opinion. Instead of establishing a new rule grounded in positive law, *Katz* announced an ambiguous formula that apparently focused upon the behavior and cognition of the individual citizen: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[219]

What this language means is unclear, and whatever else it may be, it is not a workable legal rule. Facially this formula is an amorphous standard requiring judges to consider a variety of factors, on a case-by-case basis, to determine whether a constitutional right is implicated by the facts. Not surprisingly, the Court quickly replaced this cumbersome language with the ostensibly more coherent two-part test taken from Justice Harlan's concurring opinion in *Katz*. According to Justice Harlan's formulation, a protected fourth amendment interest exists when two conditions are met: "[F]irst[,] that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[220]

This two-part "expectations" formula has become the linchpin of fourth amendment privacy analysis,[221] and the Court's decisions applying it rest upon the kinds of legal pragmatist ideas already discussed in the Article. To a large extent this is the product of the language of the test. Unlike the *Olmstead* trespass doctrine, Harlan's two-part test does not establish a straightforward rule whose meaning is determinable by reference to another

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raised in *Katz* fell well within the scope of the precedents establishing the relevance of the characterization of the property in question as constitutionally protected, or not.

217. *Id.* at 353 (quoting Warden v. Hayden, 387 U.S. 294, 304 (1967)).

218. *Id.*

219. *Id.* at 351–52 (citations omitted).

220. *Id.* at 361 (Harlan, J., concurring).

221. *See, e.g.*, California v. Ciraolo, 476 U.S. 207, 211 (1986).

body of substantive law. Unlike *Boyd*'s formalist reasoning, it does not require that decisions rest upon the values underlying the amendment.

Instead, by asking whether the expectation in dispute is one society is willing to recognize as reasonable, the test's second prong implicitly encourages decisionmakers to define fundamental constitutional values by referring to contemporary social values, goals, and attitudes. The ultimate focal point of this analysis is not the command of antecedent legal authorities, even if those rules embody the value choices made by the framers. In the best pragmatist tradition, the language of the test emphasizes present realities, found in the existing social context. By making the ultimate standard "reasonableness" from a social perspective, the test implements the pragmatist rejection of fixed truths and adopts a flexible standard that can be manipulated to achieve present instrumental goals.

The fact that the second prong of the expectations test encourages a pragmatist jurisprudence is significant, because ultimately it is this half of the test that matters. The first prong is of less importance, both conceptually and practically. Conceptually, the first prong is perhaps the most nonsensical premise in fourth amendment law. The first prong cannot mean what it literally says. The scope of a fundamental constitutional right cannot depend upon the subjective beliefs of an individual citizen.[222] If this were true, one of three unacceptable alternatives would follow. First, the government could reduce the scope of the amendment's protections merely by informing the people that it was engaging in more intrusive surveillance of them—and they should now expect less privacy. Second, the lowest common denominator of belief would prevail—all would have only the minimal level of protection expected by anyone. Or finally, the more educated would live under a different constitutional scheme from the one applied to the less educated.

An example of how the last alternative might operate illustrates the first prong's shortcomings. Imagine the far from impossible scenario in which the police break down someone's front door, search his home, and find evidence of a crime, all without a warrant or probable cause. Nonetheless, the hapless resident believes (perhaps he is a recent émigré from a totalitarian society) that this is lawful police conduct. Subjectively he *expects* the police to behave this way, and fully *expects* the legal system to authorize these police practices. He did not consent to the search, but he submitted to it readily because of his subjective expectations, and he so testifies at the inevitable

222. *See* Amsterdam, *supra* note 103, at 384 (contending that an individual's actual subjective expectation can "neither add to, nor can its absence detract from, an individual's claim to fourth amendment protection"); *see also* Gutterman, *supra* note 17, at 675–76.

suppression hearing. Taken literally, the subjective expectations concept dictates that no search of his home occurred. The better educated citizen, however, would expect privacy from unwarranted police searches of her home, and her accurate subjective belief would force the court to apply the second prong of the *Katz* test to decide the motion. These inconsistent results are absurd. In practice, our courts simply would ignore the first prong, turn directly to the second, and would conclude that the people are entitled to expect privacy in their homes, and that on these facts the evidence should be suppressed.

Perhaps because of the first prong's inherent defects, the second prong has come to dominate contemporary expectations analysis. Most cases turn upon the Court's decision about the reasonableness of those expectations.[223] It is not surprising, therefore, to find a body of case law in which the Court focuses upon social context, uses the law instrumentally to achieve social goals, and emphasizes substantive, not formal, reasoning. It is also a body of case law remarkable in its scope.

The Court has applied the expectations test in every law enforcement context to define the scope and nature of personal rights and government authority. The following is a nonexhaustive list of examples. (1) Expectations analysis has been applied to automobiles. The Court's opinions establish that: people have a lessened expectation of privacy in their automobiles and containers located in them;[224] automobile passengers have no privacy interest in the areas under the seat or in an unlocked glove compartment, and therefore lack standing to challenge a search of those areas;[225] an automobile owner has no reasonable expectation of privacy in a vehicle's identification number, even when police officers must search the vehicle to locate the number.[226] (2) Expectations analysis has been applied to the use of technology to monitor the movement of containers and automobiles: installing an electronic beeper to monitor a person's travels in public does not invade a reasonable privacy expectation,[227] but tracking the beeper in a private home may.[228] (3) The test has been applied to government requests to business entities for information about their customers, establishing that: people have no reasonable expectation of privacy in microfilm copies of deposit slips and checks maintained by their

223. For a few examples, see *infra* notes 224–238 and accompanying text.
224. United States v. Ross, 456 U.S. 798 (1982); *see also* California v. Acevedo, 111 S. Ct. 1982 (1991); United States v. Johns, 469 U.S. 478 (1985).
225. Rakas v. Illinois, 439 U.S. 128 (1978).
226. New York v. Class, 475 U.S. 106 (1986).
227. United States v. Knotts, 460 U.S. 276 (1983).
228. United States v. Karo, 468 U.S. 705 (1984).

banks;[229] people can have no privacy expectation in the numbers dialed from their telephones, therefore the use of pen registers by the telephone company to record those numbers at the request of the police is not a search or seizure.[230] (4) Expectations analysis has been applied to permit the use of specialized techniques to identify the presence of illegal drugs: utilizing trained drug detection dogs to sniff travelers' luggage does not constitute a search;[231] a chemical "field test" to determine whether a substance is cocaine "compromises no legitimate privacy interest" because "Congress has decided . . . to treat the interest in 'privately' possessing cocaine as illegitimate."[232] (5) The *Katz* test governs privacy interests in personal property: a person claiming ownership of illegal drugs does not have standing to challenge the search that uncovered the contraband if the drugs were located in another's bag because he has no reasonable expectation of privacy in that container;[233] a resident who deposits closed, opaque garbage bags on the curb outside his home has no reasonable expectation of privacy in the contents of those bags.[234] (6) Despite the *Katz* opinion's assertion that the fourth amendment protects people, not places, different expectations attach to different physical locations: a person has a greater privacy expectation in her home than in other locations;[235] a public employee may or may not have a reasonable expectation of privacy in his office;[236] even vigorous attempts to exclude trespassers, including erecting fences and posting no trespassing signs, do not create a reasonable expectation of privacy in open fields, therefore a physical trespass by police officers is not a search.[237]

Despite the ubiquity of the *Katz* test, its meaning remains unsettled and controversial. For example, it is possible to conclude that the language of the majority opinion in *Katz*—as opposed to Justice Harlan's shorthand description of it—does not require the use of pragmatist theories and methods to determine whether a particular form of government conduct violates a person's fouth amendment rights. One logical interpretation of the Court's reasoning is that it describes a value-based interpretive theory that would extend the protections of the amendment more broadly than was possible

229. United States, v. Miller, 425 U.S. 435 (1976).
230. Smith v. Maryland, 442 U.S. 735 (1979).
231. United States v. Place, 462 U.S. 696 (1983) (dictum).
232. United States v. Jacobsen, 466 U.S. 109, 123 (1984).
233. Rawlings v. Kentucky, 448 U.S. 98 (1980).
234. California v. Greenwood, 486 U.S. 35 (1988).
235. *See, e.g.*, United States v. Ross, 456 U.S. 798 (1982); Steagald v. United States, 451 U.S. 204 (1981); Payton v. New York, 445 U.S. 573 (1980).
236. O'Connor v. Ortega, 480 U.S. 709 (1987).
237. United States v. Dunn, 480 U.S. 294 (1987); Oliver v. United States, 466 U.S. 170 (1984).

under property-based rules.[238] This interpretation of *Katz* emphasizes the values protected by the amendment—and seems to stress individual liberty over competing governmental or societal interests. The Court's opinions applying the *Katz* test, however, do not employ such a value-based model. Over time expectations analysis has produced only an amorphous formula that allows the Justices to treat the fourth amendment as an instrument for achieving social goals approved by shifting majorities on the Court. This results in no small part from the Justices' use of pragmatist ideas to decide what privacy expectations are reasonable.

2. Privacy, Real Property, and Flying Machines

The pragmatist foundations of contemporary expectations analysis are illustrated by the Supreme Court's opinions construing the scope of privacy expectations in open fields and in the curtilage of the home. The recent line of cases begins with *Oliver v. United States*,[239] in which the Court affirmed that the fourth amendment provides no protection in open fields. This hoary doctrine, first announced during the fourth amendment's formalist era,[240] seemed an unlikely candidate to withstand scrutiny when expectations analysis was applied to the warrantless, trespassory search of Oliver's farm.[241]

Oliver had posted "No Trespassing" signs around his property at regular intervals, had locked the gate at the entrance to the center of the farm, and had planted marijuana in a field that was "highly secluded: it is bounded on all sides by woods, fences, and embankments and cannot be seen from any point of public access."[242] Investigators ignored these warnings and inspected the property on foot. Perhaps because of its insignificance, or perhaps because the answer was so obvious, the Court never addressed

238. *See, e.g.*, Amsterdam, *supra* note 103, at 384 (explaining how *Katz* returned the fourth amendment to the "grand conception" of *Boyd*); *id.* at 385, 400–03; Gutterman, *supra* note 17. This view is supported by the emphasis the *Katz* Court placed upon the importance of judicial review of police activities. Katz v. United States, 389 U.S. 347, 357 (1967). Despite the objective reasonableness of the agents' behavior, the search and seizure of Katz's conversations were unconstitutional because they were not conducted pursuant to prior judicial authorization; there was no warrant. *Id.* at 356–59.

239. 466 U.S. 170 (1984). The opinion decided a pair of consolidated cases, *Oliver* and *Maine v. Thornton*. *Id.*

240. Hester v. United States, 265 U.S. 57 (1924).

241. *See* Wilkins, *supra* note 10, at 1100 n.119 (asserting that many courts and commentators had assumed that *Katz* had implicitly overruled the open fields doctrine, and citing relevant opinions and treatises).

242. *Oliver*, 466 U.S. at 174. *Thornton* had taken similar precautions. *Id.* at 175.

directly the question of Oliver's subjective expectations. Instead the Court skipped to the second step, and established the per se rule that an "expectation of privacy in open fields is not an expectation that 'society recognizes as reasonable.'"[243] This conclusion rested in large part upon the kind of substantive reasoning that is the hallmark of legal pragmatism.

Oliver argued that because state property law classified the officers' behavior as a trespass upon his property, their warrantless intrusion upon his land violated the fourth amendment.[244] The Court rejected this attempt to locate privacy expectations in rights established by positive law.[245] Although it also discussed the traditional justification for the open fields doctrine, the heart of the Court's opinion was its expectations analysis, which began by emphasizing the second prong of the *Katz* test: the fourth amendment "does not protect the merely subjective expectation of privacy, but only those 'expectation[s] that society is prepared to recognize as "reasonable."'"[246]

Several factors were examined to determine whether open fields were places in which a person could legitimately expect privacy, and the discussion generally emphasized pragmatist concerns.[247] One factor was the nature of

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243. *Id.* at 179.

244. *Id.* at 183. The Court treated different rules of property law inconsistently. It followed the property law rule negating Oliver's privacy claim, concluding that the protection afforded the home's curtilage at the common law created a negative inference against privacy expectations in open fields. *Id.* at 180. Thus the text of the fourth amendment was consistent with the property law concepts relied on by the Court in *Hester*. *Id.* at 176–77, 180. Yet the well-established rule of property law proscribing trespasses was discounted. The Court concluded that "[t]he existence of a property right is but one element in determining whether expectations of privacy are legitimate. . . . [E]ven a property interest in premises may not be sufficient to establish a legitimate expectation of privacy." *Id.* at 183 (citations omitted) (second alteration in original). The property law rule supporting the privacy claim was rejected. *Id.* at 189–90 (Marshall, J., dissenting).

245. Defining social expectations by referring to relevant positive law makes sense even from a pragmatist's perspective. One benefit of this approach is that it limits the effects of judicial subjectivity. Holmes wrote that because law embodies

> beliefs that have triumphed in the battle of ideas and then have translated themselves into action, while there still is doubt, while opposite convictions still keep a battle front against each other, the time for law has not come; the notion destined to prevail is not yet entitled to the field. It is a misfortune if a judge reads his conscious or unconscious sympathy with one side or the other prematurely into the law, and forgets that what seem to him to be first principles are believed by half his fellow men to be wrong.

OLIVER W. HOLMES, *Law and the Court*, *in* COLLECTED LEGAL PAPERS, *supra* note 24, at 291, 294–95. But how does a judge know when the consensus of opinion has been reached? One logical source is a lawfully enacted statute or administrative rule. This argument might justify drug testing programs enacted by statute or administrative regulation, but it also would honor interests protected by real and personal property law.

246. *Oliver*, 466 U.S. at 177 (citations omitted).

247. *Id.* at 177–79. In this passage the Court focused upon the nature of the place—despite the clear holding in *Katz* that the fourth amendment protects people, not places.

the activities carried on in the particular place. The Court concluded that society has no interest in protecting the privacy of the types of activities, such as farming, likely to be carried on in open fields. These were contrasted with the "intimate activities that the Amendment is intended to shelter from government interference or surveillance,"[248] activities the Court linked to a different place—the home and its curtilage.[249] Since Oliver could harbor no reasonable privacy expectation, the officers' trespass was not a search regulated by the fourth amendment.

The Court's reasoning is plausible, but is far from irrefutable. Most obviously, it is inconsistent with the theoretical underpinnings of the seminal opinion upon which the Court relied. The central premise of *Katz* is that the fourth amendment protects people and their behavior, and not places. It is far from clear that the American people would accept the Court's arguments about the socially acceptable locations for activities warranting constitutional protection. It seems safe to assume, for example, that the Court included sexual activity within the class of intimate activities associated with the home. It is also arguable, using the Court's framework for the issues, that a reasonable expectation of privacy attaches to sexual behavior in some open field locations. People might purchase land in the country to obtain the spatial remoteness permitting them to carry on those intimate activities outside of the confines of the home, without exposing themselves to urban neighbors.[250] In a society where sexually explicit topics are discussed and portrayed in the most public of venues—television, radio, and movies, for example—it is not obvious that these behaviors are so taboo that a secluded rural location fails to support a privacy expectation for them. By establishing a per se rule applicable to every open field, the Court precluded everyone from ever creating or preserving a protectable expectation by taking appropriate actions to secure privacy in those locations.

This per se rule also conflicts with the Court's treatment of the facts in *Katz*. If a public telephone booth supports a reasonable expectation of conversational privacy, it is not immediately obvious why a secluded woods, surrounded by acres of private land enclosed by fences and "No Trespassing" signs, supports no privacy expectations for any kind of activities, including the intimate activities often associated with the home.[251] After all, *Katz*

248. *Id.* at 179.

249. The majority concluded that this aspect of its expectations analysis was consistent with the history of the fourth amendment and the intent of the framers. *Id.* at 178–81.

250. *See id.* at 192 (Marshall, J., dissenting).

251. *See id.* at 185–86 (Marshall, J., dissenting) (summarizing Supreme Court opinions in which nonresidential places were found to support some reasonable expectation of privacy).

expressly held: "What a person . . . seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[252]

The Court's adoption of a per se rule in *Oliver* may be explained in part by its concern for advancing a specific societal goal: efficient law enforcement. *Katz* seemingly requires a case by case analysis of privacy expectations, but in *Oliver* the Court explicitly rejected ad hoc analysis because it would place too great a burden on law enforcers.[253] The opinion did not distinguish the many other fourth amendment questions police officers must regularly resolve on a case by case basis.[254] The Court simply accepted the quintessentially pragmatist argument: the efficient achievement of social goals, in this case enforcement of the criminal law, dictated the adoption of a per se rule.[255]

The point of this analysis is not that the *Oliver* majority erred. Its arguments seem as plausible as those offered by the dissenting Justices. What is noteworthy for this discussion is that the opinion ultimately rests upon a pragmatist instrumentalism and concern for social and physical context that

252. Katz v. United States, 389 U.S. 347, 351–52 (1967) (citations omitted).

253. *Oliver*, 466 U.S. at 181.

254. The list includes, by way of illustration, whether probable cause or reasonable suspicion justifying a search or seizure exists, whether a person has been seized, whether a person has consented to a search, whether the person has authority to consent, the scope of that consent, whether an exigency justifying a warrantless intrusion exists, and the scope of that exigency.

255. Remarkably, the Court's next open fields opinion rejected an established per se rule that favored privacy claims. United States v. Dunn, 480 U.S. 294 (1987). Dunn was convicted of violating a federal narcotics law; much of the evidence used against him was discovered in a barn on his ranch. Dunn's ranch was surrounded by a perimeter fence and several interior barbed wire fences. One fence surrounded the house and a greenhouse, which were one-half mile from the public road. The barn in question was about 50 yards from this interior fence. Federal agents lacking probable cause or a warrant trespassed on defendant's land. To reach the barn they had to climb several fences, including one directly surrounding it. Locked gates blocked entry to the barn, and netting was stretched from the top of the gates to the ceiling. *Id.* at 297–98. The general rule established by the overwhelming majority of state and federal courts is that barns are included within the curtilage of a farmhouse. *Id.* at 307–09 (Brennan, J., dissenting) (citations omitted). Nonetheless, the Court adopted a four factor test to determine whether an area is included in the curtilage. Applying this test to the facts, the majority concluded that this barn was not in the curtilage; a fortiori it was in open fields. Therefore, the agents' trespasses were not unreasonable searches, did not violate the fourth amendment, and the evidence discovered was admissible. *Id.* at 302–05.

The Court's reasoning included some interesting fact analysis. Despite the location of the barn, the many fences, and the locked gates, the majority concluded that Dunn "did little to protect the barn area from observation by those standing in the open fields." *Id.* at 303. It also decided that the use of fences to enclose the barn did not mean it was not in open fields, because "[a]n open field need be neither 'open' nor a 'field' as those terms are used in common speech." *Id.* at 304 (quoting United States v. Oliver, 466 U.S. 170, 182–83 (1984)). One is left with the nagging suspicion that nothing Dunn could have done would have satisfied the majority that the fourth amendment protected his drug manufacturing activities.

license judges to base their decisions upon unsupported suppositions about the nature of social reality.

The Court's three opinions involving aerial surveillance of private property exemplify this kind of reasoning. In *California v. Ciraolo*,[256] investigation at street level did not enable police officers to confirm an anonymous tip that Ciraolo was growing marijuana in his backyard because the yard was enclosed within both a six-foot outer fence and a ten-foot inner fence. The officers circumvented this obstacle by observing the backyard from a private airplane flying at an altitude of 1,000 feet. They identified marijuana growing in the fenced yard, photographed it, and used this information to obtain a search warrant. Police officers executing the warrant seized the marijuana plants.[257]

The Court acknowledged that the backyard lay within the curtilage of the home,[258] a conclusion that seemingly dictated suppression of the fruits of the warrantless aerial surveillance. As recently as its decision in *Oliver*, the Court had guaranteed that the full fourth amendment protections associated with the home itself applied within the curtilage.[259] But rather than utilize the *per se* approach employed in its recent open fields decision, the five-Justice majority engaged in an ad hoc application of the *Katz* expectations test. It concluded that Ciraolo had manifested a subjective expectation of privacy[260] but, as is typically the case, the Court's analysis of the objective reasonableness of that expectation was dispositive.

The Court held that Ciraolo had no reasonable expectation of privacy, and its reasoning suggests a vigorous instrumentalism unbound by consistent rule application or adherence to precedent. The opinion rested upon the fact that the warrantless observations "took place within public navigable airspace in a physically nonintrusive manner."[261] The Court's reference to the second factor is surprising because the absence of a physical intrusion is irrelevant under *Katz*, which expressly overruled the trespass doctrine.[262]

256. 476 U.S. 207 (1986).

257. *Id.* at 209–10.

258. *Id.* at 212–13.

259. Oliver v. United States, 466 U.S. 170, 180 (1984) (stating that the curtilage "has been considered part of the home itself for Fourth Amendment purposes."); *see also Dunn*, 480 U.S. at 300.

260. *Ciraolo*, 476 U.S. at 211.

261. *Id.* at 213 (citation omitted).

262. *See supra* note 218 and accompanying text; *see also Ciraolo*, 476 U.S. at 223 (Powell, J., dissenting). Conversely, even the existence of a trespass is irrelevant in areas beyond the curtilage under *Oliver*. As one commentator has noted, "in light of *Katz* and *Oliver*, a property interest is neither necessary nor sufficient to obtain fourth amendment protection." Serr, *supra* note 10, at 618.

The majority apparently was eschewing rule-based decisionmaking in favor of substantive reasoning; it would implement the correct substantive outcome regardless of the commands of precedent.

Indeed, the discussion of the nature and significance of aerial observations is notable for its paucity of citations to precedent.[263] Ultimately the opinion rested upon three unsubstantiated conclusions. First, the majority equated a police officer's naked eye surveillance of a home from an airplane flying in navigable airspace with his observation of a home while travelling on a public thoroughfare.[264] Second, it equated the officer's purposeful surveillance of a particular home with the possibility that a private citizen flying in a commercial or private airplane might glance down at random properties.[265] More broadly, the opinion implicitly equated the intrusiveness of actual police investigations focusing upon specific individuals with hypothetical observations made by hypothetical private citizens.[266]

Each of these assumptions is disputable,[267] but that is not the central concern here. Rather it is to identify the connection between legal pragmatism and the Court's decisionmaking. That task is made more difficult by the majority's sparse reasoning in this opinion, but the connection exists. Most obviously, the Court did not base its decision on any foundational theories or pre-existing rules; indeed it gave only a cursory nod to its own precedents. Instead the opinion rested upon contextual and instrumental reasoning, in which substantive and not formal reasons were dispositive. A majority apparently based their decision that Ciraolo's expectation was "unreasonable" upon the Justices' unsubstantiated conclusions about human behavior within the context of contemporary society.

For example, the five-Justice majority apparently concluded that passengers in commercial airplanes are sufficiently able to observe what happens in individual homes and yards, and to associate those observations with a particular yard or person, to compromise privacy interests in those places. No judicial authority of any sort was cited to support this proposition. For the majority the most significant legal authority apparently was a set of Federal Aviation Administration (FAA) regulations defining navigable

263. *See Ciraolo*, 476 U.S. at 213–15 (citing only *Katz* and two other cases of questionable relevance).

264. *Id.* at 213 (a warrant was not required for such an aerial observation because the "Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares").

265. *Id.* at 213–14 ("Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed.").

266. *Id.* 214–15.

267. *See, e.g., id.* at 223–25 (Powell, J., dissenting).

airspace and permitting airplanes to fly at an altitude of 1,000 feet. The relevance of these air safety regulations to a homeowner's privacy expectations depended upon the investigators' compliance with the regulations. Ciraolo had no privacy expectation in his enclosed backyard because the officers had observed this area from an authorized altitude. The analysis of the relationship between individual privacy expectations and contemporary air travel cited no other authority. No data were presented detailing the frequency or location of flights over Ciraolo's home. The only such flight identified in the Court's opinion was the one conducted by government officials investigating his specific property.

Once again the majority's reasoning is not irrefutably wrong.[268] One might well conclude that the opinion in *Ciraolo* comports with common sense and everyday experience. After all, airplanes are flying up there, and even marijuana growers must know that. But this only reaffirms the pragmatist bases of the Court's analysis. It was not the law as a system of rules or even values that the Court cited to justify its reasoning. The decision ultimately seems to rest upon the Justices' idiosyncratic views about the relevant social context, including the nature of contemporary social realities and goals, rather than upon any reasoning from relevant constitutional authorities.[269]

It bears repeating that this kind of judicial behavior is neither surprising nor anomalous in contemporary legal culture. It represents not an aberration from the norm, but rather the pragmatist concept of legal decisionmaking

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268. *But see* Serr, *supra* note 10, at 600–23, 631–39 (criticizing the Court's analysis equating observation or possible observation by a private citizen with an intentional and systematic surveillance operation conducted by the government).

269. From time to time, Justices have claimed that their expectations analysis rests upon established legal standards. Even on this basic point, however, there is no uniformity of opinion. For example, in Oliver v. United States, 466 U.S. 170 (1983), the majority asserted that in determining whether government acts violate a reasonable privacy expectation relating to a particular place, "the Court has given weight to such factors as the intention of the Framers of the Fourth Amendment, . . . the uses to which the individual has put the location, . . . and our societal understanding that certain areas deserve the most scrupulous protection from government invasion." *Id.* at 178 (citations omitted). The dissenters in *Oliver* countered with a different list of three factors it posited that the Court had considered: (1) whether the expectation is rooted in entitlements defined in positive law; (2) the nature of the uses to which this type of space can be put; and (3) whether the person asserting the privacy interest manifested it in a way that most people would understand. *Id.* at 189 (Marshall, J., dissenting). Other opinions have asserted that a fourth amendment privacy expectation is reasonable "if it is rooted in a 'source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.'" Dow Chem. Co. v. United States, 476 U.S. 227, 248 (1986) (Powell, J., concurring in part and dissenting in part) (quoting Rakas v. Illinois, 439 U.S. 128, 143–44 n.12 (1978)). As this Article attempts to demonstrate, expectations analysis seems more rooted in the Justices' subjective values, experiences, and views of the social good than in any of the various criteria cited by the Justices.

evolved to an extreme form. Like the Court's efforts at balancing to determine whether government conduct is *reasonable*, its efforts to define what *expectations* are *reasonable* encourage decisionmaking based upon subjective ideas about social realities and goals—operating unconstrained by antecedent rules.[270]

Ciraolo's companion case, *Dow Chemical Co. v. United States*,[271] provides another example of how expectations analysis can degenerate into decisionmaking unbound by legal rules. The Court held that aerial photography by the Environmental Protection Agency (EPA) of Dow's industrial facility was not a search prohibited by the fourth amendment.[272] Relying in part on the reasoning in *Oliver* and *Ciraolo*,[273] the majority concluded that, although Dow had taken extensive steps to prevent both ground level and aerial observation of the facility,[274] the investigation violated no reasonable expectation of privacy. The majority apparently believed that Dow's failure to roof the 2,000 acre industrial complex made any expectation of privacy from aerial surveillance unreasonable. Similarly, although the Court recognized that the Dow complex was not precisely "open fields" equivalent to farm fields, the majority rejected Dow's argument that the open areas deserved protection as "industrial curtilage." And finally, the fact that the aerial surveillance was conducted without a physical trespass or entry strengthened the government's arguments.[275]

The significant innovation in the opinion, however, demonstrates how the Court's fourth amendment jurisprudence has come to exemplify legal pragmatism in practice. A central issue in the case was whether a warrant was needed to authorize government use of sophisticated technological devices for surveillance. The EPA photographs were taken from altitudes of 12,000, 3,000, and 1,200 feet,[276] and the District Court found that "use of 'the finest precision aerial camera available' permitted the EPA to capture

270. In *Katz*, the Court did reaffirm one traditional rule not required by any of its opinions in cases involving aerial surveillance; it required a search warrant to justify the technologically enhanced search and seizure of Katz's conversations. Katz v. United States, 389 U.S. 347, 357 (1967).

271. 476 U.S. 227 (1986).

272. *Id.* at 239.

273. The Court also addressed the EPA's investigatory authority and the significance of Dow's claims based upon trade secrets law. The government prevailed on both issues. *Id.* at 231–34.

274. *Id.* at 229; *see id.* at 241–42 (Powell, J., concurring in part and dissenting in part). *But see id.* at 237 n.4 (arguing that Dow had not taken significant steps to protect against aerial observation).

275. *Id.* at 234–39.

276. *Id.* at 229.

on film 'a great deal more than the human eye could ever see.'"[277] Nonetheless, sounding like turn of the century pragmatists extolling scientific progress, the Supreme Court determined:

> The photographs at issue in this case are essentially like those commonly used in mapmaking. Any person with an airplane and an aerial camera could readily duplicate them. In common with much else, the technology of photography has changed in this century. These developments have enhanced industrial processes, and indeed all areas of life; they have also enhanced law enforcement techniques.[278]

No authority was cited for any of these assertions. Apparently the majority believed its prosaic account of the role of science in contemporary society was sufficient to validate its reasoning.[279] This is remarkable because this unsubstantiated analysis of the relevant scientific and social contexts established a new test defining when the use of technology is sufficiently intrusive to impinge on constitutionally protected interests. This issue has played such a significant role in the development of fourth amendment theory[280] that one would expect the Court to use care in crafting a new standard.

In *Dow*, however, the Court casually approved the warrantless use of any technologies it deemed to be generally available to the public. Police use of such devices to enhance their sensory abilities is not a fourth amendment search. Only warrantless observation of private property by means of "highly sophisticated surveillance equipment *not generally available* to the public . . . *might* be constitutionally proscribed without a warrant."[281]

The Court offered no authority or justification for this new test governing technological surveillance. It offered no measure explaining the distinction between regulated and unregulated technologies. The Court instead offered hypothetical examples. The majority suggested that it would consider satellite technology and electronic devices that penetrated walls or windows to permit discovery of trade secrets as devices not generally available to the public.[282] Conversely, although the $22,000 camera[283] used by the

277. *Id.* at 230.
278. *Id.* at 231.
279. In another passage the Court cited nothing more than "[c]ommon sense and ordinary human experience" to justify its reasoning. *Id.* at 233.
280. For example, the issue led to the seminal opinions in *Olmstead* and *Katz*. *See also Dow*, 476 U.S. at 247-48 (Powell, J., concurring in part and dissenting in part) (arguing that the reasonable expectation of privacy standard is designed to insure privacy in an era in which surveillance by technology permits nontrespassory intrusions).
281. *Id.* at 238 (emphasis added).
282. *Id.* at 238-39.

EPA was capable of "seeing" details far beyond the capacity of naked eye observation (revealing objects as small as 1/2 inch in diameter), it was not a sophisticated technology generally unavailable to the public.[284]

The distinction between regulated and unregulated technologies apparently rested upon the subjective views of individual Justices about the relevant technological and social contexts. If those contexts changed, so would the conclusion. If a majority of Justices ever were to conclude that satellite technology was generally available to the public, then its use for government surveillance would not constitute a search regulated by the amendment. No legal, statistical, or other authority was cited to support the majority's characterizations of these social and scientific contexts, but it was these contexts upon which the decision rested.[285] Context controlled perhaps because it allowed the majority to act instrumentally to attain the policy goal of permitting government inspectors to exercise this kind of authority unfettered by the requirements of the Warrant Clause.

The contextual and instrumentalist characteristics of pragmatist decisionmaking are emphasized by the debate in *Florida v. Riley*,[286] the Court's most recent opinion involving surveillance from a flying machine. A four-Justice plurality held that no search occurred when police, possessing neither probable cause nor a warrant, flew a helicopter only 400 feet above Riley's greenhouse to permit observation of its interior. The greenhouse lay within the curtilage of Riley's mobile home,[287] which was located in a rural area. The home and greenhouse were surrounded by a wire fence and a "Do Not Enter" sign was posted. The contents of the greenhouse were obscured from ground level viewing by walls, trees, shrubs and the home itself. Unlike Ciraolo's back yard, Riley's greenhouse was covered by corrugated roofing panels, but at the time of the investigation two panels, comprising about ten percent of the roof area, were missing.[288]

The plurality concluded that Riley's subjective expectation that the interior of his greenhouse would be free from aerial surveillance was unreasonable. In effect, the plurality judicially noticed that airplane and helicopter flights are so common in the United States that "Riley could not

283. *Id.* at 242 n.4 (Powell, J., concurring in part and dissenting in part).

284. *See id.* at 238 n.5; *id.* at 243 (Powell, J., concurring in part and dissenting in part).

285. For a similar complaint, see *id.* at 244 (Powell, J., concurring in part and dissenting in part) (arguing that the majority opinion ignores relevant precedent and relies instead "on questionable assertions" about the means of surveillance and the character of the area observed).

286. 488 U.S. 445 (1989).

287. *Id.* at 449.

288. *Id.* at 448.

reasonably have expected that his greenhouse was protected from public or official observation"[289] from navigable airspace.[290]

The plurality's reasoning makes it unlikely that a citizen could ever establish the reasonableness of such an expectation. The plurality's conclusion did not rest upon affirmative evidence establishing the frequency of helicopter flights in this rural area, and it is unclear from the opinion that there ever had been such a flight other than the police inspection of the greenhouse.[291] The plurality instead based its judgment upon evidence not in the record: "[T]here is no indication that such flights are unheard of in Pasco County, Florida."[292] Later it noted the *absence* of evidence in the court record that "helicopters flying at 400 feet are sufficiently rare in this country to lend substance to respondent's claim that he reasonably anticipated that his greenhouse would not be subject to observation from that altitude."[293] The opinion rests not upon evidence, but upon the Justices' personal assumptions about the social and scientific contexts in which the case arose, and the *absence* of evidence controverting these unsubstantiated assumptions. So long as government surveillance flights comply with FAA

289. *Id.* at 450–51.

290. This sweeping conclusion rested upon several bases. Most were simply a reworking of the reasoning in *Ciraolo*. These included: (1) the Court's opinion in *Ciraolo*; (2) the FAA regulations that define navigable airspace for fixed wing aircraft and permit helicopters to fly below those levels when it is safe to do so; (3) the fact that the flight in this case did not violate FAA rules; and (4) the aerial surveillance was nontrespassory and did not interfere with the property. *Id.*

Eight of the Justices were willing to take judicial notice of a disputed fact—the frequency of flights. The four joining in the plurality opinion assumed that flights are common. Justice O'Connor would have placed an empirical burden on the citizen to demonstrate that flights are not common. *Id.* at 454–55 (O'Connor, J., concurring). Three of the four dissenters were willing to take judicial notice of the opposite conclusion, that helicopter flights in this area were so rare that Riley's privacy expectation was reasonable. *Id.* at 464 (Brennan, J., dissenting); *see also id.* at 468 (Blackmun, J., dissenting) (stating that he would impose the burden of proof on the state because of his personal belief that helicopters rarely fly over private property at an altitude of 400 feet, but citing no evidence to support that belief); *infra* note 295.

291. The plurality noted the number of helicopters registered in the United States but not Florida, and cited no evidence of any actual flights in the area. *Id.* at 451 n.2; *see also id.* at 457 (Brennan, J., dissenting) (asserting that the plurality's theory is that a privacy expectation "is defeated if a single member of the public could conceivably position herself to see into the area in question without doing anything illegal").

292. *Id.* at 450. The plurality quoted from *Ciraolo* to support the proposition that flights are routine in this country. The quoted passage is interesting for two reasons. First, it cited no authority—the unsubstantiated assertion in *Ciraolo* serves as precedent for a later, similar assertion. Second, the passage in *Ciraolo* referred to flights by airplanes in navigable airspace. In quoting this passage, Justice White deleted the word airplane and inserted the word helicopter. *Id.* (citing California v. Ciraolo, 476 U.S. 207, 215 (1986)).

293. *Id.* at 451–52.

regulations, everyone, everywhere, always must expect that someone is looking down from above.[294]

The plurality opinion is confusing if we try to make it comport with precedent, but it becomes sensible if we treat it as an example of instrumentalism in judicial decisionmaking. The plurality *presumed* the existence of air traffic sufficient to automatically defeat every citizen's expectation of privacy from aerial surveillance of the home and its curtilage. This presumption is inconsistent with the Court's decisions defining the home and its curtilage as the most protected areas for fourth amendment purposes, and with *Katz*'s case by case approach to defining protected privacy interests. The opinion also created an inexplicable evidentiary problem. It apparently permitted the homeowner to affirmatively rebut this presumption, but neglected to establish any test for determining how she could meet that burden.[295] The doctrinal and evidentiary confusion disappears, however, if we treat the opinion as the instrumental manipulation of fourth amendment theory to reduce constitutional constraints on law enforcers, particularly in cases involving illegal drugs. As is true in many other recent fourth amendment cases, the plurality's opinion in *Riley* promotes efficient law enforcement in the "war on drugs."[296]

Commentators and dissenting Justices, including the dissenters in *Riley*,[297] have complained about this instrumental application of fourth

294. Justice O'Connor's concurring opinion emphasizes that this is the operative assumption of a majority of the Court's members. *Id.* at 452 (O'Connor, J., concurring); *see also id.* at 458 (Brennan, J., dissenting) (describing this assumption as the basis for the Court's opinion in *Ciraolo*).

295. Justice O'Connor argued for one possible standard. She argued that under *Katz* this was an empirical question not answered by the fact that FAA safety regulations were satisfied. "[W]e must ask whether the helicopter was in the public airways at an altitude at which members of the public travel with sufficient regularity . . . . If the public rarely, if ever, travels overhead at such altitudes, . . . Riley cannot be said to have 'knowingly expose[d]' his greenhouse to public view." *Id.* at 454–55. (O'Connor, J., concurring) (second alteration in original). She concurred in the judgment, however, because she concluded that the defendant had the burden of proving that his expectation was reasonable, and he had not met her empirical test. *Id.* at 455. The four dissenters all agreed that this was at least in part an empirical question, but all would have placed the burden of proof upon the state, not the citizen. *Id.* at 465–66 (Brennan, J., dissenting); *id.* at 468 (Blackmun, J., dissenting).

296. The cases cited in the discussion of expectations analysis serve as an interesting example. Twenty-two cases are analysed or cited. Fourteen of those cases involved investigations of illegal drug trafficking or possession. In thirteen, the Court ruled in favor of the government, typically because no reasonable expectation of privacy was found to exist. The sole case upholding a person's privacy expectation as reasonable was United States v. Chadwick, 433 U.S. 1 (1977), *overruled by* California v. Acevedo, 111 S. Ct. 1982 (1991).

297. 488 U.S. at 463 (Brennan, J., dissenting) ("It is difficult to avoid the conclusion that the plurality has allowed its analysis of Riley's expectation of privacy to be colored by its distaste for the activity in which he was engaged."); *see, e.g.*, Florida v. Bostick, 111 S. Ct. 2382, 2389, 2395 (1991) (Marshall, J., dissenting); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 687

amendment theory by the "conservative" majorities (on law enforcement issues) that have dominated the Court over the past decade. Although it is tempting to attribute these decisions to social and political ideologies, it is important to recognize the intellectual pedigree of this kind of judicial behavior. It is not "lawless" decisionmaking, resting only on the power of the majority. It is judicial reasoning that stretches legal pragmatism and its basic tenets to the outer reaches of their logical limits. A century after *Boyd*, fourth amendment theory is in no danger of reverting to the errors of formalism. The problem now is an excessive nonformalism in which rules no longer carry sufficient normative weight.

C. Objective Reasonableness and Rules

The decline of rules in fourth amendment theory is exemplified by a number of recent cases in which the Court determines the constitutionality of government conduct by resorting to a malleable "objective" test of reasonableness viewed from the police officer's perspective. The Court has adopted this device to define the scope of a suspect's consent to an automobile search,[298] to uphold the warrantless search of a home based on the consent of a third party who lacked actual authority to permit the search,[299] to affirm a warrantless search authorized by an unconstitutional statute,[300] to authorize a protective sweep in a home where a suspect is arrested despite the absence of a search warrant,[301] and to permit the mistaken search of an apartment not named in a search warrant.[302] In all of these cases the Court has declared that if the officers' conduct was

(1989) (Scalia, J., dissenting).

298. Florida v. Jimeno, 111 S. Ct. 1801 (1991) (scope of consent to a search of an automobile and its contents defined by the officer's reasonable belief).

299. Illinois v. Rodriguez, 497 U.S. 177 (1990) (warrantless entry by police based on consent given by a third party is constitutional if police reasonably believe the third party holds common authority over property even if that belief is erroneous).

300. Illinois v. Krull, 480 U.S. 340 (1987) (exclusionary rule not applicable where officers acted in reasonable reliance upon statute authorizing warrantless administrative searches that was later found to violate the fourth amendment).

301. Maryland v. Buie, 494 U.S. 325 (1990) (protective sweep of house at time of arrest is constitutional if officer reasonably belives that a person posing a threat to safety is in the house).

302. Maryland v. Garrison, 480 U.S. 79 (1987) (officers who search the wrong apartment while executing a search warrant do not violate the fourth amendment if the mistake on the face of the warrant and by the officers was reasonable). The Court has also adopted the objective reasonableness standard for judging whether police officers used excessive force in making a seizure. Graham v. O'Connor, 490 U.S. 386 (1989) (finding that claims under 42 U.S.C. § 1983 alleging that officers used excessive force are analyzed under the standard of fourth amendment reasonableness, not under a substantive due process standard).

objectively reasonable, the exercise of government authority does not violate the fourth amendment even if the officers were mistaken or violated an explicit command found in the constitutional text.[303]

The most important of these cases demonstrates how little weight the Court accords even unequivocal rules protecting privacy, property, and liberty interests when it applies this "objective" test. In *United States v. Leon*,[304] the Court established an exception to the exclusionary rule based upon the investigating officers' good faith reliance on a warrant issued without probable cause.

The fourth amendment's most definite rule is that "no warrants shall issue, but upon probable cause."[305] This is not some judge-made rule, discardable in subsequent opinions as an erroneous and ill-advised precedent. The text of the Constitution explicitly commands that warrants must be based upon probable cause. Although we can disagree about the definition of probable cause and its presence or absence in a particular case, the rule is definite. Whatever probable cause is, it is the prerequisite for a valid warrant.

A judge adopting a formal, rule-based theory of decisionmaking would have little trouble invalidating a warrant issued without probable cause. She would rule that a valid search warrant could not issue in the absence of probable cause. Such a warrant and any search relying upon it violate the letter of the amendment,[306] as well as the values on which it is based, and should trigger remedies existing to give teeth to this explicit right.

It was the remedy that was the rub in *Leon*. Enforcing the probable cause rule would have required exclusion of evidence probative of the defendant's guilt, and the majority purposely set out to avoid this result. The majority focused on the costs to society of suppressing reliable physical evidence, and concluded that on these facts the costs of exclusion outweighed any countervailing benefits.[307] The majority's discussion of the benefits of

303. For example, the text of the fourth amendment requires that warrants describe with particularity "the place to be searched." U.S. CONST. amend. IV. Nonetheless, in *Garrison*, 480 U.S. at 88–89, the objective reasonableness test was used to justify the mistaken search of an apartment pursuant to a warrant with an erroneous and inadequate description of the place to be searched.

304. 468 U.S. 897 (1984).

305. U.S. CONST. amend. IV.

306. A valid warrant also must describe with particularity the "things to be seized." *Id.* Applying *Leon*, the Supreme Court also used the good faith exception to uphold a search based upon a warrant failing to satisfy this explicit rule. Massachusetts v. Sheppard, 468 U.S. 981 (1984).

307. *Leon*, 468 U.S. at 913 ("[O]ur evaluation of the costs and benefits of suppressing reliable physical evidence seized by the officers reasonably relying on a warrant issued by a detached and neutral magistrate leads to the conclusion that such evidence should be admissible in the prosecution's case-in-chief.").

exclusion did not focus on the negative rights held by citizens against the government, as had earlier cases. Instead the majority defined the interests served by the exclusionary rule as narrowly as possible. Suppression of evidence serves only one interest in this analysis: deterring police misconduct.[308] Indeed, the majority apparently was more concerned with statistical analyses of the impact of the exclusionary rule on the prosecution and conviction of suspected criminals than it was with any rights claimed by the defendants.[309] The majority's reasoning is quintessential legal pragmatism and the antithesis of formal reasoning from rules.

One has to sympathize with the majority's response to the dilemma it faced in *Leon*. The investigating officers had done precisely what the Supreme Court's earlier decisions had commanded. They had conducted an extensive investigation to confirm an informant's tip. Before searching the suspects' homes, they prepared a warrant application, had it reviewed by several assistant prosecutors, and submitted it to a state trial court judge who issued a facially valid warrant, which they executed.[310] Suppressing the evidence on these facts was tantamount to creating an incentive for officers *not* to jump through the hoops of the warrant process. It is easy to characterize suppression as a bad outcome in this case, not just because guilty people would go free, but also because of the institutional messages this result would send to law enforcers.

This reasoning highlights a distinction between rule-based and particularistic decisionmaking that is important for understanding the impact of pragmatist ideas on fourth amendment theory. Rule-based decisionmaking accepts that rule application produces suboptimal outcomes in some number of cases, and accepts this cost in return for the benefits of rule-based decisionmaking. A judge who believed strongly in rule-based decisionmaking, for example, could conclude that although the suppression of evidence produces unfortunate social costs, they are simply an unavoidable by-product of proper judicial application of relevant rules.

In contrast, particularistic or all-things-considered decisionmaking attempts to arrive at the optimal decision in every case. In *Leon* the majority simply was unwilling to accept the suboptimal outcome of suppressing reliable evidence when the investigating officers had attempted to comply with the

308. *Id.* at 916; *cf. id.* at 938–60 (Brennan, J., dissenting) (sharply criticizing the majority's characterization of the deterrence rationale); Mapp v. Ohio, 367 U.S. 643, 657–60 (1961) (citing justifications for the exclusionary rule in addition to deterring police misconduct, including the need to preserve the integrity of the judicial process).

309. *Leon*, 468 U.S. at 907 n.6.

310. *Id.* at 901–02.

commands of the warrant rule. It focused on the social interests at stake, examined all the information relevant to its decision, including much that lay outside the rule, and discarded the rule (by creating an exception to it) for this and future events like it. The goal of this analysis was to achieve the optimal substantive outcome, regardless of the requirements of existing rules.

A differing tolerance for suboptimal outcomes is only one of the differences between rule-based and particularistic decisionmaking that is relevant to fourth amendment interpretive theory. The final Parts of this Article explore the implications of a number of these differences for fourth amendment theory, and conclude that they dictate that a rule-based interpretive model is preferable.

III. RULES, POWER, AND VALUES

In the concluding sections of the Article, I propose that we should employ an interpretive theory of the fourth amendment that emphasizes a core of rules but permits some flexibility at the point of rule application. Part III examines *how* such a theory differs from the Supreme Court's current approach and anticipates how it would operate. Part IV offers a normative explanation of *why* such a theory is necessary.

Contemporary fourth amendment case law suggests that one problem inherent in legal pragmatism is its antiformalism. These cases exhibit both an excessive nonformalism and an extreme instrumentalism that together overemphasize substantive reasoning while undervaluing the text of the amendment and the importance of rules. These cases also reveal important attributes of rules, and how they do—and do not—function.

Fourth amendment cases now are decided on a particularistic, all-things-considered basis, not by application of rules derived from the constitutional text or from foundational principles. If the outcome indicated by an existing rule conflicts with the outcome indicated by substantive reasons favored by a majority on the Court, the rule is ignored, distinguished, or discarded. Even when decisions are tied to rules, the decisionmaking process emphasizes substantive, not formal, reasons. An existing rule is retained or a new one created when ruled-based decisionmaking is better than ad hoc reasoning at advancing policy goals favored by the decisionmakers. Despite the appearance of rule-based decisionmaking in some of these cases, the rules lack normative weight. Outcomes are not justified because the rule *qua* rule is controlling, but because the rule and the favored substantive reasons indicate consistent outcomes.

In other words, rules have become devalued. This is a critical change in fourth amendment theory, because rules can function as devices for

protecting individual liberty, and because the ruleless model of decisionmaking has tended to shift power from judges to police officers. Reaching an understanding of how this change has occurred in the fourth amendment context also illuminates the nature and effects of rules and rule-based decisionmaking.

A. The Limited Benefits of Rules

A number of benefits are commonly associated with rule-based decisionmaking, and they often are offered as arguments for the superiority of formal over nonformal decisionmaking. The conventional list of benefits attributed to rule-based decisionmaking includes an increase in the predictability of outcomes, the related opportunity to act in reliance on past decisions, and enhanced efficiency from the perspective of the rule-applier deciding disputes in individual cases. An examination of how rules operate in the fourth amendment context reveals that these benefits traditionally associated with rules are real, but overrated.[311] Another attribute of rule-based decisionmaking is more important in fourth amendment disputes: Rules allocate power. This attribute ultimately supplies the most significant arguments for a rule-based interpretive theory of the fourth amendment.

The discussion should begin, however, with the benefits typically attributed to rule-based decisionmaking. First, formal rule application should allow decisionmakers to accomplish their tasks more easily and efficiently. Because decisionmakers may consider only a limited range of factors when applying legal rules, their universe of choices is sharply constrained.[312] As H.L.A. Hart put it, "the life of the law consists to a very large extent in the guidance both of officials and private individuals by determinate rules which, unlike the applications of variable standards, do *not* require from them a fresh judgment from case to case."[313] Rule application reduces the costs of each decision, because the existence of the rule eliminates the need for—indeed it precludes—consideration of all potentially relevant items.[314]

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311. *See, e.g.*, Schauer, *Rules*, *supra* note 58, at 685 (asserting that rule-based values of reliance, predictability, and certainty are "occasionally valid but often overstated").

312. *See, e.g.*, Schauer, *Formalism*, *supra* note 58, at 510 (describing the essence of formalism as decisionmaking according to rule, which in turn embodies "what is supposed to be the failing of formalism: screening off from a decisionmaker factors that a sensitive decisionmaker would otherwise take into account"); *see also* FREDERICK SCHAUER, PLAYING BY THE RULES, A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 145–49 (1991) [hereinafter SCHAUER, PLAYING BY THE RULES].

313. *See* Hart, *supra* note 5, at 623–24.

314. *See, e.g.*, POSNER, *supra* note 5, at 44–45 (arguing that reliance upon flexible standards, rather than rules, increases uncertainty, which "is a source of cost and disutility").

The search warrant rule demonstrates how rules can produce decisionmaking efficiency for all institutional actors in the criminal justice system. The rule commands that a valid search warrant is a prerequisite for a constitutional search of a dwelling. The rule thus streamlines the decisionmaking process at every stage, particularly if it is not riddled with exceptions. Police officers know they must get a warrant before searching a home, and their compliance with—or violation of—the rule provides prosecutors, defense lawyers, and judges with quick answers to questions about the admissibility of evidence found in the search.

Experience teaches that rules channel decisionmaking in these ways in some number of cases, but it also teaches that decisionmaking efficiency is not an absolute goal. Flipping a coin might be the most efficient way of deciding any issue, and in many situations random chance would produce an acceptable result.[315] Few of us are likely to accept this as a legitimate method of resolving important legal issues, so efficiency can be only a partial justification for rule-based decisionmaking.

Another set of benefits commonly attributed to rule-based decisionmaking includes predictability, certainty, and consistency. I will refer to these collectively as the argument for predictability. According to this argument, rules permit the governed and the governors alike to predict the outcomes of individual disputes. A subsidiary benefit is that rules supply guidelines for behavior for those falling within their compass. Supreme Court Justices often tout this as a justification for rules announced in their fourth amendment opinions, emphasizing in particular the need to provide police officers with clear, simple rules to apply.[316] Rules undoubtedly increase predictability in many law enforcement situations. This is most apparent in relatively simple contexts. The automobile driver apprehended while driving at a speed far exceeding the legal limit, the police officer who writes the ticket, the traffic court judge, and the public at large all can predict the eventual result in this matter with a fair degree of certainty, particularly when we compare a precisely crafted rule with a general standard like reasonableness. Forty years ago the posted speed limit on some highways in this country was "reasonable and proper."[317] This ambiguous standard is less certain than the "55 Miles Per Hour" rule common today. The

315. *See* SCHAUER, PLAYING BY THE RULES, *supra* note 312, at 147.

316. *See, e.g.*, California v. Acevedo, 111 S. Ct. 1982, 1989–90 (1991); Oliver v. United States, 466 U.S. 170, 181–82 (1985); United States v. Ross, 456 U.S. 798, 821 (1982); New York v. Belton, 453 U.S. 454, 458–59 (1981).

317. *See, e.g.*, Iowa Code Ann. § 321.285 (West 1985) (the statute's legislative history states that the speed limit on Iowa highways was "reasonable and proper" until 1957, when a speed limit of "sixty miles per hour from Sunset to Sunrise" was added).

numerically defined rule provides a comparatively high degree of certainty.[318]

However, when we address more complex situations, or those arising at the margins of the relevant rules' coverage, decisionmaking efficiency declines and the predictability of outcomes becomes more tenuous for a variety of reasons.[319] Perhaps the most obvious reason is the complexity of life. It is unlikely that a rulemaker can anticipate all future situations in which a rule might be applied. Even if he can, it is equally unlikely that the rule he crafts will be sufficient to resolve all of the disputes arising out of those events. The efficacy of rule-based decisionmaking is undercut by the variousness of experience and by our limited capacity to anticipate the future.

Another limitation derives from the nature of rules as generalizations that are both forward and backward looking.[320] Rules are generalizations that inevitably emphasize some characteristics of the historical events generating the rules, and those to which the rules will be applied in the future, while suppressing other characteristics of those events. A decisionmaker applying a pre-existing rule may conclude that the properties suppressed by the rule in fact are relevant to the events in the instant case, and therefore emphasize those characteristics while suppressing others accentuated by the rule.[321] The resulting decision will evade the constraints of the earlier generalization, thereby avoiding the result indicated by the rule.

Fourth amendment case law offers countless examples of this conundrum. A rule requiring police officers to obtain warrants before they

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318. *See* SCHAUER, PLAYING BY THE RULES, *supra* note 312, at 174 ("When rule-based values are thought important, therefore, more constraining (and ordinarily more specific) rules will be selected and entrenched . . . .").

319. Yet even a factually and legally simple event like the apprehension of a speeding driver can be sufficiently complex to generate an outcome inconsistent with the rule's requirements. *See* A. Morgan Cloud, III, *Introduction: Compassion and Judging*, 22 ARIZ. ST. L.J. 13 (1990).

320. For a discussion of the temporal issue, see MACCORMICK, *supra* note 83, at 75 ("[Formal justice imposes] forwardlooking as well as backward-looking constraints on the decision of litigated disputes.").

321. The contrasting speed limits—"55 miles per hour" and "reasonable and proper"—mentioned earlier serve as useful examples. The numerical speed limit emphasizes some characteristics of the act of driving—perhaps that fewer fatalities occur when people drive 55 miles per hour rather than at some faster speed. By emphasizing this property, the numerical rule also requires the rule applier to disregard characteristics of the driving event that would be relevent under the reasonable and proper standard—and which might determine whether a motorist was traveling at an unsafe speed. A speed of 75 miles per hour might be reasonable to someone driving an automobile on a straight, flat, dry, empty road in the desert during a sunny day. Enforcing the numerical speed limit requires suppression of all of these arguably relevant characteristics. Conversely, a traffic officer choosing not to enforce the rule because of these reasons would be ignoring the generalization embodied in the rule precisely because she chose to emphasize those characteristics suppressed by the rule.

conduct searches and seizures suppresses a number of characteristics commonly associated with police-citizen encounters. These suppressed characteristics include the diverse exigencies police officers face on a daily basis. An officer with probable cause to arrest a person travelling in an automobile faces the possibility that the suspect will escape unless seized immediately. Attempting to get a warrant would permit the suspect to flee. The officer faces a "recalcitrant experience"[322] in which the generalization embodied in the warrant rule is unsuitable for resolving the immediate problem, and may even conflict with at least some of the background justifications for the rule. Faced with this dilemma, the officer, and those who later review her conduct, must decide whether the rule is to be followed or avoided.

In fourth amendment cases, the Supreme Court's solution often has been to create exceptions emphasizing the exigencies that would be suppressed by strict rule application. Formal rule application is abandoned to arrive at the "correct" substantive outcome in particular cases. Over time the exceptions themselves often have taken on the canonical nature of rules, operating as permanent escape routes from the commands of the original rule.[323]

This suggests another factor operating to reduce the predictability of results produced by rule-based decisionmaking. Different rules, each relevant to disparate attributes of an event, may dictate conflicting outcomes in the same dispute. Our legal system has produced a large and diverse array of rules, often adopted over a long period of time by different rulemakers. Taken together, the factual complexity of experience and the existence of rules relevant to differing attributes of the same complex event dictate that

322. I have adopted the term from Professor Schauer, who defines recalcitrant experiences as "the occasions on which the generalizations of the past prove unsuitable for the needs of the present, are the precipitating events for the accommodations which represent the primary characteristic of a pure conversational mode." SCHAUER, PLAYING BY THE RULES, *supra* note 312, at 42.

323. Some might argue that a rule with exceptions, particularly one with as many exceptions as the warrant rule, is not a rule at all. I disagree. A rule need not be absolutely mandatory to be a rule. The fourth amendment system of rules and exceptions demonstrates this. Despite the many exceptions to the warrant and probable cause rules, they still provide guidance to police officers, judges, and citizens, and in many situations outcomes turn on whether or not the police adhered to the rule. In those instances the rule, as an instantiation of the policies generating that rule, is entrenched against both conflicting outcomes indicated by those background justifications and results indicated by substantive policies extrinsic to the rules. *See, e.g.*, the various opinions in Arizona v. Hicks, 480 U.S. 321 (1987). For more theoretical arguments supporting this position, see HART, *supra* note 73, at 136 ("A rule that ends with the word 'unless' . . . is still a rule."); SCHAUER, PLAYING BY THE RULES, *supra* note 312, at 115.

a particular event may be resolved by multiple rules producing inconsistent results.[324]

Once again the fourth amendment supplies useful examples. Even a simple police-citizen encounter may be governed by rules that dictate competing outcomes. The cluster of rules governing the necessary factual predicates for different classes of seizures are instructive. One rule commands that police officers must have probable cause to arrest, another permits investigative seizures based on the lesser standard of reasonable suspicion, yet another provides that consensual encounters require neither.[325] If an encounter is an arrest, but the officer possesses only reasonable suspicion, the seizure violates the fourth amendment, and any resulting evidence is inadmissible. But if the encounter is consensual, evidence derived from it is admissible even if the officer possesses no facts supporting her suspicions of criminality.[326] The rule applier (be it police officer or judge) must select the relevant characteristics of the present event, and compare them to the facts of the rule-generating events to determine which of the three rules governs. If—as is likely—the past and present events being compared are not identical, the decisionmaker will have the opportunity to identify differences among the potentially relevant properties of each event. If individual decisionmakers emphasize or suppress different properties of the present and precedent setting events, they will disagree about which rule—that is which generalization —controls a particular matter.[327]

This inevitable flexibility in the basic processes by which decisionmakers identify rules' factual predicates, then arrive at selective generalizations from those facts when deciding later cases,[328] reduces the capacity of rule-based decisionmaking to produce outcomes that are certain and predictable. By relying upon different features of the same event, decisionmakers can select

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324. *See, e.g.*, SCHAUER, PLAYING BY THE RULES, *supra* note 312, at 188 (arguing that events rarely are governed by only one rule, and that "more commonly various rules and precedents within a decision-making system will for many cases point in opposite directions"); *id.* ("[T]he array of rules comprising the legal system . . . will frequently indicate different and mutually exclusive results for the same event, especially given the fact that events themselves are complex . . . ."); *see also* Moore, *supra* note 18, at 888–89.

325. Florida v. Bostick, 111 S. Ct. 2382 (1991); Florida v. Royer, 460 U.S. 491 (1983); United States v. Mendenhall, 446 U.S. 544 (1980).

326. *Royer*, 460 U.S. at 507; *Mendenhall*, 446 U.S. at 550.

327. Examples of this process can be found in the cases in which the Supreme Court determines whether a citizen has been seized under the fourth amendment by applying a standardless "objective" test viewed from the citizen's perspective. These include *Bostick*, 111 S. Ct. at 2386–89; Michigan v. Chesternut, 486 U.S. 567, 573 (1988); INS v. Delgado, 466 U.S. 210, 215 (1984); *Royer*, 460 U.S. at 502; *Mendenhall*, 446 U.S. at 554 (announcing the "objective" test adopted in later opinions).

328. *See* SCHAUER, PLAYING BY THE RULES, *supra* note 312, at 18–22, 183–84, 188–94.

different rules that produce mutually exclusive results.[329] Even if we all agree that like cases should be decided alike,[330] we can disagree about which cases are alike. As a result, even a strict brand of rule-based decisionmaking cannot produce absolute certainty.[331]

Uncertainty also can result from the differing priorities that decisionmakers attribute to conflicting rules. Rule appliers may disagree about the hierarchy in which the relevant rules are arrayed, or disagree about whether the more local or more general of the conflicting rules should prevail.[332] Unless a legal system dictates the relative priority of its rules, rule-based decisionmaking can promote uncertainty. This dilemma arises frequently in fourth amendment case law. For decades the Supreme Court has declared that the warrant rule is the general rule governing searches and seizures, yet has continually applied (or created) more local rules (often cast as exceptions to the more general rule) that control specific cases. The numerous cases in which these exceptions have trumped the general rule tempt one to conclude that the more local rule always controls, but the Court has never established such an explicit hierarchy. In a specific case a decisionmaker remains free to choose among them.

The inherent ambiguity of language also diminishes the predictive capacity of rules cast in words. Language ensures that rules are open-textured, at least in relation to some events.[333] The command of the fourth amendment that searches and seizures not be "unreasonable" exemplifies this problem. The adjective is inherently ambiguous, and frequently admits to differing interpretations as applied in particular situations.

For all these reasons, rule application—particularly in the factually complex situations to which the fourth amendment is applied—may require an analytical process of fact and rule selection not significantly less intricate than the particularistic approaches more commonly linked to substantive

329. *See id.* at 193–94.

330. *See* Hart, *supra* note 5, at 623–24 (principle of treating like cases alike is an essential element of the concept of justice in the administration of the law, as opposed to "justice of the law").

331. *See* HART, *supra* note 73, at 125 ("[U]ncertainty at the borderline is the price to be paid for the use of general classifying terms in any form of communication concerning matters of fact.").

332. *See* SCHAUER, PLAYING BY THE RULES, *supra* note 312, at 189–91 (arguing that the rule with local priority will typically prevail over the more general in a system preserving rule-based decisionmaking). Supreme Court Justices often have debated this issue in the context of the fourth amendment. One frequent issue is whether the general rule requiring warrants, or a more specific rule creating an exception to the warrant rule, should receive priority in a particular case. *See, e.g.*, United States v. Ross, 456 U.S. 798, 831–34 (1982) (Marshall, J., dissenting) (arguing that the general rule requiring a warrant, and not the automobile exception, is controlling).

333. *See* HART, *supra* note 73, at 120, 124–32, 249; MACCORMICK, *supra* note 83, at 65–66.

reasoning. In complex contexts, therefore, the benefits of efficiency and predictability commonly associated with rules may be overrated.

These limiting attributes do not mean that rule-based decisionmaking fails to provide some measure of efficiency and predictability. These values are realized in many cases, and undoubtedly create an important systemic frame of reference. Traffic rules undoubtedly shape the driving behavior of motorists collectively, although their effect is diluted, if not chimerical, in many individual instances.

The same may be said of fourth amendment rules. They influence the collective behavior of actors in the criminal justice system. Police officers, prosecutors, defense lawyers, and judges all recognize that, absent some exigency, a warrant is needed before government agents can forcibly enter someone's home to conduct a search.[334] As a general matter, the rule constrains the behavior of police. The rule eases decisionmaking by each of these actors in the criminal justice system, and yields predictable results in a large number of cases.

Nonetheless, even strictly formal rule-based decisionmaking offers less than absolute certainty and less than perfect decisionmaking efficiency. If a system of rules offered only the benefits associated with the arguments for predictability and decisionmaking efficiency, particularistic decisionmaking would be relatively more attractive. But rules can provide other significant benefits, including some packing normative power in the context of the fourth amendment.

B. Rules, Institutional Power, and Liberty

Rules serve a jurisdictional function. They allocate power among institutional actors.[335] In a political system with a structural separation of powers, the power to make and enforce rules distributes power among participants in the system.[336]

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334. Payton v. New York, 445 U.S. 573 (1980).

335. Professor Schauer asserts that because rules

> serve primarily as vehicles for the allocation of power, . . . the extent to which decision-makers adopt (or are compelled to adopt) rule-based decision-making modes is likely to embody social judgements about the distribution of jurisdiction. Rules, including legal rules, apportion decision-making authority among various individuals and institutions, reflecting a society's decisions about who will decide what, who is to be trusted and who not, who is to be empowered and who not, whose decisions are to be reviewed and whose are to be final, and who is to give orders and who is to take them.

SCHAUER, PLAYING BY THE RULES, *supra* note 312, at 173.

336. *See id.* at 158–61.

In theory, a system of rule-based decisionmaking tends to allocate power to the rulemakers, particularly if they have the authority to review the acts of rule appliers. Decisionmakers in later cases are bound by rulemakers' prior choices and the values they embody. This allows rulemakers to impose values on those deciding subsequent cases, to project their value choices into the future.[337] In the fourth amendment context, this aspect of formal decisionmaking permits judges as rulemakers and rule enforcers to guide and restrict the behavior of rule appliers, including judges and police officers.[338]

Fourth amendment formalism provides a relevant example. In theory, nineteenth century formalism allocated fundamental power within the legal system to rulemakers rather than to decisionmakers subsequently applying the rules. In *Boyd* and its progeny, the Supreme Court adopted formal rules designed to promote individual liberty by restricting the government's power to search and seize private property. This value choice persisted so long as rule appliers adhered to it and judges enforced these rules. For decades the judicially created rules derived from *Boyd* and its progeny prohibited law enforcers from seizing "mere evidence" or compelling the production of many documents.[339] These judicially created rules limited the autonomy of both police officers and the judges who reviewed their conduct.

Similarly, the warrant rule embodies a complex set of value choices that allocates institutional power. A strict rule requiring antecedent judicial review of proposed searches embodies an obvious mistrust of executive branch decisionmaking in this area. Even post-search review enhances judicial authority over executive branch decisionmaking. The warrant rule not only

337. For an analysis of these attributes of formalism, see William C. Powers, *Formalism and Nonformalism in Choice of Law Methodology*, 52 WASH L. REV. 27, 28–32 (1976). *See also* ATIYAH & SUMMERS, *supra* note 53, at 26 ("Formal reasons may be justified by value judgments about the appropriate persons to make decisions . . .").

338. There is much to be said for giving rulemaking authority to the police. They are more familiar with the daily problems of law enforcement than are judges, especially appellate judges. Police officers understand the needs of law enforcement, and have closer contact with the behavior of criminals. Thus, the rules they draft should be more closely crafted to fit the situations in which they are applied. Arguably, officers would be more likely to obey police-generated and enforced rules. The argument for police-made rules has been made before, and made well. *See, e.g.*, Amsterdam, *supra* note 103, at 409–39; Wayne R. LaFave, *Controlling Discretion By Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442 (1990). Unfortunately, executive branch rulemaking has proven inadequate to regulate police behavior. As a practical matter, our system demands external sources of checks on government power—including checks on the executive branch.

339. The mere evidence rule that evolved from *Boyd* was not abandoned by the Supreme Court until 1967. Warden v. Hayden, 387 U.S. 294 (1967). A series of recent opinions overturned the ban on subpoenas for most business documents, and restricted that limitation to a narrow class of documents. *See* Braswell v. United States, 487 U.S. 99 (1988); United States v. Doe, 465 U.S. 605 (1984); Andresen v. Maryland, 427 U.S. 463 (1976); Fisher v. United States, 425 U.S. 391 (1976).

provides guidance for police officers, lawyers, and citizens; it also enhances judicial power at the expense of decisionmaking autonomy by police officers. This power was increased dramatically by the imposition of the exclusionary rule—a remedy peculiarly controlled by judges—upon every police department in the country.[340] This was "wholesale" rule creation and application, binding every police officer in every case.

Conversely, judges applying the standard of reasonableness are less likely to produce a generalization (rule) that will apply to all future cases. They deal with problems "retail," and experimentally, as pragmatism asserts they should. Each case, each problem, each fact set will be decided on its specific terms—to achieve the "best" substantive outcome. As a practical matter, this approach is less likely to exert legal control over actors like police officers than are the generalizations embodied in rules.[341]

From an institutional perspective, the reasonableness standard allows police officers to operate with greater independence from judicial review. Judicial review survives, of course, and judges retain discretion to decide what conduct is "reasonable." In theory, replacing a system of rules with particularistic decisionmaking should increase the autonomy of judges deciding individual cases,[342] particularly judges sitting on courts of last resort.[343] But when we expand our focus from individual cases to the entire criminal justice system, we find that one of the most important consequences of the shift from rules to reasonableness in fourth amendment theory has been

340. Mapp v. Ohio, 367 U.S. 643 (1961).

341. Professor Hart has described this attribute of the operation of rules as the exercise of legal control by directions that are general in two ways: they indicate a general type of conduct and apply to a general class of actors. HART, *supra* note 73, at 21.

342. Professor Schauer argues:

> [T]he type of rules employed is usually the vehicle by which a decision-making environment determines how much discretion its decision-makers will have. Will judges or other legal officials be told to make decisions in just *this* way, or will they be substantively unfettered, unleashed by terms such as 'reasonable' or 'appropriate' to decide for themselves just what matters in the particular case at hand? And even when judges and other legal officials are given narrow and specific prescriptions with which to work, the extent to which those officials are instructed or compelled to treat the prescriptions as opaque mandatory rules rather than transparent rules of thumb will reflect the extent to which the system has chosen to constrain the discretion of its decision-makers.

SCHAUER, PLAYING BY THE RULES, *supra* note 312, at 172–73.

343. By employing particularistic methods, the Supreme Court Justices leave themselves free to decide the next case unconstrained by the limits rules impose on decisionmakers. The Justices also have employed nonformal methods to extend the scope of the fourth amendment—and judicial review under it. For example, *Terry* applied the amendment to stops and frisks for the first time. But an examination of a broad range of fourth amendment issues demonstrates that the Court's reliance upon the flexible reasonableness standard has permitted police officers greater freedom as decisionmakers in the field, and has reduced the power of judges as rulemakers and rule-appliers. *See infra* notes 344–354 and accompanying text.

an increase in executive branch power. Once the question is not whether the officers possessed a warrant, but whether they were "reasonable," it is almost certain that executive branch conduct will be affirmed more frequently in cases in which they acted without a warrant.

Katz provides an example. There the Supreme Court concluded that the FBI agents' behavior was objectively reasonable, but the incriminating evidence they discovered was suppressed because they failed to get a search warrant.[344] If the Court had relied upon the reasonableness standard rather than the warrant rule, the evidence may well have been admissible. By replacing the warrant based rules with a standard of reasonableness, the Court implicitly guarantees that police officers will have greater independence from judicial interference.

The fourth amendment case law not only demonstrates how the judicial choice between formal and nonformal decisionmaking theories and methods can allocate power among institutional actors, it also reveals how this can affect the relative scope of government power and individual freedom. Formal decisionmaking can restrict the power of government officials,[345] and the Supreme Court's fourth amendment decisions frequently have employed rules for that purpose. The warrant rule permitted judges (especially after *Mapp*) to impose limits on all police officers, and these constraints on the police generally have expanded the realm of individual autonomy.

Conversely, the nonformal methods resting upon the concept of reasonableness emphasized in recent opinions have tended to enhance the discretionary power of the police or other executive department actors, and by reducing the capacity of the judiciary to review those acts, have diminished the scope of the freedoms claimed by individual citizens. This is apparent in decisions in which the Court balances interests,[346] engages in expectations analysis,[347] applies the general standard of reasonableness,[348] and establishes, modifies, or rejects rules.[349] Taken together, the redistribu-

344. Katz v. United States, 389 U.S. 347, 356–59 (1967).

345. *See, e.g.*, ATIYAH & SUMMERS, *supra* note 53, at 73; POSNER, *supra* note 5, at 48 (one of the principal advantages of rules over standards is the curtailing of the "discretion of officials who administer rules, but not those who make them.").

346. *See supra* Part II.A.

347. *See supra* Part II.B.

348. *See supra* Part II.C.

349. *See, e.g.*, California v. Acevedo, 111 S. Ct. 1982 (1991) (establishing a per se rule reducing fourth amendment protection for containers seized from automobiles); Oliver v. United States, 466 U.S. 170 (1985) (establishing a per se rule that a search warrant is never needed to search open fields); United States v. Ross, 456 U.S. 798 (1982) (establishing that the scope of a warrantless search conducted pursuant to the automobile exception is as broad as could be

tion of power within the institutions of justice and between the government and the people help explain a seeming anomaly: outcomes in recent fourth amendment cases have been surprisingly predictable despite the Supreme Court's adoption of nonformal decisionmaking theories.

In theory, the shift from rules to a reasonableness standard should reduce predictability. Even as modified by a plethora of exceptions, the search warrant and probable cause rules inform police officers generally of the prerequisites of a lawful search and seizure. A system of ad hoc decisionmaking in which police officers and judges instead must decide what is reasonable should make outcomes less predictable—unless everyone agrees, explicitly or implicitly, that some operative principle dictates decisions in individual cases.[350]

Both the reasoning and the results in the Court's contemporary fourth amendment case law suggest the presence of such a unifying principle. The principle is found in a value choice favoring efficient law enforcement, particularly when police practices are challenged by the guilty seeking to suppress probative evidence of their guilt.[351] When the Supreme Court applies this value choice, law enforcers and the interests they assert usually prevail. If we accept that "the police win" is a unifying principle in these cases, then the doctrinal confusion of the Supreme Court's recent fourth amendment decisions evaporates.

The Court's value choice favoring law enforcement increases our ability to predict outcomes in particular cases, and is consistent with a decisionmaking theory that allocates discretionary authority to the police whether they are acting as rule appliers[352] or decisionmakers applying the vague standard of reasonableness.[353] Thus, both the choice of decisionmaking theory and the underlying value choice support the redistribution of power from the judicial branch to the executive branch.

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authorized by a search warrant); New York v. Belton, 453 U.S. 454 (1981) (establishing a per se rule authorizing warrantless searches of automobile passenger compartments and closed containers found there incident to the arrest of a person located in the automobile).

350. *See, e.g.*, Strossen, *supra* note 10, at 1186–87 (arguing that case by case adjudication tends to undermine the consistency and predictability of judicial rulings, and provides little guidance for other fact patterns).

351. *See, e.g.*, Florida v. Bostick, 111 S. Ct. 2382, 2388 (1991) (objective test defines a seizure by referring to the reasonable *innocent* person).

352. *See, e.g.*, Florida v. Riley, 488 U.S. 445 (1989); United States v. Leon, 468 U.S. 897 (1984); Illinois v. Gates, 462 U.S. 213 (1983).

353. For example, Justice Stevens has objected to the extent of discretion allowed police officers operating a roadblock program, particularly their "virtually unlimited discretion to detain the driver on the basis of the slightest suspicion." Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 464–65 (1990).

This redistribution of power has increased police authority at the expense of individual liberty. In one sense every fourth amendment decision requires a value choice between government power and individual autonomy. However, pragmatism adopts no unifying theory of value, and a judge applying pragmatist theories and methods is free to make either value choice. Ultimately, however, I think Professor Grey is right in concluding that legal pragmatism tends to operate as a "conservative" mechanism that favors the status quo.[354] Its joint emphasis upon social context and discovering what "works" within that context intrinsically tends to favor existing social interests—which often are defined and enforced by the exercise of government power.

Fourth amendment balancing exemplifies this characteristic of fourth amendment pragmatism. In individual cases the collective social interest in effective law enforcement typically outweighs each defendant's liberty interests. This was as true when the "liberal" Warren Court balanced in *Schmerber*, *Camara*, and *Terry* as it is when the "conservative" Rehnquist Court balances today. It is not surprising that the decision to allocate more power to law enforcers has been accompanied by an increased tolerance for decisionmaking errors by the executive branch.

C. Optimal Results and the Allocation of Power

Decisionmaking error can be defined in various ways.[355] A strict formalist would deem it error to reach a decision that conflicts with the command of a controlling rule. But if decisionmaking error is defined by a standard other than fealty to the command of a controlling rule, rule-based decisionmaking inevitably produces some number of suboptimal or "wrong" decisions. In this sense "wrong" decisions occur when rule-generated outcomes are inconsistent with those indicated by either the background justification for the rule, or by some fact, goal, or policy extrinsic to the rule. The rule-based decision is erroneous because the decisionmaker would arrive at a different result, one indicated by these non-rule considerations, but for the presence of the rule.[356]

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354. Grey, *What Good is Legal Pragmatism?*, *supra* note 5, at 18.

355. For example, Professor Schauer defines decisionmaking error "as a result other than that indicated by [a] direct particularistic application of a background justification or theory of justification." SCHAUER, PLAYING BY THE RULES, *supra* note 312, at 149.

356. Rule-based decisionmaking inevitably produces errors of overinclusion and underinclusion because of the generality of rules, because of the ambiguity of language and the open texture of rules, and because of the incapacity of any rulemaker to predict future events.

In *United States v. Leon*, for example, government agents secured probative evidence by relying upon a search warrant issued despite the absence of probable cause. The warrant and exclusionary rules required suppression of this evidence. To the *Leon* majority, suppression of the evidence was error because it conflicted both with a background justification for the exclusionary rule (deterrence of police misconduct), and policies extrinsic to the rule (efficient law enforcement and the search for truth at trial). Error would result not from the decisionmaker's mistake in applying the warrant and exclusionary rules, but from accurate decisionmaking according to relevant rules.[357]

A strong particularist would argue that we should pursue the correct substantive decision in every case, even if that outcome conflicts with the result generated by rule application. Of course, attempting to arrive at an optimal result in every case—a result consistent with the rule's background justification or some substantive reason extrinsic to the relevant rule—is an idealistic, unrealistic, and unrealizable goal. Attempting to consider all relevant factors in order to arrive at the best decision in each case does not guarantee that this will happen.[358]

Indeed, particularistic reasoning may increase the frequency of decisionmaking errors precisely because it cedes greater freedom to decisionmakers in individual cases. Decisionmakers are fallible. The human condition imposes limits on what we can perceive, predict, understand, and know. People inevitably err in some number of their decisions, and when we expand the set of appropriate factors that decisionmakers can consider, we create a greater opportunity for errors in judgment.[359]

By limiting the factors decisionmakers can consider, rule-based decisionmaking attempts to reduce this source of poor decisions. At the same time, rule-based decisionmaking rests on relatively modest assumptions about the capacity of decisionmakers to reach the correct substantive decision in each case.[360] Even the strictest rule applier must recognize that on occasion

357. *See* Schauer, *Rules*, *supra* note 58, at 685 (noting that faithful obedience to rules will produce some number of suboptimal, unjust, or silly results in the area of underinclusion or overinclusion).

358. SCHAUER, PLAYING BY THE RULES, *supra* note 312, at 149–50.

359. *Id.* at 155 (rule-based decisionmaking "relinquishes aspirations for complete optimization in order to guard against significant decisionmaker errors, and in doing so reflects the necessarily risk-averse aspect of rule-based decision-making").

360. *Id.* at 100–02 (suboptimality of rules exists because in some cases the results achieved by following rules will be equivalent to those achieved by adherence to background justification, in some cases rules will produce inferior results, but in no cases will it produce superior results).

rules produce less than optimal results.[361] These two attributes of decisionmaking according to rule—decisionmaker incapacity and the acceptance of suboptimal results—are justified by other institutional goals and realities.

The criminal justice system, for example, consists of institutions in which a variety of decisionmakers operate. The system encompasses separate classes of decisionmakers (police officers, prosecutors, defense attorneys, judges, and juries), and great diversity exists within each class. Within each group are decisionmakers possessing varying—often conflicting—attitudes, values, ideas, goals, and abilities.

One reasonable—perhaps essential—institutional response to this variety is to try to limit the autonomy of decisionmakers in individual cases. Here rule-based and particularistic decisionmaking diverge. Professor Schauer asserts, and I think he is correct, that rule-based decisionmaking focuses on the worst of any array of decisionmakers, because it worries more about decisionmaker error than about the errors built into the rules themselves. Rules disable both wise and incompetent decisionmakers.[362]

Conversely, a system of particularistic decisionmaking reduces these constraints, empowering the best decisionmakers while accepting the fact that the system empowers the incompetent as well. There is a danger that these decisionmakers will undervalue important considerations,[363] or worse, may be prejudiced, venal, ignorant, or malicious, and the errors they make may far exceed suboptimality—they may be horrific.[364]

The choice of decisionmaking processes thus rests upon implicit calculations about the frequency and seriousness of the dangers posed by these two types of errors. The selection of rule-based or substantive decisionmaking systems to interpret the fourth amendment implicitly rests upon a decision that the alternative poses greater risks. The Justices who created and adhered to the so-called monolithic model of the fourth amendment were willing to

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361. *Id.* at 156 (rule-based decisionmaking accepts the occasional suboptimal result "as an error worth tolerating, a price to be paid for the advantage that comes from crowding the variety and fluidity of experience into the constraining and therefore stabilizing pattern of decision according to broadly applicable rules").

362. *Id.* at 152–53.

363. *Id.* at 151 (rules constraining police interrogation tactics reflect worry that "various procedural and constitutional complexities are beyond [their] understanding [and] fear that the nature of the police officer's role will cause certain factors to be undervalued").

364. *Id.* at 154. Elsewhere Professor Schauer concludes:

> In a world of non-ideal decisionmakers, therefore, one would calculate the virtues of ruleness based not only on an assessment of the costs of errors of under- or over-inclusion, but also on an assessment of the incidence and consequences of those errors that are more likely when decisionmakers are not constrained by rules.

Schauer, *Rules*, *supra* note 58, at 685.

tolerate rule-based errors because they believed that it was essential to constrain the behavior of individual police officers. This rule-based model of the fourth amendment accepted suboptimal results in some cases in exchange for what the Justices perceived to be greater benefits resulting from disabling the police as decisionmakers. Implicitly they attempted to reduce the number of bad decisions police officers would make if left free to calculate all relevant factors affecting every search and seizure decision.[365]

Contemporary Justices who have replaced the monolithic model with particularistic methods derived from legal pragmatism, on the other hand, are more concerned with the costs generated by rule-based errors, and are willing to tolerate the costs of decisionmaker error by members of the executive branch. The Court's present tolerance for errors resulting from police officers' particularistic decisionmaking derives in part from two significant institutional changes that follow from the abandonment of the rule-based model. First, the particularistic approach requires decisionmakers at all institutional levels to seek optimal outcomes according to substantive reasons extrinsic to the traditional monolithic rules based on the Warrant Clause. Second, it distributes more power to the executive branch; it empowers the police, and as a practical matter reduces the impact of post-conduct judicial review.

The Court's adoption of pragmatist theories and methods thus conforms to its value choices favoring effective law enforcement and greater executive branch power, and devaluing individual liberty and judicial power. The particularistic decisionmaking model empowers police officers to base their decisions on the facts (all-things-considered) of each event, in an attempt to reach what they believe is the optimal outcome every time. If their decisions are consistent with substantive reasons a majority of Justices deem paramount, the Court will find the officers' actions were "reasonable" and comport with the fourth amendment, regardless of the commands of any relevant rules.

The relationship between rules and institutional power suggests that despite pragmatism's ostensible substantive neutrality, in the fourth amendment context the nonformal, particularistic methods that flow from it favor government authority. This in turn provides another theoretical explanation for the Court's recent wholesale adoption of nonformal theories

365. *See, e.g.*, SCHAUER, PLAYING BY THE RULES, *supra* note 312, at 152 (rule-based models are likely to be rejected when we trust decisionmakers who must resolve "comparatively unique decision-prompting events with serious consequences if they are decided erroneously," but are likely to be adopted where we distrust a group of decisionmakers "with certain kinds of determinations, and where the array of decisions to be made seems comparatively predictable").

to interpret the fourth amendment. During the past decade the Court has moved from a longstanding institutional value choice favoring individual liberty to one promoting executive branch authority. Nonformal, particularistic decisionmaking theories are particularly well-suited for periods of change because they justify abandonment of existing rules that instantiate value choices made by earlier rulemakers.[366] In this way the pragmatist theories now prevailing in fourth amendment theory facilitate this process of change and simultaneously promote the value choice favoring government authority.

The claim that rules—often made and enforced by judges—are essential devices for protecting individual liberties against improper government behavior suggests a possible shortcoming in theories of constitutional interpretation that emphasize the importance of democratic processes and institutions. The shortcoming is apparent in cases in which the people asserting fourth amendment rights are the least appealing advocates of liberty—they are criminals who do not even claim to be innocent. Instead, they argue that probative evidence cannot be used to prove their guilt. Not only are they guilty of crimes, but as individuals they may appear to be unsavory, unpleasant, and downright dangerous to decisionmakers sitting in legislatures, on juries, and acting as part of the electorate.[367] As a result, decisionmakers in individual cases—juries, for example—may find it unbearably unpalatable to decide in their favor. This explains in part why damage claims presented to a civil jury are inadequate remedies in the context of many fourth amendment disputes.[368] Similarly, a theory like Professor Ely's that relies on participation in democratic processes while confining judicial constitutional review to limited tasks, including "representation reinforcement" and the protection of "discrete and insular minorities," fails adequately to account for citizens who are unpopular *and* accused

366. The use of nonformal theories and methods also facilitates transition during periods of change. By narrowing the range of potential decisions, rules erect barriers to changes from the status quo, in part by suppressing differences among events and emphasizing generalizing similarities. In this sense, rule-based decisionmaking is institutionally conservative. Particularistic decisionmaking, with its focus upon precise factual predicates, refuses to entrench the status quo as defined by rules, and thus permits divergence. From this perscpective, the Court's recent fourth amendment theory is not conservative; it is radical. By adopting particularistic decisionmaking models, it has facilitated change; it has encouraged movement away from the status quo of the warrant model. *See, e.g., id.* at 155–57.

367. *See, e.g.*, United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting) ("safeguards of liberty" frequently have been asserted by "not very nice people"); Harris v. United States, 331 U.S. 145, 156 (1947) (Frankfurter, J., dissenting) ("the appeal to the Fourth Amendment is so often made by dubious characters").

368. *See* Amar, *supra* note 1, at 1175–81 (presenting an argument for the "central role of the jury in the Fourth Amendment").

of criminality.[369] Because there is no political lobby for criminals, some nondemocratic mechanism is needed to ensure that constitutional analysis is not distorted in these cases. These are the hard cases where other devices are least adequate, and in which judicially enforced rules constraining the executive and legislative branches are most needed.

Of course rules can be designed to augment the power of those who govern,[370] and we can imagine legal systems comporting with our concepts about the rule of law that are not rule-based. It is obviously not necessary, and undoubtedly undesirable, that all legal decisions be rule-based. We can even imagine a legal system that grants decisionmakers absolute discretion to decide each dispute on an ad hoc basis,[371] yet exhibits many of the standard attributes of a modern legal system. Such a system of ad hoc decisionmaking could be comprehensive in its jurisdiction over disputes, could implement the correct substantive outcome in each case, and could be accepted in the society as the authoritative mechanism both for resolving disputes and for fulfilling and creating legal values.[372] But it would lack primary rules of conduct providing guidance to the governed and controlling the actions of the governors, including police officers and judges.[373] A positivist might argue that such primary rules are essential if the legal system is to decide

369. JOHN HART ELY, DEMOCRACY AND DISTRUST, A THEORY OF JUDICIAL REVIEW (1980). Despite their unpopularity, criminals would not seem to comprise a discrete and insular minority deserving protection under even the most expansive definition of this concept as offered by Professor Ely. *Id.* at 74–78, 137–52. Indeed, he appears to exclude criminals. *Id.* at 154.

370. *See, e.g.*, California v. Acevedo, 111 S. Ct. 1982 (1991); Colorado v. Bertine, 479 U.S. 367 (1987); New York v. Belton, 453 U.S. 454 (1981); United States v. Robinson, 414 U.S. 218 (1973); SCHAUER, PLAYING BY THE RULES, *supra* note 312, at 162.

371. For an allegorical discussion of these issues, see LON L. FULLER, THE MORALITY OF LAW 33–94 (1969). If rules are an essential device for regulating government power, then a system of rules also serves an important symbolic function. If anything characterizes a government in which individuals are "free," it is the idea that government power itself is limited by rules. If the executive branch is regulated only by the command that it be reasonable, and this standard is measured by flexible measures, the inevitable symbolic message is that the elected branches of government possess power that tends to be unlimited by the rule of law. Only the most egregious examples of rights violations will be constrained by these flexible standards. The fifth amendment case law regulating police interrogation tactics offers interesting examples. *Compare* Brown v. Mississippi, 297 U.S. 278 (1936) *with* Miranda v. Arizona, 384 U.S. 436 (1966).

372. *See* Grey, *supra* note 67, at 6–11. *See generally* HART, *supra* note 73.

373. Formal rules may be demanded by the governed, who desire a clear, consistent set of rules by which to govern their behavior. "The demand for formal rules—and especially for clarity and proper enforcement of the rules—is thus more likely to come from the ruled themselves than from officials who wish to wield power." ATIYAH & SUMMERS, *supra* note 53, at 73. Although this passage refers to rules regulating individual behavior, rather than those governing the behavior of government officials, it makes a critical point. Adherence to formally articulated rules restricts the discretionary power of government officials. Whether exercised in an arbitrary manner or not, government power is limitable by formal rules.

disputes according to the rule of law,[374] but one need not be a strong positivist to recognize the deficiencies of such a system of ad hoc decisionmaking—particularly when judges are resolving conflicts between government power and individual liberty—the very conflict that lies at the heart of the fourth amendment.[375]

These theoretical observations about the nature of rule-based and nonformal decisionmaking are consistent with our recent experience with the Supreme Court's version of fourth amendment pragmatism. The Court's opinions demonstrate that if the fourth amendment is to function as a device that protects individual autonomy by limiting government power, its interpretation must rest upon a theory that emphasizes strong rules, yet is sufficiently flexible to cope with the diverse problems arising under the fourth amendment.[376]

D. Presumptive Positivism and the Fourth Amendment

Such a theory would emphasize formal reasoning, but permit substantive reasoning as well. From some perspectives this proposal seems self-evident. Both formal and substantive reasoning are "inherent in any viable conception of law,"[377] and are utilized in any complex legal system. Each represents some point on a continuum, and are true antinomies only in their extreme

374. Even such an ad hoc system needs jurisdictional rules to establish and organize its decisionmaking. These jurisdictional rules would determine who had authority to do what, but not dictate substantive outcomes. H.L.A. Hart describes these as power-conferring rules, and distinguishes these secondary rules from primary rules that regulate conduct. HART, *supra* note 73, at 26–48, 77–79, 97, 238–40; *see also* SCHAUER, PLAYING BY THE RULES, *supra* note 312, at 169, 172.

375. Common notions about the rule of law accept the importance of rules. A dispute resolution system operating according to the rule of law requires the existence of rules posessing some degree of "authoritative" and "mandatory" formality. ATIYAH & SUMMERS, *supra* note 53, at 12–17. These ideas are of course common to legal positivists. *See, e.g.*, MACCORMICK, *supra* note 83, at 57, 73. Yet even thinkers associated with strong antiformalist ideas often recognize the necessary role played by formal rules. Karl Llewllyn, for example, modified his views about the nature and functions of rules. At the peak of his rule skepticism he wrote that "what these officials do about disputes is, to my mind, the law itself," and rules "are important . . . so far as they help you . . . predict what judges will do . . . . That is all their importance, except as pretty playthings." KARL LLEWELLYN, THE BRAMBLE BUSH 3, 5 (1st ed. 1930) [hereinafter LLEWELLYN, BRAMBLE (1st ed.)]. Two decades later he acknowledged that this analysis was incomplete, and affirmed that "one office of law is to control officials in some part, and to guide them even . . . where no thoroughgoing control is possible, or is desired . . . ." KARL LLEWELLYN, THE BRAMBLE BUSH 9 (2d ed. 1951); *see also* Morrison v. Olson, 487 U.S. 654, 733 (Scalia, J., dissenting) ("A government of laws means a government of rules. Today's decision on the basic issue of fragmentation of executive power is ungoverned by rule[s], and hence ungoverned by law.").

376. *See* SCHAUER, PLAYING BY THE RULES, *supra* note 312, at 173.

377. ATIYAH & SUMMERS, *supra* note 53, at 3.

forms, when decisionmakers rely excessively upon either substantive or formal reasoning. In most circumstances it is plausible to believe that legal decisionmakers employ some mix of formal and substantive reasoning.

Of course some decisionmakers act at one of these analytical poles some of the time. The idea that judges arrive at their decisions by all-things-considered substantive reasoning, then turn to formal reasoning to justify their acts, lay near the heart of the legal realist argument.[378] Some of the Supreme Court's recent fourth amendment opinions provide what appear to be examples of this kind of decisionmaking. Conversely, it takes little effort to locate a judicial opinion in which a judge proclaims that a pre-existing rule dictates an outcome, and she would reach a contrary conclusion if free of the rule's constraints.[379]

But neither extreme—strict formal reasoning nor strong particularism—is adequate to meet the complex demands that face constitutional decisionmakers. Some blend of formal and substantive reasoning is inevitable and desirable. The problem is defining the appropriate mix, particularly because the choice among decisionmaking theories implicates other values. It is relatively easy, for example, to conclude that rules are necessary to curb police misconduct, but difficult to design effective rules that do not hamper necessary police activities. In recent years the Supreme Court seems to have given up the search for the proper blend of formal and substantive reasoning to interpret the fourth amendment, and has tilted hard in the direction of particularistic decisionmaking. This tilt has produced an imbalanced decisionmaking, in which citizen autonomy is undervalued and underprotected, while the value of government's law enforcement power is exaggerated.

I suggest that an interpretive theory of the fourth amendment that emphasizes rule-based decisionmaking, yet is flexible at the point of rule application in particular cases, not only is necessary, it is possible. One useful model can be found in Frederick Schauer's recent book[380] and articles[381] about rules. Professor Schauer identifies two decisionmaking models lying between the extremes of strict rule-based[382] and particularistic[383] decision-

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378. *See, e.g.*, FRANK, *supra* note 36; LLEWELLYN, BRAMBLE (1st ed.), *supra* note 375, at 3, 5; SCHAUER, PLAYING BY THE RULES, *supra* note 312, at 191–92; Schauer, *Rules*, *supra* note 58, at 617, 645, 658.

379. *See, e.g.*, New York v. Quarles, 467 U.S. 649, 660 (1984) (O'Connor, J., concurring in part and dissenting in part).

380. SCHAUER, PLAYING BY THE RULES, *supra* note 312.

381. Schauer, *Rules*, *supra* note 58; Frederick Schauer, *The Rules of Jurisprudence: A Reply*, 14 HARV. J.L. & PUB. POL'Y. 839 (1991).

382. SCHAUER, PLAYING BY THE RULES, *supra* note 312, at 52–78, 135–37.

383. *Id.* at 77–78, 136–37, 192.

making. He labels them "rule-sensitive particularism" and "presumptive positivism," and each describes decisionmaking that attempts to incorporate formal and substantive reasoning. I will examine these two models to demonstrate that the kind of rule-based yet flexible decisionmaking system that I propose for the fourth amendment is technically feasible.

Rule-sensitive particularism is Schauer's label for decisionmaking that takes into account both the substantive reasons behind a rule and the rule-generating justifications for embodying those substantive reasons in the form of a rule. Rule-sensitive particularism incorporates the reasons for having rules, and for deciding disputes according to rules, as factors in an all-things-considered method. But they are not particularly weighty factors. Decision-makers can consider all relevant factors, including the value of obeying relevant rules, and they are free to select the "best" outcomes regardless of their consistency with rule-generated results.[384]

Under this analysis, appropriate rule-generating justifications should include those discussed earlier: efficiency in the decisionmaking process, the argument for predictability, institutional and temporal conservatism, and the allocation of power among institutional actors.[385] This model retains rules, as rules of thumb that are transparent to their background justifications, "but allows their very existence and effect *as* rules of thumb to become a factor in determining whether rules should be set aside when the results they indicate diverge from the results indicated by direct application of their substantive justifications."[386]

Schauer concludes that rule-sensitive particularism is superior to either pure particularism or formalism. He argues that it furthers the virtues of having rules without falling into the trap of "rule-worship."[387] On the

384. Sometimes the value of adhering to a rule would dictate the outcome:

> If we acknowledge the existence of rule-generating justifications as part of the array of justifications lying behind a rule, a decision-maker consulting the justifications behind a rule finds both substantive justifications and the justifications for specifying those justifications in the form of a rule. Consequently a decision-maker deciding on the basis of this full array of justifications would be entitled in some cases to conclude that obedience to the rule itself was required even though the rule indicated a different result from that indicated by the rule's substantive justifications taken alone. The conclusion that the rule ought to be followed even though its substantive justifications would have indicated a contrary result need not be the outcome in every case. Sometimes the decision-maker might determine that the substantive justificiations outweighed the rule-generating justifications when in some case the two pointed in opposite directions.

Id. at 94-95.

385. *Id.* at 95-96 (discussing the attributes I describe as comprising the argument for predictability).

386. *Id.* at 97.

387. *Id.* at 98.

other hand, he recognizes that if the justification for having rules is jurisdictional, and is intended to disable rule-appliers, then rule-sensitive particularism fails because it still allows consideration of the full array of justifications at the point of rule application.[388] Whichever set of justifications we favor, I would argue that this description of a modified form of substantive reasoning has at least one virtue. It more accurately describes how many judges actually behave much of the time than does either of the extreme theories.

The problem is that a decisionmaking model like rule-sensitive particularism permits a decisionmaker to consider freely the full array of possible justifications for decisions in every case. The police officer or judge is free to decide whether to obey the literal commands of the fourth amendment or some rule derived from its text, or to decide that this is a case in which all-things-considered, substantive reasons indicating a different result outweigh the benefits of having and following rules.[389] A system utilizing rules to control this exercise of discretion in individual cases requires rules with more bite.

Schauer's other classification, "presumptive positivism," describes such an approach to decisionmaking. It is a "descriptive claim about the status of a set of pedigreed norms within the universe of reasons for decision employed by the decisionmakers within [a] legal system"[390] and "is a way of describing the interplay between a pedigreed subset of rules and the full (and non-pedigreeable) normative universe."[391] He uses the adjective *presumptive* to describe not an evidentiary presumption, but rather the "force possessed by a rules [sic], and more specifically to a degree of force such that the rule is to be applied unless particularly exigent reasons can be supplied for not applying it."[392] The decisionmaking procedure he describes is consistent with this presumption: "[D]ecision-makers override a rule within the pedigreed subset not when they believe that the rule has produced an erroneous or suboptimal result in this case, no matter how well grounded that belief, but instead when, and only when, the reasons for overriding are perceived by the

388. *Id.* He uses the following example: "If we do not trust a decision-maker to determine *x* then we can hardly trust that decision-maker to determine that this is a case" in which the reasons for having *x* are outweighed. *Id.*

389. Schauer notes that "what I have called rule-sensitive particularism has traditionally been thought to be consistent with an act-utilitarian decision-making procedure." *Id.* at 99 (citations omitted).

390. *Id.* at 203. Here Schauer is apparently using the term "pedigree" as an equivalent to Hart's rule of recognition or Dworkin's term pedigree. *Id.* at 199.

391. *Id.* at 204.

392. *Id.* at 203.

decisionmaker to be particularly strong."[393] Rules possess more power to resist the pressure of substantive reasons for decision, but that power is presumptive, not absolute.

For anyone adopting the position that fourth amendment rules are necessary to protect individual liberty, presumptive positivism is an appealing alternative to the methods currently employed by the Supreme Court. The model emphasizes the importance of rules, and compared to particularism or rule-sensitive particularism, restricts the scope of substantive reasoning by decisionmakers in specific cases. A decisionmaker would not be free to examine the entire array of factors to determine the optimal outcome in every case. She would always follow the rule unless some particularly compelling substantive reason appeared to defeat the rule's command. Rather than examine the full set of factors relevant to her decision, she could only take a quick "peek" to see if such a particularly compelling rule-trumping substantive reason exists. If not, the rule controls. A search warrant would be required in every case, for example, unless some particularly compelling reason for dispensing with the warrant appeared.

Schauer's attempt to distinguish rule-sensitive particularism from presumptive positivism clarifies how legal decisionmaking of the sort we find in the application of the fourth amendment to particular cases has both social and psychological dimensions. The allocation of institutional power ultimately determines *whose* decisions matter, and thus is a social fact. The mental processes of the institutional actor choosing between formal and nonformal decisionmaking theories is a psychological fact, and requires that we make assumptions about the abilities and behavior of relevant actors. This in turn suggests some possible problems with Schauer's model.

Two possible criticisms of presumptive positivism are relevant to this discussion. The first relates to the psychological dimension of decisionmaking. We may well question whether it is psychologically possible for a decisionmaker to engage in the finely tuned analytical process presumptive positivism requires. A decisionmaker obviously must look "behind" or "outside" the rule to determine whether some compelling reason justifies disobeying its command. This appears to be an endeavor suspiciously similar to the analytical task facing the rule-sensitive particularist, who considers the importance of having a rule along with all other relevant factors in reaching her all-things-considered decision.

The claimed difference between these two decisionmaking models is psychological. It rests on the relative degree of force a decisionmaker

393. *Id.* at 204.

attributes to rules and to the substantive reasons that indicate outcomes different from those generated by the rule. To the best of my knowledge, no empirical evidence exists conclusively proving or disproving Schauer's hypothesis. We might well conclude that once a decisionmaker is freed of the limits of strict rule application, once she is free to examine the substantive issues relevant to her decisions, it is too much to expect that she will act as a presumptive positivist. After all, the stakes in legal actions are significant, and powerful pressures exist to reach the "best" substantive outcome in every case. It is too much to expect her to take no more than a quick "peek" to see if any unusually important rule-trumping reasons exist. Once she takes the look, inevitably she will engage in particularistic reasoning.

Schauer acknowledges this problem with his theory, and does not purport to absolutely refute it.[394] He does offer examples of this kind of decisionmaking in our legal system. One is the constitutional standard that prohibits some state actions unless the government can demonstrate that a compelling interest justifies its behavior. Another example is found in cases in which juries acquit a defendant, even if they strongly suspect her guilt, because they decide the prosecution's evidence does not prove guilt beyond a reasonable doubt.[395] These examples seem to demonstrate at least the possibility that legal decisionmakers can engage in the precise reasoning required by presumptive positivism.

This conclusion raises a second possible criticism of presumptive positivism as a model for legal decisionmaking. Even if some kinds of decisions can be made this way, it is unrealistic to expect police officers, prosecutors, and judges entangled in the hectic, rough and tumble world of law enforcement and the criminal justice system to do so. The legal pragmatist might argue that the appropriate decisionmaking theory depends upon the context in which the dispute arises, and a particularistic method simply is more practical in the fourth amendment context, in part because the analytical task Schauer describes is beyond the realm of the possible.

I suggest that experience teaches us the opposite lesson. In practice, the so-called monolithic model of the fourth amendment functioned much in the manner of presumptive positivism, at least as I understand Schauer's description. The warrant model established a clear rule—all searches and seizures conducted without a warrant were presumed to be unconstitutional—but permitted decisionmakers to avoid the rule in compelling situations,

394. *Id.* at 204–05.
395. *Id.*

typically involving true exigencies. These exigencies included threats to the safety of the officers and the public, the destruction or loss of evidence, and the escape of people suspected of committing crimes. When faced with these true exigencies, the Court regularly treated them as substantive justifications sufficiently powerful to produce a result inconsistent with the outcome indicated by the general rule.

In presumptive positivism's terms, the Justices took a "peek" and concluded that these substantive reasons trumped the rule. Frequently they instantiated these substantive reasons, creating exceptions that were in effect more local than the general rule. The automobile, search incident to arrest, hot pursuit, arrest, and other exceptions to the warrant rule all were cast in the form of rules, so that the fourth amendment system became a hierarchy of rules, complex but nevertheless exhibiting many of the virtues of a rule-based decisionmaking system.

Of course the warrant model has been criticized as being too complex, as providing too little guidance to the police, and most important here, as imposing too many limits on police authority. The conclusions we reach about the merits of these complaints rest more on the value choices we make between autonomy and authority than upon any empirical truth about the ways these rules actually function. We can only decide if the warrant model is "best" by examining our value choices.

We can, however, decide if the rule-based warrant model is capable of producing rational responses to the issues arising in the cases the Court now decides by employing nonformal reasoning. I believe it is. We can examine, for example, the disputes that the Supreme Court has resolved by resorting to the standard of reasonableness to determine whether the warrant rule is capable of resolving those disputes. The issues raised by suspicionless drug-testing of railway employees should suffice as an example of how the warrant process could apply. The *Schmerber* model, which requires probable cause and medically sound procedures—but no warrant—to extract and test body fluids, supplies one rule-based solution. In the alternative, suspicionless taking of samples could be permitted to meet the exigency (loss of evidence) posed by the passage of time, but probable cause and a warrant could be required to authorize testing of the samples, which would have to be stored until investigators could apply for a warrant.[396]

396. Inventory searches provide another example. A warrant could be required as a justification for searches of impounded containers or vehicles unless the police obtained consent or a waiver from the arrestee or other appropriate person, or unless facts existed that suggested the existence of an exigency.

These brief examples indicate that the warrant concept offers an interpretive model of the fourth amendment that is sufficiently flexible to meet changing social and legal issues, yet is rigid enough to function as a system of rules. Like any complex system of legal decisionmaking, this model incorporates rules and formal reasoning, while permitting substantive reasoning both in rule formation and at the point of rule application. It may well represent a real-world example of "presumptive positivism" at work.

In the next section I argue that this kind of rule-based decisionmaking is a necessary—but insufficient—condition for an appropriate interpretive theory of the fourth amendment. Such a theory ultimately must rest upon a value choice.

IV. A PRINCIPLED POSITIVISM OF THE FOURTH AMENDMENT

The fundamental issue that I have introduced—but have avoided addressing directly—is whether some set of normative values requires that we reject the Supreme Court's contemporary nonformal, pragmatist interpretation of the fourth amendment, and replace it with a rule-based theory. My analysis of fourth amendment case law demonstrates *how* fourth amendment pragmatism operates, and *how* it tends to favor government power over individual claims of liberty. Likewise, the more theoretical examination of legal decisionmaking illustrates *how* formal and substantive reasoning differ when applied in the fourth amendment context, particularly *how* each tends to allocate power among the branches of government, as well as between citizens and the government. But neither discussion attempts to explain normatively *why* we ought to prefer one approach over the other.

That is my goal here. The earlier discussion does not purport to identify the values that should inform our interpretation of the fourth amendment.[397] In this final section I will outline an argument for a value-based interpretive theory of the fourth amendment. I do not attempt to justify the argument in any comprehensive way here, but instead pursue the more modest goal of outlining its major elements.[398] The argument rests on the claim that the fourth amendment itself adopts a normative position about the relationship between people and government—and this normative position

397. Because it focuses upon internal processes of legal decisionmaking, the earlier discussion is more consistent with modern positivist critiques, like Hart's description of the internal view of law or Schauer's taxonomy of decisionmaking theories, including the category of presumptive positivism.

398. A more extensive examination of this argument is the subject of a work in progress.

can supply a principled basis for defining the core rules of the amendment, and for identifying when it is appropriate to avoid those rules.

I will use the label *principled positivism* to describe this interpretive approach. I adopt this phrase, despite the substantial baggage each of its constituent terms carries, because it draws together ideas essential to my argument. In this brief discussion I do not attempt to review the various uses to which the words *principle* and *positivism* can be put, but instead focus only upon the limited purposes for which each is employed here.

I use the term *positivism* to indicate that interpretation of the fourth amendment should rest upon a core of rules enunciated by an appropriately pedigreed source—either the text itself or government actors charged with that task. I use the term *principled* to signal that these rules derive from normative claims justified by the history and text of the amendment, but ultimately grounded in a value-based claim about the nature of the amendment. This obviously signals an intentional divergence from the classic positivist attempt to separate law and morality and describes a substantive set of values rather than values grounded in notions about the internal processes of the legal system itself.

This emphasis on values also highlights a fundamental disagreement with pragmatism, which places the rejection of foundational principles near the core of the theory. The Supreme Court's fourth amendment case law reveals why pragmatism is inadequate as a theory and a method—at least for interpreting this kind of constitutional text. The legal universe may provide opportunities for the value-neutral application of empirical methods to resolve disputes, but the fourth amendment is not one of them. After all, "it is *a constitution* we are expounding,"[399] and in the fourth amendment context the interpretive act not only shapes the law, it shapes the very fabric of the democracy. The authority we give to government to intrude directly into the lives of the people—and searches and seizures are usually the most physical of intrusions—provides a tangible definition of the nature of liberty in our society. And it is a definition primarily applied not in the rarefied world of legal theory, but in the gritty reality of the daily lives of thousands of citizens. Defining the relationship of physical power between the people and their government may be a work in progress, but it is one that rests

399. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis added).

finally upon values, not upon some ostensibly value-free pragmatic methodology.[400]

A. Identifying the Appropriate Constitutional Values

1. Constraining Government Power

The fundamental principle I argue for is this: The fourth amendment exists for the very purpose of enhancing individual liberty by constraining government power.[401] The limitations it imposes on government are not narrow and technical, but rest upon a sweeping vision of privacy and autonomy. The fourth amendment enacts a vision of the individual as an autonomous agent, empowered to act and believe and express himself free from government interference. Not surprisingly, these are values protected in the speech and religion clauses of the first amendment, and the self-incrimination privilege of the fifth.[402]

But the fourth amendment text differs from these other amendments in two significant ways. First, it expressly grounds this vision in physical reality, by protecting the "right of the people to be secure in their persons, houses, papers, and effects."[403] This language can leave little doubt that the amendment is intended as more than a philosophical statement—it is

400. Justice Harlan acknowledged this when he recanted his statement of the two-part formula that quickly became enshrined as the *Katz* test for privacy. He rejected the notion that a pragmatic expectations analysis could suffice. First, because "[o]ur expectations . . . are in large part reflections of laws that translate into rules the customs and values of the past and present." United States v. White, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting). Second, because issues under the fourth amendment—like the use of modern technology to engage in electronic surveillance of conversations—inevitably require judges to decide "whether under our system of government, as reflected in the Constitution, we should impose on our citizens [these] risks." *Id.*

401. *See, e.g.*, California v. Acevedo, 111 S. Ct. 1982, 1994 (1991) (White, J., dissenting) ("The Fourth Amendment is a restraint on Executive power. The Amendment constitutes the Framers' direct constitutional response to the unreasonable law enforcement practices employed by agents of the British Crown.") (citations omitted); Davis v. United States, 328 U.S. 582, 595, 597, 602 (1946) (Frankfurter, J., dissenting) (the purpose of the fourth amendment is to prevent the police from searching without a warrant).

402. The eighteenth century English general warrant cases that influenced the framers of the fourth amendment involved searches for political tracts criticizing the government. *See, e.g.*, Boyd v. United States, 116 U.S. 616, 625–30 (1886); JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT, A STUDY IN CONSTITUTIONAL INTERPRETATION 28–30 (1966); LASSON, *supra* note 8, at 43–50. The fourth amendment provides a powerful justification for the heightened protection offered in the home for the possession of personal property, the ideas that property may induce, and the expressive behavior that may accompany both. Similar protection may not exist when a person is in a public place. Consider, for example, the facts of Stanley v. Georgia, 394 U.S. 557 (1969), and Paris Adult Theater I v. Slaton, 413 U.S. 49 (1973).

403. U.S. CONST. amend. IV.

designed to provide tangible protection for people and their property. Second, the amendment describes rights that are not absolute. Only searches and seizures are restricted, and they are prohibited only if they are *unreasonable*. This complex text establishes tangible footings for a broad normative vision, yet expressly limits its scope. An interpretive theory of the fourth amendment must attempt to reconcile these conflicting positions. How we reach that reconciliation depends upon the values we bring to the task.

Not everyone will agree with my characterization of the amendment's purposes[404] precisely because its interpretation is driven by two conflicting value-based assumptions. One assumption favors efficient law enforcement, the other favors individual liberty. One assumption treats the amendment as a license for the exercise of expansive government powers, the other treats it both as a negative shield against those powers and an affirmative sword that carves out an expansive realm of individual autonomy within our society.

For my part, the value choice favoring liberty makes the most sense as the *grundnorm* of the amendment, and for the same reasons the assumption favoring government power seems to stand the amendment on its head.[405] These reasons originate in the history and text of the amendment, and are intertwined with a core of interpretive rules that is consistent with both. I will start with the history.

If history teaches us anything useful about the meaning of the fourth amendment,[406] it is that the framers intended at the very least to eliminate two evils: suspicionless searches and seizures of the sort authorized by general warrants and writs of assistance; and the exercise of arbitrary discretion (usually by members of the executive branch) to decide where to search and what and whom to seize.[407] These particular lessons of history are uncon-

404. *See, e.g.*, TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION (1969).

405. I propose that the warrant process should be reclaimed as the central rule of fourth amendment theory. Nearly a quarter century ago Professor Taylor, on the other hand, asserted that from an historical perspective this approach stands "the fourth amendment on its head." *Id.* at 23–24.

406. For general histories of the fourth amendment, see LANDYNSKI, *supra* note 402 (beginning coverage with English law in the fifteenth century and ending with the Supreme Court's decisions in the early 1960s); LASSON, *supra* note 8 (tracing the roots of the amendment from Biblical references and Roman law, through the adoption of the Bill of Rights, to the Supreme Court's opinions up to the 1930s).

407. *See, e.g.*, Amsterdam, *supra* note 103, at 411–12 (citing English and colonial cases for the proposition that preconstitutional history establishes the framers' rejection of searches and seizures that lacked an adequate factual justification, or were arbitrary because they allowed executive officals to act despotically and capriciously); LaFave, *supra* note 338, at 449; *see also* Camara v. Municipal Court, 387 U.S. 523, 527 (1967) ("The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against

troversial as general maxims,[408] and permit us to conclude that whatever else the fourth amendment means, at a minimum it exists to prevent these types of abusive government behavior.

We could treat this principle, rooted in history as it is, as justifying only the narrowest of rules—and limit its coverage to the specific evils against which the framers were reacting. It is at the point of deciding how general our rules are to be that the broader principle becomes important. If the amendment adopts a normative stance favoring individual freedom, its interpretation cannot be limited to a grudging nod toward eighteenth century events; it must be propelled by an expansive vision of the nature of liberty, and must employ decisionmaking tools capable of realizing that vision.[409]

Here we come full circle. As we have seen, an interpretive theory adopted to implement this value choice is effective only if it includes enforceable rules. Interest balancing and the other methods that are the hallmarks of fourth amendment pragmatism inevitably incline toward government power. Without rules designed to regulate collective authority, the fourth amendment is converted to a license for government intrusions. Simply put, if liberty is the goal, rules are needed.

2. The Warrant Rule as a Paradigm

But these rules need not be woven out of whole cloth. The text of the amendment is a convenient source of the core rule that implements the value choice favoring autonomy. It is the warrant rule. The structure of the compound sentence comprising the fourth amendment provides no irrefutable meaning, but the central interpretive theory adhered to by the Court from

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arbitrary invasions by governmental officials."); Schmerber v. California, 384 U.S. 757, 767 (1966) ("'The security of one's privacy against arbitrary intrusion by the police' [is] . . . 'at the core of the Fourth Amendment' . . . .") (quoting Wolf v. Colorado, 338 U.S. 25, 27 (1949)); Boyd v. United States, 116 U.S. 616, 630 (1886) (stating that the founders struggled for twenty years against arbitrary searches and seizures).

408. Of course, disputes arise about their application. The Supreme Court's decisions have long accepted these as principles, but this consensus, particularly about the requirement of individualized suspicion, has begun to unravel under the force of fourth amendment pragmatism. *See, e.g.*, Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990); Skinner v. Railway Labor Executives Assoc., 489 U.S. 602, 624 (1987); Warden v. Hayden, 387 U.S. 294, 301, 312 (1987) (Fortas, J., concurring); New Jersey v. T.L.O., 469 U.S. 325, 340 (1985); *id.* at 355, 359–60 (Brennan, J., dissenting).

409. This argument describes the interpretive stance the Supreme Court adopted in some of its formalist era opinions, including Boyd v. United States, 116 U.S. 616 (1886), and Gouled v. United States, 255 U.S. 298 (1921). In general I agree with the Court's philosophical position in those cases. The practical shortcoming that eventually led to their demise was that they produced rules that were too absolute in their restrictions on law enforcement.

1950 to 1980 permits a text-based system of rules.[410] It uses the more specific language of the amendment's second (warrant) clause as the primary (but not exclusive) source of meaning for the more general first (reasonableness) clause.

This interpretive theory yields a general rule commanding that all searches not justified by probable cause and a warrant (or a recognized exception) are unreasonable. This core rule not only rests upon the text, it also is consistent with the historical concerns that produced the amendment. The current approach, which treats the second clause as a subset of the first, applicable only in limited circumstances, is a defensible interpretive position. But from an historical approach, the model based upon the Warrant Clause does a better job of addressing the two fundamental evils that concerned the framers. The probable cause standard eliminates the evil of suspicionless searches and seizures, and the warrant-based system of rules also controls excessive executive branch discretion by imposing external standards that are enforceable by a separate arm of the government.[411]

The warrant rule thus serves as a paradigm for decisionmaking according to a principled positivism of the fourth amendment. The core rule dictates that a warrant should be required for every search or seizure. The rule exists to add teeth to the abstract principle that government should not intrude upon individuals and their activities unless the government has a good reason—and that reason must be based upon objective facts sufficient to persuade a neutral decisionmaker (a judge) that it is necessary to jettison the principle favoring liberty and allow the government to proceed with a search or seizure.

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410. *See, e.g.*, Amsterdam, *supra* note 103, at 410–11 (supporting an interpretive theory of the amendment that strongly prefers search warrants because the Court "is obliged to give an internally coherent reading" to the amendment's two clauses as "expressions of repudiation of the general warrant").

411. Justice Frankfurter made a similar argument in one of his influential dissents:

> One cannot wrench "unreasonable searches" from the text and context and historic content of the Fourth Amendment. It was the answer of the Revolutionary statesmen to the evils of searches without warrants and searches with warrants unrestricted in scope. Both were deemed "unreasonable." . . . When the Fourth Amendment outlawed "unreasonable searches" and then went on to define the very restricted authority that even a search warrant issued by a magistrate could give, the framers said with all the clarity of the gloss of history that a search is "unreasonable" unless a warrant authorizes it, barring only exceptions justified by absolute necessity.

United States v. Rabinowitz, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting).

B. Creating Principled Flexibility

This paradigm explicitly recognizes that the claim to autonomy is not absolute, and authorizes government intrusions when the tests established by the core rule—probable cause, particularity, and the oath—are satisfied. But some additional mechanism is needed to accommodate the pressing and legitimate claims made by police officers and other law enforcers. The infinite complexity of life, played out every day in the diverse encounters between those who enforce the laws and those who disobey them,[412] ensures that a general theory of the fourth amendment cannot rest solely upon so simple and rigid a rule. As in other areas of constitutional law, the core rule cannot function adequately unless we allow for some play in the joints. If my notion of a principled positivism is to work, the principle should identify when and how to create that flexibility.

In recent years the Supreme Court has created flexibility by turning to pragmatist methods, and this has been "principled" in the sense that the Justices typically have rested their decisions upon a value choice—the one favoring government power. Theoretically they could employ the same methods to augment liberty, but as we have seen, the pragmatist methods they choose favor the competing value choice. My proposal for a principled positivism thus requires that additional flex in the joints of fourth amendment theory not rest on pragmatist methods. It must come from rules that are framed as exceptions to the core warrant rule. This approach utilizes the fundamental normative principle favoring liberty to identify the appropriate use for and scope of those exceptions.

The creation of rule exceptions is, of course, the approach that the Court relied upon prior to the emergence of full-blown pragmatism in fourth amendment theory. But in those opinions Court majorities typically did not use the principle of liberty to define exceptions to the warrant rule. The needs of law enforcement, not claims of liberty rights, generated the formulation of escape routes from the general rule. One example should suffice. The exigency of mobility was the original justification for the automobile exception.[413] The inherent mobility of motor vehicles creates an exigency for police officers who have cause to believe that a particular automobile contains a suspect or evidence of a crime. If the officers seek a warrant, the suspect can escape and evidence may be lost. Without

412. Those grappling with the difficult task of interpreting the fourth amendment have often noted this reality. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 13 (1968) ("[E]ncounters between citizens and police officers are incredibly rich in diversity.").

413. Carroll v. United States, 267 U.S. 132 (1925).

abandoning this justification, the Supreme Court later permitted police officers to conduct full-blown warrantless searches of motor vehicles that had been impounded and were safely immobilized—a circumstance obviously eliminating the exigency that justified abandonment of the warrant requirement.[414] The Court's attempts to explain this result make little sense theoretically, but the result is sensible as a means of easing the burdens imposed on police officers and law enforcement agencies. The value choice favoring government authority led to a modification that made the rule more flexible.

A principled positivism of the amendment would create an automobile exception, but would patrol its borders more stringently with the warrant rule. Since the rights protected by the fourth amendment are not absolute, the commands of the core warrant rule must give way when confronted with a sufficiently powerful substantive argument. The rulemaker would, in other words, engage in the psychological process described by presumptive positivism. She would take a peek behind the rule, and in this circumstance undoubtedly would determine that the exigency is a substantive reason so important that the core rule must give way.

But the normative principle favoring liberty dictates that the exception should be crafted as narrowly as possible, and the warrant process should control once the exigency justifying its avoidance has passed. Once officers have seized an automobile, for example, absent the consent of the owner or operator, or absent some other true emergency (perhaps a bomb is located in the vehicle), they would have to get a warrant before they could search it. Here the principle produces the core rule, identifies the circumstances in which escape is permitted, and defines the scope of the escape route. The approach permits flexibility, but constrains the operation of the exceptions by its fealty to the underlying principle and the core rule.

Fourth amendment aficionados will quickly note that these are the kinds of limits that Justices advocating a broad scope for the warrant rule have urged in their dissents over the past twenty years.[415] My point is not that these arguments have never been made. They have. My point is that they have not been adopted in a consistent, coherent, systematic way by Supreme Court majorities for decades—arguably for more than half a century. Instead, the Justices have gradually abandoned the use of rules to promote individual

414. Chambers v. Maroney, 399 U.S. 42 (1970). The Court subsequently utilized the *Katz* expectations test to justify not only warrantless searches of impounded vehicles, but also of containers taken from them and impounded for several days. United States v. Johns, 469 U.S. 478 (1985).

415. *Chambers*, 399 U.S. at 62–65 (Harlan, J., concurring in part and dissenting in part).

liberty, embracing instead the methods of legal pragmatism. The Court's decisions have been principled in the sense that they have been based upon a choice among competing values. Unfortunately they are not the values the fourth amendment exists to protect.

CONCLUSION

I have attempted to demonstrate that substantial benefits flow from the integration of the fourth amendment into broader debates about constitutional law and legal theory. In this the fourth amendment stands as a surrogate for other parts of the Constitution, as well. Escaping the boundaries of narrow doctrinal analysis surely enriches fourth amendment theory, but it also expands our understanding of the theories we apply. Here analysis of legal pragmatism and some related theories about rule-based and particularistic decisionmaking have served as a laboratory for testing these hypotheses.

The Supreme Court's contemporary fourth amendment decisions reveal legal pragmatism at work—in a very real sense they represent the fruition of the theories proposed by legal pragmatism's proponents at the turn of the century. Recognizing the pragmatist pedigree for these opinions offers fresh explanations for the Justices' interpretive behavior. From the perspective of traditional doctrinal analysis, these opinions can appear to be nothing more than examples of the exercise of raw judicial power. They now can be understood as the application of instrumental and contextual ideas about law and its uses that are the product of one of the most influential legal theories operating in this country in this century.

Identifying the pragmatist pedigree for these opinions does not invalidate many of the complaints raised by the Court's critics. The Court's fourth amendment opinions often are inconsistent with precedent. The Justices do travel an unpredictable course: following old rules in some cases, rejecting them in others; announcing new rules in some opinions, and relying upon nonformal methods in many others. But reframing the analysis within the parameters of legal pragmatism reveals that much of the blame for the inconsistency and seeming incoherence in the contemporary case law rests not with those deciding cases, but instead with the theory they apply. The nonformal tendencies inherent in pragmatism ultimately lead to decisionmaking that is excessively substantive, and insufficiently rule-based.

Scrutinizing the fourth amendment case law under the pragmatist lens teaches as much about the nature, limits, and inadequacies of legal pragmatist theories as it does about the meaning of the relevant legal text. In particular, the fourth amendment provides a powerful example of pragmatism's

shortcomings as an interpretive tool for constitutional analysis. A pragmatist interpretive theory is inadequate precisely because of its intrinsic antiformality—and because of the nature of rules and the results of their application to resolve disputes between the governors and the governed.

Of greatest importance, rules allocate power. The fourth amendment experience illuminates how rule-based and particularistic decisionmaking theories distribute power differently within our criminal justice system. Within these institutions rules not only guide the behaviors of judges, lawyers, police officers, and citizens; rules can determine whose decisions count most. In the context of the fourth amendment, it is this attribute of rule-based decisionmaking that matters most.

These lessons are fundamental because when we get to the bottom of it, fourth amendment decisionmaking always involves choices about the allocation of authority within the institutions of government—and rests on value-driven choices about the proper scope of government power and individual freedom. We have seen that in practice a pragmatist theory of the fourth amendment ensures that these choices will usually favor the interests asserted by the government. We have also seen that rules can be employed to expand government power. But the fourth amendment example teaches us that without some coherent system of rules designed to limit that power, solitary individuals who claim the right to be free from government intrusions will lose, and the principle of liberty embodied in the amendment gradually will disappear.