The Fourth Amendment During the *Lochner* Era: Privacy, Property, and Liberty in Constitutional Theory

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In this article, Professor Morgan Cloud proposes a surprising remedy for a Fourth Amendment jurisprudence he criticizes as lacking a unifying theory and failing to preserve the rights guaranteed by the Amendment. Professor Cloud's solution is a return to the theories espoused by the Supreme Court during the infamous Lochner *era of the early twentieth century. He calls for a merging of the formalist and pragmatist theories of that period into an interpretive theory of the Fourth Amendment and suggests a rededication to the Amendment's Warrant Clause. Such a theory avoids the pitfalls of literalism and judicially determined social policy, while protecting the basic purposes of the Amendment—to protect individual liberty, privacy, and property and to prevent unjustified government intrusions.*

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I. INTRODUCTION

Fourth Amendment theory is in tatters at the end of the twentieth century. The disarray in the Supreme Court's recent case law has been explored in numerous scholarly articles and judicial dissents.[1] Two of the most common

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1. For a sample of the recent literature, see Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757-59 (1994) (describing modern Fourth Amendment theory as "a mass of contradictions and obscurities" and proposing the adoption of either a reasonableness model or a strict warrant model); Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468, 1471 (1985) (describing modern Fourth Amendment analysis as a "mass of contradictions and

complaints are that these opinions lack any unifying theory and fail to preserve the rights embodied in the Amendment.[2] This article proposes a remedy for these defects and it has a surprising source—the theories employed by the Supreme Court to interpret the Fourth Amendment at the beginning of the century, during the *Lochner* era.[3] That epoch is an unexpected source of solutions for modern problems in constitutional theory for two reasons. First, in contemporary discourse the *Lochner* era is infamous. The very name "*Lochner*" serves

obscurities;" proposing "adoption either of a reasonableness model or a strict warrant model"); Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory,* 41 UCLA L. Rev. 199, 204-05 (1993) [hereinafter Cloud, *Pragmatism*] (noting widespread criticism of the Supreme Court's contemporary Fourth Amendment jurisprudence; describing recent cases as inconsistent and incoherent); 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) (noting contradictory Supreme Court decisions in search and seizure cases involving the use of drug courier profiles); 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, 377 (1992) (discussing inconsistencies in recent Supreme Court decisions); Tracey Maclin, *When the Cure for the Fourth Amendment Is Worse than the Disease,* 68 S. Cal. L. Rev. 1, 65-67 (1994) (arguing against replacing warrants and probable cause with a reasonableness standard); Brian J. Serr, *Great Expectations of Privacy: A New Model for Fourth Amendment Protection,* 73 Minn. L. Rev. 583, 587 (1989) (arguing that recent Supreme Court decisions clash 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, 1176 (1988) (proposing that the least intrusive alternative analysis be "systematically incorporated" into the balancing test); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 Minn. L. Rev. 383, 383-86 (1988) (proposing a model to replace modern "makeshift" Fourth Amendment analysis); Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory,* 77 Geo. L.J. 19, 19-21 (1988) (describing liberal-conservative consensus on the disastrous 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) (proposing test to guide decisions).

Supreme Court justices also have been critical of recent Fourth Amendment decisions. *See, e.g.,* National Treasury Employees Union v. Von Raab, 489 U.S. 656, 679-80 (1989) (Marshall, J., dissenting) (terming majority's decision to allow drug testing of Customs employees "unprincipled and unjustifiable"); Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 636 (1989) (Marshall, J., dissenting) (asserting that majority's decision to allow suspicionless drug testing without probable cause erodes liberty); Florida v. Riley, 488 U.S. 445, 463 (1989) (Brennan, J., dissenting) (asserting that the majority allowed its disapproval of the defendant's illegal drug activity to color its Fourth Amendment analysis); Dow Chem. Co. v. United States, 476 U.S. 227, 251 (1986) (Powell, J., concurring in part and dissenting in part) (observing that as technology advances, privacy rights become tenuous with decisions such as the one in this case allowing aerial photography of a chemical plant without a warrant); California v. Ciraolo, 476 U.S. 207, 223-25 (1986) (Powell, J., dissenting) (disagreeing with majority decision that a reasonable expectation of privacy does not encompass aerial observation of the home's curtilage); United States v. Montoya de Hernandez, 473 U.S. 531, 566 (1985) (Brennan, J., dissenting) (objecting to lengthy and degrading detention of international traveler at the border without probable cause).

2. *See* Amar, *supra* note 1, at 758 (describing recent Fourth Amendment decisions as complex, contradictory, and perverse); Serr, *supra* note 1, at 584 (arguing that the Supreme Court has recently promoted law enforcement interests in Fourth Amendment cases at the expense of individual freedom and personal privacy).

3. The Court decided Lochner v. New York, 198 U.S. 45 (1905), almost a century ago. The so-called *Lochner* era in jurisprudence began earlier, however. *See, e.g.,* Robert Eugene Cushman, *The Social and Economic Interpretation of the Fourteenth Amendment,* 20 Mich. L. Rev. 737, 741-42 (1922) (placing the beginning of the era in the 1880s); Felix Frankfurter, *Hours of Labor and Realism in Constitutional Law,* 29 Harv. L. Rev. 353, 359 (1916) (citing an 1894 Nebraska decision striking down an eight-hour day law as "violative of liberty of contract"); Stephen A. Siegel, Lochner *Era Jurisprudence and the American Constitutional Tradition,* 70 N.C. L. Rev. 1, 4 n.9 (1991) (dividing the era into three periods: an early period from 1870-1900, a middle period from 1900-1920, and a late period from 1920-1937).

as an epithet,[4] and the phrase "to *Lochnerize*" is used to connote some fundamental judicial error,[5] although the precise nature of the error is not always clear.[6] A discredited period of constitutional decisionmaking seems a curious place to turn for guidance.[7]

Second, referring to *Lochner* in the context of Fourth Amendment case law suggests some link between decisions interpreting different parts of the Constitution. One could reasonably assume that the *Lochner* opinion, in which the Supreme Court invoked the Fourteenth Amendment Due Process Clause to invalidate a New York law limiting the hours that bakers could work, has no connection with the Fourth Amendment. In fact, the connections between the Supreme Court's decisions interpreting the two Amendments are both fundamental and striking. My primary goal here is to reconstruct Fourth Amendment theory by reclaiming ideas that have been discarded in recent decades. But establishing the theoretical links between the Court's *Lochner* era substantive due process and search and seizure opinions may have an unintended consequence: If we conclude that the Fourth Amendment theory of that era has

4. *See, e.g.*, BERNARD H. SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 23 (1980) (describing *Lochner* as "one of the most condemned cases in United States history . . . used to symbolize judicial dereliction and abuse").

5. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 567 (2d ed. 1988) (" '*Lochnerizing*' has become such an epithet that the very use of the label may obscure attempts at understanding"). The scholarly literature contains numerous discussions of the *Lochner* decision, as well as the *Lochner* era in constitutional interpretation. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 14-15 (1980) (noting that *Lochner* era decisions striking down worker protection laws "are now universally acknowledged to have been constitutionally improper" by interpretivists and noninterpretivists alike); SIEGAN, *supra* note 4 at 23 (noting "the animosity and contempt that erupted against" the *Lochner* line of substantive due process cases); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 99 (1984) (citing the due process formalism of the *Lochner* era as an ideology modern scholars condemn); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1193-94 (1985) (discussing prevalent belief that the *Lochner* Court decided cases on political grounds); William Powers, Jr., Book Review, 1985 DUKE L.J. 221, 232 (describing Holmes' dissent in *Lochner* as "a battle cry for an attack on a legal order whose time had passed"); Louis Michael Seidman, *Public Principle and Private Choice: The Uneasy Case for a Boundary Maintenance Theory of Constitutional Law*, 96 YALE L.J. 1006, 1006-07 (1987) (discussing legal realist criticisms of the *Lochner* Court's reliance on natural law in demarcating public and private spheres); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1066 n.9 (1980) (discussing criticism of *Lochner* era substantive due process decisions as being inconsistent with the language of the Due Process Clause); Charles Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 464-65 (1926) (arguing against the *Lochner* Court's broad interpretation of the Fourteenth Amendment); *see also Lochner*, 198 U.S. at 74-76 (Holmes, J., dissenting) (asserting that the Fourteenth Amendment does not preclude workplace regulation and criticizing the majority's use of *laissez-faire* economic theory in its due process analysis); United States v. Lopez, 115 S. Ct. 1624, 1654 (1995) (Souter, J., dissenting) (warning against a return to *Lochner*-style substantive due process); *id.* at 1651 (Stevens, J., dissenting).

6. *See, e.g.*, GERALD GUNTHER, CONSTITUTIONAL LAW 444-49 (12th ed. 1991) (offering a list of possible evils of the *Lochner* era); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 873-74 & n.7 (1987) (explaining conventional wisdom about why *Lochner* was wrong—because it involved judicial activism—but noting various explanations for the error).

7. *See* GUNTHER, *supra* note 6, at 445 ("Rejection of the Lochner heritage is a common starting point for modern Justices: reaction against the excessive intervention of the 'Old Men' of the pre-1937 Court strongly influenced the judicial philosophies of their successors.").

merit, we may be forced to reconsider some of the persistent criticisms of the era's substantive due process theory as well.[8]

Lochner era due process and search and seizure opinions often rested upon interrelated conceptions about the nature and sources of individual rights, the permissible scope of police powers and judicial review, and the processes of legal reasoning. In this article, I use the label "formalism" to describe the body of ideas about law that encompassed these attributes of *Lochner* era jurisprudence, ideas that were part of the fundamental legal consciousness of the time.[9] The Supreme Court's leading formalist opinions interpreting both the Fourth and the Fourteenth Amendments shared the following set of interrelated ideas.[10]

The justices interpreted the concept of liberty broadly. They elevated property rights to the status of fundamental rights and treated some property rights as essential attributes of liberty.[11] They conceptualized individual liberty rights as strong rights that often prevailed in conflicts with the assertion of police powers by elected officials, and rendered decisions directly and explicitly limiting the powers of the popularly elected branches of government.[12] They defined spheres of public and private rights and powers and struck down laws

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8. *See, e.g.*, TRIBE, *supra* note 5, at 6 (observing that constitutional theory of *Lochner* and its progeny is "[p]robably more coherent than it has been fashionable to admit"). Recently, Professor Sunstein has attempted both to identify the theoretical foundations of the *Lochner* decision and to employ these concepts to explain areas of constitutional theory not addressed directly in *Lochner* itself. *See* Sunstein, *supra* note 6, at 874-75 (discussing *Lochner* era concepts of government neutrality and inaction and applying these concepts to recent Supreme Court decisions).

9. I use the term "legal consciousness" 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. L. & SOC. 3, 6 (Rita J. Simon & Steven Spitzer eds., 1980). A shared legal consciousness rests upon underlying premises that actors in the legal system accept. These premises 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.

10. The next section examines legal formalism in more detail. *See* text accompanying notes 31-47 *infra*. Arguably the term "formalism," like the term "*Lochner*," carries so much baggage that another label, say "foundationalism" or "classical legal theory," might be more useful. But each label has its defects, and formalism has been associated frequently enough with the ideas discussed in this article to justify its use. *See* notes 31-32 *infra* and accompanying text.

11. *See, e.g.*, GUNTHER, *supra* note 6, at 445-46.

12. The Court issued these decisions in a time of widespread political activity promoting electoral democracy. For example, at least two *Lochner* era constitutional amendments emphasized the importance of the popular vote. The Seventeenth Amendment, ratified in 1913, established the direct election of United States Senators. The Nineteenth Amendment, ratified seven years later, extended the right to vote to women. Some trace the *Lochner* era back as far as 1870, the year of ratification of the Fifteenth Amendment. *See* Siegel, *supra* note 3, at 4 n.9. The Fifteenth Amendment guaranteed that the right to vote shall not be denied "on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1. It is worth noting that Boyd v. United States, 116 U.S. 616 (1886), the first important decision interpreting the Fourth Amendment, declared a federal statute unconstitutional. The *Boyd* decision—like some substantive due process opinions—held a statute enacted by the majoritarian branches to be unconstitutional because it transgressed upon liberty rights defined at least in part by reference to property rights. *Id.* at 623; *see* notes 95, 104-117 *infra* and accompanying texts.

improperly invading the realm of private rights.[13] They employed concepts of natural law and natural rights inherited from the founding generation to supply meaning for ambiguous constitutional texts. They eschewed textual literalism and favored interpretive theories protective of the values underlying the text, enforcing these values even where the result achieved was not compelled by the text's language, but was justified by unenumerated rights. They deduced rules from these natural law concepts, as well as from the common law, then employed formal reasoning to apply these rules to decide individual cases. Often they asserted that their decisions resulted from the formal application of mandatory principles and rules, rather than from political or economic theories.[14]

Most of these elements of legal formalism do not survive in Fourth Amendment theory at the end of the twentieth century. In recent decades the Supreme Court has abandoned the formalist conception of strong individual rights, its linkage of liberty, privacy, and property rights, its value-based theory of constitutional interpretation, and its emphasis upon formal reasoning. In its place the Court has substituted a sterile pragmatism that confuses interpretive techniques like interest balancing with constitutional theory.[15]

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13. *See* TRIBE, *supra* note 5, at 6 (discussing attempts by *Lochner* era justices to develop formulas for defining private, state, and national spheres of power); Kennedy, *supra* note 9, at 8-14 (using *Lochner* as an example of the Supreme Court's belief in constitutionally derived spheres of power).

14. One difference between the Fourth and Fourteenth Amendment decisions of the *Lochner* era occurs at the intersection of politics and constitutional law. The Court's turn-of-the-century Fourth Amendment decisions have never been evaluated in terms of the prominent political battles of the day. Conversely, *Lochner*'s critics have often argued that the Court erroneously elevated property rights to the level of fundamental liberty rights, then used that misinterpretation of the text to take sides in some of the critical political disputes of the period, including the clash between capital and labor. According to these critics, the Court erred by adopting *laissez-faire* economic theory and linking property rights and liberty to defeat the will of political majorities and their elected representatives in the legislative and executive branches of the national and state governments. *See, e.g.*, ARCHIBALD COX, THE COURT AND THE CONSTITUTION 353 (1987) (noting "evidence that at least some of the Justices of the *Lochner* era viewed the courts . . . as the last bastion against the socialist temper of political forces"); ELY, *supra* note 5, at 14; PAUL KENS, JUDICIAL POWER AND REFORM POLITICS: THE ANATOMY OF LOCHNER V. NEW YORK 133 (1990) (discussing the *Lochner* Court's "brazen" substitution of its will for the legislature's); J. Braxton Craven, Jr., *Personhood: The Right to be Let Alone*, 1976 DUKE L.J. 699, 700 n.4 (citing *Lochner* as an extreme example of the Court substituting its judgment for the legislature's); Cushman, *supra* note 3, at 753 (describing the *Lochner* era as "one in which courts ruthlessly overrode the determinations of the legislature); Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495, 500 (1908) (arguing that the Court should not act legislatively because it is not politically accountable); Robert F. Schopp, *Education and Contraception Make Strange Bedfellows:* Brown, Griswold, Lochner, *and the Putative Dilemma of Liberalism*, 32 ARIZ. L. REV. 335, 346-47 (1990) (distinguishing the *Griswold* Court from the *Lochner* Court because the former did not feel free to make its political preferences law); Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888-1921*, 5 L. & HIST. REV. 249, 250 (1987) (claiming that the *Lochner* era Justices "arrogated tremendous discretionary power to themselves"); Mark Tushnet, *The Newer Property: Suggestion for the Revivial of Substantive Due Process*, 1975 SUP. CT. REV. 261, 278 (noting criticism of the *Lochner* Court's substitution of its judgment for the legislature's).

15. For detailed analyses of the prevalence of pragmatist ideas in contemporary Fourth Amendment jurisprudence, see T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 958-65 (1987) (describing the Fourth Amendment balancing test as a logical doctrinal application of pragmatism); Cloud, *Pragmatism*, *supra* note 1, at 223-68 (examining the pragmatist foundations of the Supreme Court's recent Fourth Amendment jurisprudence); Strossen, *supra* note 1, at 1184-88 (criticizing the Fourth Amendment balancing test because it calls for subjective judgments).

The pragmatist ideas that have come to dominate contemporary Fourth Amendment theory also can be traced to the *Lochner* era, when pragmatism emerged to challenge then-prevailing ideas, including formalism, in constitutional theory.[16] In recent years the Court has tended to treat pragmatist and formalist theories as antinomies—dichotomous if not mutually exclusive devices for interpreting the Fourth Amendment—while replacing formalism and its vestiges with a distorted version of legal pragmatism. These recent opinions exhibit an extreme instrumentalism, an excessive emphasis upon social context, and an overemphasis upon substantive reasoning.[17] Most notably, these opinions abandon the notion that the rights preserved by the Fourth Amendment are robust enough to prevail over conflicting social policies.

Unlike contemporary Fourth Amendment pragmatism, many seminal examples of *Lochner* era pragmatism defended strong individual rights. One of the fascinating attributes of the *Lochner* era Fourth Amendment case law is that the leading pragmatist opinions written by Brandeis (and, to a lesser extent by Holmes) and the leading formalist opinions rest upon shared values. A powerful conception of personal liberty akin to that evident in formalist reasoning energized Brandeis' Fourth Amendment opinions, even though he was one of the most effective critics of substantive due process opinions like *Lochner*[18] and an influential proponent of pragmatist theory in constitutional interpretation.

Consider, for example, Brandeis' well-known description of *Boyd v. United States*,[19] the most important example of Fourth Amendment formalism. Brandeis wrote that *Boyd* is "a case that will be remembered as long as civil liberty lives in the United States."[20] His conclusion is surprising once we recognize that *Boyd* is the Fourth Amendment's analogue of *Lochner*, employing the same kind of natural law-based reasoning linking liberty and property rights to

16. *See* notes 49-76 *infra* and accompanying text; *see also* P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS 246 (1987) (describing the tendency in the American legal system in the 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"); MORTON WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM 107 (Beacon Press 1957) (1947) (observing that pragmatism was a coherent, viable jurisprudential theory by 1912); Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945, 948-49 (1977) (positing that legal realism developed as a revolt against formalism).

17. *See generally* Cloud, *Pragmatism*, *supra* note 1, at 1184-88 (demonstrating how the modern Court's instrumentalist approach to Fourth Amendment cases has limited individual rights and increased the power of government); Strossen, *supra* note 1 (critiquing the subjectivity of the balancing approach). *See* note 64 *infra* and accompanying text for a definition of substantive reasoning.

18. *See, e.g.*, Gunther, *supra* note 6, at 445 (stating that opinions like *Lochner*, which invalidated legislation on substantive due process grounds, typically "provoked dissents, most often by Holmes and, later, Brandeis").

19. 116 U.S. 616 (1886).

20. Olmstead v. United States, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting). For more than a century *Boyd* has been praised as an exemplar of liberty-oriented constitutional interpretation. Although the Supreme Court has eviscerated its practical significance in recent years, judges continue to cite this seminal Fourth Amendment opinion. As one would expect, the praise has not been universal. *See* notes 117-123 *infra* and accompanying text.

strike down a statute.[21] Brandeis praised *Boyd* because that decision identified and preserved the values upon which the Fourth Amendment rests, values that Brandeis himself defended. These shared values provide a surprising connection between the theories of formalists and their pragmatist critics, and suggest that it is possible to integrate these seemingly disparate theories about law into a coherent interpretive theory of the Fourth Amendment. Ironically, Brandeis' value-based Fourth Amendment pragmatism supplies essential elements of the integrated theory I propose to replace the Court's contemporary pragmatism. It is ironic because his influential use of pragmatist ideas helped supplant the *Lochner* era formalism he opposed in the Fourteenth Amendment context.

One other attribute of *Lochner* era search and seizure theory that was shared by formalists and pragmatists needs to be resurrected as a central element of a rational interpretive theory of the Fourth Amendment. It is the warrant model. Turn-of-the-century formalists and pragmatists alike recognized that the constitutionality of most searches and seizures must be judged against the requirements of the Amendment's Warrant Clause.[22] These opinions developed the warrant model that emerged during the *Lochner* era and eventually dominated Fourth Amendment theory during the 1960s and 1970s.

The central thesis of this article is that elements of the three interpretive theories employed in search and seizure case law at the beginning of the century—Fourth Amendment formalism and pragmatism, together with the warrant model—can be fused into a successful theory for interpreting the Amendment. None of the three elements is sufficient alone. Even someone so rash as to propose a return to pure nineteenth century formalism—an unlikely prospect even if we thought it desirable—would have to admit that the search and seizure case law of the period has many defects. Conversely, the application of pragmatist techniques unrestrained by the liberty-oriented values prevalent a century ago has produced the chaos and irrationality evident in contemporary Fourth Amendment theory. Finally, the warrant requirement standing alone is inadequate because law enforcers face many situations in which it is impossible to obtain warrants. Each of the *Lochner* era approaches has defects, but they can be integrated into a vibrant and effective theory of the Fourth Amendment.

A final element of this integrated theory is suggested by a specific difference between the texts of the two Amendments—just as an intriguing set of parallels between the Fourth and Fourteenth Amendments suggests why the *Lochner* era Court often employed the same theories when interpreting them.[23]

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21. *See* notes 95-112 *infra* and accompanying text.

22. *See* notes 160-161, 170-172 *infra* and accompanying texts.

23. The *Lochner* era cases interpreting the relationship between privacy, liberty, and property should interest those who have examined this relationship as it arose in other areas of constitutional law, and particularly those who conclude that many parts of the Constitution can, should, and must be read together to understand the meaning of the entire document, or at least some of its constituent parts. *See, e.g.*, Charles L. Black, Jr., Structure and Relationship in Constitutional Law 7-8 (1969) (proposing a structural or integrated approach in Constitutional interpretation); Cloud, *Pragmatism*, supra *note* 1 at 200 (lamenting the academic separation of the Fourth Amendment from other areas of constitutional analysis); A. Morgan Cloud, III, *Structure and Values in Constitutional Interpretation*, 40 Emory

The Fourteenth Amendment forbids the states from depriving "any person of life, *liberty, or property,* without due process of law."[24] The text refers to property without specifying the kinds of property within its reach. Although the Amendment explicitly protects both property and liberty, the relationship, if any, contemplated between the two is unstated. The Fourth Amendment, on the other hand, protects some aspects of liberty and privacy—although neither word is mentioned in the text—but does so largely in terms of property, and a person's relationship to it:

> 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.*[25]

The Fourth Amendment text associates liberty and privacy with identifiable types of real and personal property. At the turn of the century, the Supreme Court placed this relationship near the center of its Fourth Amendment jurisprudence.[26] The relationship had two faces, one procedural and one substantive. Searches and seizures were unconstitutional if they failed to satisfy procedural requirements, typically those set out in the Warrant Clause. But even proper procedures could not justify intrusions upon some substantive

L.J. 875, 878-79 (1991) (citing *Boyd* as a rare example of the Court's use of a structural approach to interpreting parts of the Bill of Rights); *see generally* Akhil Reed Amar, *The Bill of Rights as a Constitution,* 100 YALE L.J. 1131 (1991) (offering an integrated overview of the Bill of Rights and how the amendments relate to one another and to the original document). Of course the Fourth and Fourteenth Amendments are not identical. They were adopted in different centuries, in response to different events. For those reasons alone, the links between *Lochner* era decisions interpreting the two Amendments may not be intuitively obvious to some. Certainly traditional scholarship about the *Lochner* era has paid scant attention to the Supreme Court's contemporaneous search and seizure cases. This omission is sensible if one concludes that the two Amendments possess no shared meanings, and that judicial opinions interpreting them share no significant characteristics, but there are many reasons to reject those conclusions. One obvious reason is that the Supreme Court has concluded that the rights guaranteed by the Fourth Amendment are fundamental attributes of the *liberty* protected by the Due Process Clause of the Fourteenth. Ker v. California, 374 U.S. 23, 30-34 (1963); Mapp v. Ohio, 367 U.S. 643, 650-53, 655-60 (1961); Wolf v. Colorado, 338 U.S. 25, 27-28 (1949). The Court's reasons for incorporating the Fourth Amendment into the Due Process Clause do not, however, exhaust the inquiry. Other potential connections between the two Amendments remain largely unexplored, but some are examined in this article.

24. U.S. CONST. amend. XIV, § 1 (emphasis added).

25. U.S. CONST. amend. IV (emphasis added). This article focuses upon searches and seizures related to property. Issues relating to the right to be free from unreasonable seizures of the person are beyond its scope.

26. In recent years the Supreme Court has attempted to sever protected Fourth Amendment rights from property rights. *See, e.g.,* Katz v. United States, 389 U.S. 347, 353 (1967) (abandoning the trespass doctrine previously employed in Fourth Amendment analysis). When the Court has relied upon rights or powers derived from property law to decide cases in recent years, it has usually employed them to defeat claims of liberty or privacy and to uphold the power of the government. *See, e.g.,* Florida v. Riley, 488 U.S. 445, 450-51 (1989) (upholding police use of a helicopter to observe the contents of a greenhouse located in the home's curtilage from an altitude of 400 feet where no physical trespass occurred); United States v. Dunn, 480 U.S. 294, 301-03 (1987) (holding that observation of the interior of a barn not a search because it was located outside of the curtilage of the house); Oliver v. United States, 466 U.S. 170, 183-84 (1984) (holding that "open fields" are not protected by the Fourth Amendment). *But cf.* Soldal v. Cook County, 113 S. Ct. 538, 543 (1992) (defining seizure of a mobile home as interference with possessory interests in property).

rights and some kinds of property. Like the Due Process Clause, the Fourth Amendment protected substantive as well as procedural rights.[27] And one kind of property mentioned explicitly in the Fourth Amendment—papers—received special treatment during the *Lochner* era.

Throughout most of the *Lochner* era, searches and seizures of private papers were limited by Supreme Court opinions announcing that the Fourth Amendment and the Fifth Amendment privilege against self-incrimination ran together to create a zone of privacy into which the government could not lawfully intrude. Even a valid warrant could not authorize the seizure of some private papers.[28] The Court justified these opinions in part by relying upon common law notions about papers as a species of property, but the extra protection the Court awarded papers derived from concerns about compelled revelations of the papers' contents. This early insight about the significance of property expressing ideas has been lost in recent Supreme Court decisions, which have been deferential when government actors have asserted a need to obtain private papers, both in the exercise of regulatory powers and for use as evidence in criminal cases. The recognition that property in which a person's ideas are manifested may deserve special protection is one attribute of *Lochner* era search and seizure theory that deserves renewed attention, and here formalist property concepts overlap with Brandeis' views about privacy to suggest how papers should be treated in Fourth Amendment theory. This issue is examined in some detail later in the article.[29]

This article examines the Supreme Court's *Lochner* era Fourth Amendment jurisprudence in Parts I, II, and III. Part I introduces formalist and pragmatist theory, then analyzes the most important examples of Fourth Amendment formalism. The discussion highlights some of the forgotten virtues of the formalist conception of liberty, including the connections drawn between liberty and property rights, and the heightened protection given to papers in the Supreme Court's seminal opinions. The article argues that the formalist linkage between property, privacy, and liberty was more effective than is contemporary theory at implementing the Amendment's purposes and was more consistent with its text and history, particularly when it imposed substantive as well as procedural limits on searches and seizures. The most important substantive limit restricted searches and seizures of papers, and the analysis demonstrates that one source of the ultimate failure of Fourth Amendment formalism was the Supreme Court's decision obliterating the distinction between papers and other types of property.

Part II traces the emergence of pragmatism in Fourth Amendment theory and examines the differences between formalist and pragmatist styles of reasoning. The degree of scrutiny applied to searches and seizures is one of the most interesting differences between *Lochner* era decisionmaking and contemporary theory. Formalist reasoning imposed de facto forms of heightened scru-

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27. *See* notes 309-340 *infra* and accompanying text.
28. *See* notes 162-163 *infra* and accompanying text.
29. See notes 336-340 *infra* and accompanying text for a more detailed examination of this issue.

tiny upon searches and seizures. De facto versions of rational basis scrutiny are prevalent in recent case law, and the use of pragmatist reasoning helped facilitate this change. Part III studies *Olmstead v. United States*,[30] the decision that stands as the theoretical endpoint of the liberty-oriented version of Fourth Amendment formalism. This decision retained the formalist linkage between property rights, privacy, and liberty, but shackled the theory with a crabbed literalism that abandoned the values that had energized earlier opinions.

Part IV presents an argument for a value-based theory of the Fourth Amendment that integrates the formalist, pragmatist, and warrant-based theories that emerged from the *Lochner* era cases. This value-based integration of the three *Lochner* era theories serves as an alternative to the extreme version of pragmatist reasoning that dominates search and seizure theory in contemporary case law. The discussion does not focus upon the Fourteenth Amendment decisions of the era—countless other articles and books have done that already—but the analogies between the two bodies of case law will be readily apparent.

II. Fourth Amendment Formalism

A. *Formalism and Pragmatism*

In the early years of the *Lochner* era, the Supreme Court's most significant efforts at interpreting the Fourth Amendment exemplified nineteenth century legal formalism.[31] Later in the period, however, pragmatist ideas began to appear in the Court's Fourth Amendment case law. Because these two labels have not been applied uniformly in legal discourse, brief summaries of the meanings of the terms legal formalism and pragmatism as used in this article may be helpful.

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30. 277 U.S. 438 (1928), *overruled by* Katz v. United States, 389 U.S. 347 (1967).

31. Like the word *Lochner*, the term formalism has come to be treated as an epithet in common legal discourse. *See, e.g.*, Atiyah & Summers, *supra* note 16, at 29 ("[T]he term 'formalism' is today often used in American . . . legal writing and legal theory, to refer to such vices as conceptualism, overemphasis on the inherent logic of legal concepts, the over-generalization of case-law, and the like."); H.L.A. Hart, The Concept of Law 126 (1961) (describing formalism as a "vice"); Duncan Kennedy, *Legal Formality*, 2 J. Legal Stud. 351, 358-59 (1973) (asserting that formalism requires mechanical, unquestioning rule application); David Lyons, *Legal Formalism and Instrumentalism—A Pathological Study*, 66 Cornell L. Rev. 949, 949 (1981) (describing how Holmes and subsequent theorists rejected formalism as a "rigid and impoverished conception of the law"); Frederick Schauer, *Formalism*, 97 Yale L.J. 509, 509 (1988) (noting that formalist legal decisions and theories are condemned with accelerating frequency); Mark V. Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 Mich. L. Rev. 1502, 1506-07 (1985) (explaining anarchistic and public value critiques of formalism); Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 Yale L.J. 949, 950 (1988) (describing formalism as "like a heresy driven underground" in current academic discourse).

The term "formalism" has no single definition,[32] but in this article "formalism" and variants like "formalist" serve as the label for a theory of law[33] prominent in this country during the nineteenth century and the early decades of this century. In contrast, I use terms like "formal reasoning" to describe legal analysis emphasizing the use of deductive logic in the application of rules. Reliance upon formal reasoning was only one attribute of formalist theory.[34]

Several attributes of nineteenth century legal formalism are relevant here.[35] First, it generally required that decisionmakers identify controlling legal principles or rules, and then apply them deductively to decide individual disputes. Second, these foundational principles and rules could generally be found in the existing corpus of legal materials, although this corpus was often broadly defined. In the words of Dean Langdell, "law is a science and . . . all the available materials of that science are contained in printed books."[36]

Whether printed or not, legal rules were expansive in scope. Formalist theory presumed that these rules were comprehensive and complete, that they provided the means to resolve all problems, and left no gaps in the law.[37] Law

32. *See, e.g.*, White, *supra* note 16, at 12 ("It is very hard to give an exact definition of the word 'formalism' . . . ."); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593, 610 (1958) (arguing that the literature denouncing the vices of formalism never makes its meaning clear); Lyons, *supra* note 31, at 950 (positing that formalism is 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); Schauer, *supra* note 31, at 509-10 (reporting that there is "scant agreement" on what formalism means).

33. Some have argued that formalism was not itself a "general theory of law." Robert Samuel Summers, Instrumentalism and American Legal Theory 137 (1982); *see also* Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 Stan. L. Rev. 787, 818-19 (1989). 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 9, at 3-6; Gary Peller, *The Classical Theory of Law*, 73 Cornell L. Rev. 300, 301 (1988) (arguing that the *Lochner* era is "roughly representative" of the classical law belief that legal rules provide a neutral objective framework).

34. To the extent that formalist theory commanded that once a rule was enacted it possessed mandatory formality preventing subsequent decisionmakers from considering factors extraneous to it, the theory was consistent with decisionmaking that rejected sociological arguments as the *Lochner* majority did. *See, e.g.*, Atiyah & Summers, *supra* note 16, at 16-17 (describing attributes of mandatory formality); Summers, *supra* note 33, at 138 (arguing that formalism limits the "foresight of lawmakers" by restricting "input"); William C. Powers, Jr., *Formalism and Nonformalism in Choice of Law Methodology*, 52 Wash. L. Rev. 27, 28 (1976) (discussing formalism's process of screening out all information not specifically invoked by a rule); Schauer, *supra* note 31, 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").

35. *See* Atiyah & Summers, *supra* note 16, at 250 (identifying eight characteristics of turn-of-the-century American formalism).

36. Christopher Columbus Langdell, *Harvard Celebration Speeches*, 3 L.Q. Rev. 123, 124 (1887) (asserting the necessity of establishing these two points as part of his efforts to justify inclusion of the law school and legal education within the university); *see also* 1 C.C. Langdell, A Selection of Cases on the Law of Contracts viii-ix (2d ed. 1879) ("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."); Summers, *supra* note 33, at 143 (noting that Langdell "was far from alone in his view").

37. *See* Lyons, *supra* note 31, at 950; *see also* 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

possessed an internal coherence, an "internal intelligibility,"[38] 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.[39] In other words, a legal dispute could be resolved by resort to a formal reason for decision, which "is a legally authoritative reason . . . [that] usually excludes from consideration, overrides, or at least diminishes the weight of, any countervailing substantive reason arising at the point of decision or action."[40]

Finally, formalist theory posited that foundational or first principles—and the legal rules that rested upon them—often were the product of natural law or natural rights,[41] as embodied in the Constitution and common law.[42] Logically, these were strong rights and the rules enforcing them were to be applied rigorously even if this produced results that conflicted with important social goals, such as efficient law enforcement.[43] The notion of strong rights was supported by a widely held conception of a legal system in which private and

possible goals of legal systems: comprehensiveness, completeness, formality, conceptual order, and acceptability).

38. Weinrib, *supra* note 31, at 952; *see also* James Gouinlock, *What is the Legacy of Instrumentalism? Rorty's Interpretation of Dewey*, 28 J. HIST. PHIL. 251, 265 (1990) ("The monism of the classic tradition consists in the assumption that all things are systematically interconnected, as in the Absolute of philosophical idealism—a special target for Dewey, as it had been for James.").

39. *Compare, e.g.*, Grey, *supra* note 33, at 818-19 (reporting Holmes' criticism of formalism for failing to account for social ends in arriving at legal decisions), Lyons, *supra* note 31, at 949 (claiming that formalists believe that "existing law provides a sufficient basis for deciding all cases that arise") and Weinrib, *supra* note 31, at 951 ("Formalism postulates that law is intelligible as an internally coherent phenomenon.") *with* Thomas C. Grey, *What Good Is Legal Pragmatism?*, *in* PRAGMATISM IN LAW AND SOCIETY 9, 15-16 (Michael Brint & William Weaver eds., 1991) (describing pragmatists' instrumental view that "law is not a self-contained system but rather a set of human directives aimed at socially desired ends").

40. ATIYAH & SUMMERS, *supra* note 16, at 2.

41. Apparently we are in the midst of a revival of interest in natural law and natural rights among legal scholars. *See, e.g.*, *Natural Law Symposium*, 38 CLEV. ST. L. REV. 1 (1990); Symposium, *Perspectives on Natural Law*, 61 U. CIN. L. REV. 1 (1992); Randy E. Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 CONST. COMMENTARY 93, 107-109 (1995) (discussing the distinction between natural law and natural rights). *But see* CHARLES GROVE HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS: A STUDY OF THE ESTABLISHMENT AND OF THE INTERPRETATION OF LIMITS ON LEGISLATURES WITH SPECIAL REFERENCE TO THE DEVELOPMENT OF CERTAIN PHASES OF AMERICAN CONSTITUTIONAL LAW 52-53 (1930) (explaining that, in the American colonies "natural rights and natural law were regarded either as identical or as merely two phases of the same concept").

42. *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 . . . ."). *Lochner* era scholarly commentary accepted natural law sources for Fourth Amendment rights. *See, e.g.*, HARVEY CORTLANDT VOORHEES, THE LAW OF ARREST IN CIVIL AND CRIMINAL ACTIONS 1 (1915) (describing the right of personal liberty as "a natural one [that is] the birthright of every freeman, even in those ages before civilization . . . and is now guarded with jealous care by . . . 'the law of the land' " (quoting Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 250, 270 (1819)).

43. *See, e.g.*, Note, *supra* note 16, at 945-948 ("Nineteenth century legal formalism in America was exemplified by the view that adjudication proceeds by deduction from virtually absolute legal principles rooted in natural law and enshrined in both the common law and the Constitution."); *see also* Gouinlock, *supra* note 38, at 264-65:

> One of the most recurrent ideas in the classic tradition is that the true nature of things is inherently systematic and changeless. . . .
>
> If being is changeless and eternal, the fundamental cognitive act is the direct intellectual intuition of the supremely real. . . . One must cognize the antecedently real and simply conform to it. Particular acts are judged by classifying them according to this order. In various

public actors operated within separate spheres of rights and powers.[44] In such a system, government intrusions into private spheres of rights and powers were likely to be rejected—and some strong justification was needed to support those intrusions that survived legal scrutiny.

The formalist approach to constitutional interpretation posited the existence of fundamental principles derived from natural law that often were embodied in the common law. And the conception of natural rights prevalent at the end of the nineteenth century was not the invention of judges of that period. Both supporters and critics of the formalist jurisprudence of the *Lochner* era have long conceded that the natural rights ideology of that period—including its conception of property rights—can be traced to the ideas of the founding generation.[45] As one commentator has recently observed, "the notion that property and contract were essential ingredients of the liberty the Constitution was to protect, was common to Madison, Marshall, and the twentieth century advocates of laissez-faire."[46] To many people in both eras, these were natural rights.

The analytical task facing a formalist judge was to identify these foundational principles, deduce legal rules from them, then apply those rules syllogistically to resolve individual disputes.[47] Rules were treated as mandatory, rights

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guises, this view is found in Plato, theological and natural-law theories, Kant, classical liberalism, and idealism.

44. The *Lochner* opinion rested in part on this conception of spheres of rights and powers. *See* Lochner v. New York, 198 U.S. 45, 57 (1905) ("It is a question of which of two powers or rights shall prevail—the power of the State to legislate or the right of the individual to liberty of person and freedom of contract."); *id.* at 56 ("It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. . . . Otherwise the Fourteenth Amendment would have no efficacy and the legislatures of the States would have unbounded power . . . .").

45. *See generally* HAINES, *supra* note 41, at 54-58, 80-165 (examining the development of the concepts of natural rights and natural law in America); Edward S. Corwin, *The Extension of Judicial Review in New York: 1783-1905*, 15 MICH. L. REV. 281, 281 (1917) (tracing the development of constitutional jurisprudence in New York); Bryant Smith, *Retroactive Laws and Vested Rights*, 5 TEX. L. REV. 231, 235 (1927) (tracing the roots of "extra-Constitutional limitation[s] of law"). For more recent works discussing the Framers' views, see JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 1-9, 225-28 (1990) (discussing the Framers' beliefs concerning private property and limited government); Barnett, *supra* note 41, at 109 (asserting the Framers' belief in the necessity of natural rights); Sunstein, *supra* note 6, at 902-03, 912 (arguing that *Lochner* and the Constitution were both "influenced by an understanding of the naturalness of the distribution of property").

46. NEDELSKY, *supra* note 45, at 228.

47. Undoubtedly, *Lochner* is the best-known example of the Supreme Court's use of formalism to resolve a dispute involving constitutional law. The case involved a challenge to the constitutionality of a state law limiting the number of hours that bakers were allowed to work. The statute was the product of progressive efforts to enact laws promoting social welfare, in this case by protecting the health of bakery workers and the public. The law's supporters contended that the law advanced these social purposes, and the appellate record contained information arguably substantiating the need for this legislation. *See Lochner*, 198 U.S. at 65-74 (Harlan, J., dissenting). The Supreme Court majority rejected these arguments, concluding that the statute impermissibly interfered with the rights to contract and to labor encompassed within the liberty protected by the Due Process Clause of the Fourteenth Amendment. The majority announced that the "general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment." *Id.* at 53.

Applying this principle to the dispute, the Court concluded that the "right to purchase or to sell labor is part of" that constitutionally protected right to liberty of contract which applied to the parties to a labor contract. *Id.* The general test of constitutionality enunciated by the Court asked: "Is this a fair,

as indefeasible, and foundational principles as eternal verities. This was the kind of foundational conceptualism typically rejected by turn-of-the-century pragmatists who led the attack on legal formalism.[48]

Pragmatism emerged as a coherent philosophy during the *Lochner* era, and it provided the theoretical foundations for the sucessful attack on legal formalism waged by scholars, judges, and lawyers during the early decades of this century.[49] Pragmatist theory typically[50] rejected the core ideas of legal formalism, and particularly its attempt to base decisions upon foundational princi-

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reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor . . . ?" *Id.* at 56. The legislation failed this test, in part because the majority found "no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health or the health of [bakers]." *Id.* at 58. Because the majority could find no reasonable ground for interfering with the employers' and bakers' liberty to freely enter into employment contracts and to choose the number of hours the employee would work, it held the statute violated the Fourteenth Amendment. *Id.* at 64. The majority opinion was even more dismissive of the statute as "a labor law, pure and simple," *id.* at 57, because correcting economic inequalities exceeded the proper scope of the police power. Critics of the opinion have frequently argued that this analysis bore little relationship to the reality of negotiations in the employment marketplace, and defeated what now seems a modest effort at social welfare legislation. *See* GUNTHER, *supra* note 6, at 447.

48. *See* EDWIN W. PATTERSON, JURISPRUDENCE: MEN AND IDEAS OF THE LAW 472 (1953) ("[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 . . . ."); WHITE, *supra* note 16, at 11-31 (describing pragmatists' attack on formal logic); Grey, *supra* note 33, at 799 (describing pragmatists' critique of the formalist view that law is based on first principles); *see also* John Dewey, *Nature and Reason in Law*, 25 INT'L J. ETHICS 25, 26 (1915) ("Appeal to nature may, therefore, signify the reverse of an appeal to what is desirable in the way of consequences; it may denote an attempt to settle what is desirable among consequences by reference to an antecedent and hence fixed and immutable rule."); Grey, *supra* note 39, at 13 (contrasting 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.").

49. One measure of pragmatism's success is that it has been embraced by contemporary commentators espousing diverse ideological positions. For a sample of the recent discussion of legal pragmatism in the scholarly literature, see RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990); SUMMERS, supra note 33, at 12; Lynn A. Baker, *"Just Do It": Pragmatism and Progressive Social Change*, 78 VA. L. REV. 697 (1992); Jennifer Gerarda Brown, *Posner, Prisoners, and Pragmatism*, 66 TUL. L. REV. 1117 (1992); Stanley Fish, *Almost Pragmatism: Richard Posner's Jurisprudence*, 57 U. CHI. L. REV. 1447 (1990) (reviewing POSNER, *supra*); Grey, *supra* note 39; Grey, *supra* note 33; 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); Robert S. Summers, *Judge Richard Posner's Jurisprudence*, 89 MICH. L. REV. 1302 (1991) (reviewing POSNER, *supra*); *Symposium on the Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990); Tushnet, *supra* note 31; Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983).

50. As with formalism, no single definition can capture all the ideas of pragmatist thinkers. *See, e.g.*, CHARLES PEIRCE, *The Essentials of Pragmatism*, *in* PHILOSOPHICAL WRITINGS OF PEIRCE 251-72 (Justus Buchler ed., 1955) (reasserting his original formulation of pragmatism and distinguishing it from the work of James, Schiller and others who subsequently adopted his terminology); *see also* POSNER, *supra* note 49, 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 various characteristics of pragmatism, particularly its emphasis upon "scientific virtues" including the "process of inquiry"); SUMMERS, *supra* note 33, at 19-22 (arguing for the label "pragmatic instrumentalism" to describe the coalescence of philosophical pragmatism, sociological jurisprudence, and some tenets of legal realism); W.V.

ples.[51] John 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."[52]

Pragmatists envisioned an instrumental "law in use" rather than a conceptual law allegedly applied without regard to consequences.[53] A central question in pragmatist theory is: What are the consequences of this action?[54] Answering this question, and not divining transcendental legal truths, drove pragmatist theory and method. Pragmatists conceived of law as an instrument decisionmakers should employ to achieve social goals[55] and often defined these

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Quine, *The Pragmatists' Place in Empiricism*, *in* PRAGMATISM: ITS SOURCES AND PROSPECTS 23, 23 (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 theory, 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. The following statement by Holmes, one of the most significant of the legal pragmatists, highlights the diversity of ideas about pragmatism. Frederick Pollock wrote to Holmes about 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 . . . ." Letters between Oliver Wendell Holmes and Frederick Pollock (May 29, 1908 & June 17, 1908), *in* 1 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874-1932, at 138-39 (Mark DeWolfe Howe ed., 1941).

51. Roscoe Pound, for example, criticized formalist theory as a "jurisprudence of conceptions." *See, e.g.*, 1 ROSCOE POUND, JURISPRUDENCE 91 (1959) (crediting Jhering with coining the phrase); *see also* WILLIAM JAMES, *What Pragmatism Means*, *in* PRAGMATISM AND OTHER ESSAYS 22, 25 (1963) (stating that 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.*").

52. Dewey, *supra* note 48, at 31; *see also* JOHN DEWEY, ESSAYS ON PHILOSOPHY AND PSYCHOLOGY, 1912-1914, at 328 (J. Boydston ed., 1985) (stating 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").

53. *See* SUMMERS, *supra* note 33, at 21; Grey, *supra* note 33, at 806-07, 826-27. Of course, decisionmaking in a system of formal justice can impose "forward looking as well as backward-looking constraints on the decision of litigated disputes." NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY 75 (1978).

54. James wrote, for example, 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." JAMES, *supra* note 51, at 38; *see also* DEWEY, *supra* note 52, 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"); JAMES, *supra* note 51, at 25 ("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."); WILLIAM JAMES, *Humanism and Truth*, *in* PRAGMATISM AND OTHER ESSAYS, *supra* note 51, at 163 ("All that the pragmatic method implies, then, is that truths should *have* practical consequences.") (citation omitted).

55. This was typical of legal pragmatism. *See* OLIVER WENDELL HOLMES, *The Path of the Law*, *in* COLLECTED LEGAL PAPERS 167, 184 (1920) (criticizing judges for failing "adequately to recognize their duty of weighing considerations of social advantage"); SUMMERS, *supra* note 33, 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.").

goals within the context of contemporary social experience.[56] Jurisprudence should be employed to generate outcomes in particular cases designed to advance the social good[57] within the context of the here and now.[58]

Perhaps pragmatism as applied to law has never been true to the command to eschew antecedent principles. Today, of course, pragmatism is deployed frequently on behalf of foundational principles.[59] As we will see, one of the attributes distinguishing Brandeis' Fourth Amendment pragmatism from the version prevalent today was his overt reliance upon privacy as a fundamental principle.[60]

Legal pragmatists treated antecedent authorities as analytical guides, not as mandatory rules dictating outcomes,[61] and they viewed deduction from legal rules as a means to achieve proper goals, not as an end in itself.[62] Pragmatists argued, therefore, that a judge was not constrained to base a decision only upon a formal reason.[63] Instead, the judge should also consider any relevant substantive reason, which is a "moral, economic, political, institutional, or other social

56. The best-known example is undoubtedly Holmes' famous aphorism, "[t]he life of the law has not been logic: it has been experience." OLIVER WENDELL HOLMES JR., THE COMMON LAW 1 (1881). The emphasis Holmes placed upon experience was common to the pragmatist thinkers of the era. *See, e.g.*, JOHN DEWEY, ART AS EXPERIENCE 3-4, 13-14 (1934) (discussing the importance of experience in perception); WILLIAM JAMES, *Pragmatism's Conception of Truth*, in PRAGMATISM AND OTHER ESSAYS, *supra* note 51, at 87 (arguing that truth is "bound up with" experience); SUMMERS, *supra* note 33, at 12, 142-44 (discussing pragmatists' insistence on satisfying existing wants and interests in constructing law).

57. *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."); Grey, *supra* note 33, at 805 (describing pragmatist's view that law should be a means for achieving socially desired ends.

58. For a general discussion asserting—and assuming—the importance of context in non-formalist legal decisionmaking, see JEROME FRANK, LAW AND THE MODERN MIND 271-76 (1930). Professor Grey describes the pragmatist idea that "thought always comes embodied in practices—culturally embedded habits and patterns of expectation, behavior, and response," and asserts that contextualism "led to pragmatism's most important philosophical innovation—its Deweyan critique of the quest for certainty, the longstanding Western project of placing solid and impersonal *foundations* under human beliefs." Grey, *supra* note 39, at 12-13.

59. *See* Rorty, *supra* note 49, at 719.

60. *See* notes 231-246 *infra* and accompanying text.

61. Justice Holmes' famous dissent in *Lochner* supplies an example: "General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise." Lochner v. New York, 198 U.S. 45, 76 (1905); *see also* Dewey, *supra* note 48, at 31 (advocating treatment of antecedent rules as intellectual guides, but not as "norms of decision"); FRANK, *supra* note 58, at 253-60 (praising Holmes for treating logical deduction from rules and precedent as a tool of limited utility).

62. Holmes wrote that legal rules were 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." HOLMES, *supra* note 55, at 182-83.

63. One effect pragmatism has had upon American legal theory has been to increase the use of nonformal methods in legal decisionmaking. It is no accident that "the American version of instrumentalist legal theory which has flourished since the middle decades of this century is vigorously antiformalistic." SUMMERS, *supra* note 33, at 21. The theory and the method go together. In practice, pragmatist legal theories produced nonformal methods for achieving substantive goals. *See* ATIYAH & SUMMERS, *supra* note 16, at 251 (asserting that American antiformalists pursued highly substantive reasoning and were so critical of formalism and formal reasoning that they failed to recognize the appropriate functions of formal reasoning).

consideration."[64] Not only could legal decisionmakers discover appropriate reasons for their decisions outside the corpus of traditional legal materials, but these reasons could even defeat principles embodied in legal rules. Pragmatist legal theory permits the view that rights are not indefeasible, but instead are mere interests that can be trumped by legitimate—and not necessarily compelling—state interests.

Legal pragmatists tended to eschew the formalist emphasis upon natural law and the common law as sources of fundamental legal principles and rules, and they rejected decisionmaking that stressed formal reasoning from legal rules. Pragmatists argued that formalism produced a "mechanical jurisprudence"[65] stressing the "beauty of its logical processes or the strictness with which its rules proceed from the dogmas it takes for its foundation,"[66] rather than the results the decision produced.

The formalist emphasis upon rules derived from foundational principles contributed to the perception that formalism was an inherently conservative theory about law, a perception magnified by decisions like *Lochner*, in which judges employed formalist reasoning to strike down progressive legislation. Pragmatism, on the other hand, generally was associated with liberal movements for social change, and particularly with liberal political movements.[67] Broader intellectual movements favoring social progress influenced the evolution of pragmatism in law, and energized the attack on legal formalism.[68] As Roscoe Pound put it, "[w]e have, then, the same task in jurisprudence that has been achieved in philosophy, in the natural sciences and in politics."[69]

Pound's reference to politics was not incidental. The American pragmatist movement was in part "a reaction against certain substantive conceptions that underlay formalism, including laissez-faire, the notion that only the fit should survive the competitive struggle, generalized judicial conservatism, and, some

64. Atiyah & Summers, *supra* note 16, at 1. Formalist judicial decisionmaking, on the other hand, exhibited a "marked tendency . . . to avoid the discussion of substantive grounds wherever possible." Patterson, *supra* note 48, at 465.

65. Roscoe Pound, *Mechanical Jurisprudence*, 8 Colum. L. Rev. 605 (1908).

66. Pound, *supra* note 65, at 605; *see also* William James, *The One and the Many*, *in* Pragmatism and Other Essays, *supra* note 51, at 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 . . . .")

67. This political alignment is not inevitable. *See* Dewey, *supra* note 48, at 26-27 (noting that use of natural law theories to support "individualistic as against collective or socialistic" philosophies is "purely accidental").

68. The Progressive movement in American politics was an important influence upon the antiformalist revolt in legal theory. Dewey, *supra* note 48, at 29; *see, e.g.*, Richard Hofstadter, The Age of Reform: From Bryan to F.D.R. 154 (1955).

69. Pound, *supra* note 65, at 609. The activist role played by intellectuals in this movement is described in Hofstadter, supra note 68, at 154. Hofstadter's list of important progressive scholars included some who influenced the growth of legal pragmatism.

> In the Progressive era the primary function of the academic community was still to rationalize, uphold, and conserve the existing order of things. But what was significant in that era was the presence of a large creative minority that set itself up as a sort of informal brain trust to the Progressive movement. To call the roll of the distinguished social scientists of the Progressive era is to read a list [that includes] John Dewey in philosophy, and (for all his formal conservatism) Roscoe Pound in law.

Id.

would say, the influence of theories of natural law."[70] Pragmatists vigorously criticized the influence of these theories upon formalist judicial opinions interpreting the Fourteenth Amendment. Pound again is a useful source:

> The manner in which the Fourteenth Amendment is applied affords a striking instance of the workings to-day of a jurisprudence of conceptions. Starting with the conception that it was intended to incorporate Spencer's Social Statics in the fundamental law of the United States, rules have been deduced that obstruct the way of social progress. The conception of liberty of contract, in particular, has given rise to rules and decisions which, tested by their practical operation, defeat liberty. . . . The conception of freedom of contract is made the basis of a logical deduction. The court does not inquire what the effect of such a deduction will be, when applied to the actual situation.[71]

Although phrased as a debate about legal theory, the political content is obvious. Pound disagreed not just with the theory and the method, but also with the outcomes in cases rooted in the political battles of the day. Dewey was, if anything, even more explicit in arguing that reliance upon antecedent sources to justify legal decisions unduly favored the status quo.[72] This view was not limited to academics, but was shared by practicing lawyers and judges as well. The best-known instance of judicial criticism of formalism is Holmes' dissent in *Lochner*,[73] upon which Pound relied in crafting his attack on "mechanical jurisprudence" adhering to "Spencer's Social Statics."[74] Some critics have argued that in cases like *Lochner*, judges simply masked essentially political decisions with rhetoric creating the illusion that formal application of abstract principles and mandatory legal rules compelled the outcomes.[75] These judges erred by treating property interests as fundamental rights, and compounded the error by deploying formal reasoning to protect those rights.

The early legal pragmatists who rebelled against formalism in law argued that instead of deciding cases by reasoning deductively from assumed first prin-

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70. SUMMERS, *supra* note 33, at 28; *see also* Hart, *supra* note 32, at 611 (the stigma of "mechanical" jurisprudence was applied to choices favoring a "conservative social aim"); Grey, *supra* note 33, at 813 ("Dewey used pragmatist premises as a basis for an optimistic brand of activist liberal reformism.").

71. Pound, *supra* note 65, at 615-16 (citations omitted).

72. Dewey, *supra* note 48, at 30-31 ("But we also find that one of the chief offices of the idea of nature in political and judicial practice has been to consecrate the existent state of affairs . . . ."). On the other hand, some scholars have noted the potential conservatism of pragmatist theory. *See* Grey, *supra* note 39, at 9, 18.

73. Lochner v. New York, 198 U.S. 45, 74-76 (1905) (Holmes, J., dissenting).

74. See notes 65 & 71 *supra* and accompanying text.

75. *See, e.g.*, Hart, *supra* note 32, at 611 & n.39 (citing *Lochner* as representing turn-of-the-century Supreme Court decisions that have been criticized because although they were not core cases, but penumbral ones, they were phrased in the language of mechanical rule application and gave effect to conservative policies); PATTERSON, *supra* note 48, at 493 (asserting that early twentieth century liberals suspected that many Supreme Court constitutional law decisions rested upon one subjective value generalization by the judges—apparently political—but were justified publicly by resort to another). *See also* Schauer, *supra* note 31, at 511-12.

> We condemn *Lochner* as formalistic not because it involves a choice, but because it attempts to describe this choice as compulsion. What strikes us clearly as a political or social or moral or economic choice is described in *Lochner* as definitionally incorporated within the *meaning* of a broad term. Thus, choice is masked by the language of linguistic inexorability.

Id. (footnote omitted).

ciples, judges should focus upon the consequences of their decisions.[76] They should consider the social context in which disputes arose and should be willing to employ their decisionmaking power in the service of important social policies. In the Fourteenth Amendment arena, at least, the pragmatists incorporated a political element into their critique of formalist legal theory.

The pragmatists' attack on formalist ideas was waged vigorously in disputes about the relationship between liberty and property in the politicized disputes arising in the context of the Fourteenth Amendment. But Pound, Dewey, and other early pragmatists paid little attention when the Court employed similar theories in Fourth Amendment cases to protect liberty and property while restricting the powers of legislative and executive branch actors. The outstanding example is the Court's first important search and seizure opinion.

B. Boyd *and Formalism*

The Supreme Court did not issue its first important decision interpreting the Fourth Amendment[77] until it decided *Boyd v. United States*[78] in 1886. The majority opinion exhibited the fundamental attributes of nineteenth century formalism: It employed deductive reasoning and categorical concepts of property rights to define expansive liberty and privacy rights protected by the Fourth and Fifth Amendments. Both the analytical method the Court employed and the rules derived from the opinion influenced Fourth Amendment theory for much of the following century,[79] so *Boyd* warrants close scrutiny.

76. The pragmatist reaction to formalism had theoretical as well as political sources. *See* Atiyah & Summers, *supra* note 16, at 246 (describing the tendency in the American legal system in the 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 id.* at 251 (stating that the "instrumentalist" revolt in American legal theory "was in large part a reaction to the formalism of the preceding period"). 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 16, at 11 (asserting antiformalist theories of the era "cannot be fully understood without some sense of their relation to the ideas which dominated the nineteenth century").

77. The Court had interpreted the Fourth Amendment in earlier cases, but did not attempt to establish a comprehensive theory of the amendment. *See, e.g., Ex parte* Jackson, 96 U.S. 727, 733 (1877) (holding that a search warrant was required to authorize a government search of sealed letters and packages). Most of the early Supreme Court opinions mentioning the Fourth Amendment deal with it only tangentially. *See, e.g., Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 102 (1866) (holding that the Fourth Amendment is not a limitation on the war-making power); Smith v. Maryland, 59 U.S. (18 How.) 71, 76 (1855) (holding that because the Fourth Amendment only restricted the national government, a state statute permitting issuance of a search warrant without requiring an oath does not violate the Constitution); Luther v. Borden, 48 U.S. (7 How.) 1, 71-72 (1849) (Woodbury, J., dissenting) (arguing that the Fourth Amendment was relevant to a trespass action challenging a warrantless search and seizure performed pursuant to a state's declaration of martial law); *Ex parte* Bollman, 8 U.S. (4 Cranch) 46, 62 (1807) (failing to mention the Fourth Amendment, although defense counsel cited it in support of a claim that no probable cause existed, and discharging defendants on other grounds).

78. 116 U.S. 616 (1886).

79. *Boyd*'s persistent significance is apparent both from subsequent praise, see Olmstead v. United States, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting) ("*Boyd v. United States* [is] a case that will be remembered as long as civil liberty lives in the United States.") (citation omitted), and from critics' felt need to declare its demise a century after the decision. *See* United States v. Doe, 465 U.S. 605, 618 (1984) (O'Connor, J., concurring) (asserting the Court had finally sounded "death knell" for *Boyd*'s Fifth Amendment protections for papers).

The facts of *Boyd* were pedestrian. The United States brought a civil forfeiture action alleging that E.A. Boyd & Sons (the Boyds) had violated customs laws by importing thirty-five cases of plate glass without paying the required duties,[80] and sought civil forfeiture of the glass. At the government's request and pursuant to a federal statute, the District Court issued a subpoena commanding the Boyds to produce an invoice for an earlier shipment of imported glass. The Boyds complied, but objected to the compelled production of the invoice and its introduction into evidence, claiming that the statute authorizing the subpoena violated both the Fourth Amendment prohibition against unreasonable searches and seizures and the Fifth Amendment privilege against self-incrimination.[81]

The Supreme Court agreed, and ruled in favor of the Boyds. The Court's decision rested on a conception of individual liberty more expansive than the literal language of either the Fourth or Fifth Amendment requires. The Fourth Amendment regulates searches and seizures, and the Court acknowledged that the disputed statute "does not authorize the search and seizure of books and papers, but only requires the defendant or claimant to produce them."[82] The privilege against self-incrimination literally applies to criminal prosecutions,[83] but this was a *civil* forfeiture case in which the privilege arguably was irrelevant. The Court plausibly could have refused to apply either Amendment to this dispute, but instead it held that the statute violated both.

The majority concluded that the Fourth Amendment applied because the *purpose and effect* of the disputed subpoena were equivalent to those produced by a literal search and seizure. The purpose of a search is to discover evidence to be used by the government against suspected wrongdoers. A subpoena for documents, of course, has the same purpose. The effect produced by either method is that government power has been used to obtain incriminating evidence, probably against the will of the affected people. The relevant federal statute provided that if the Boyds had failed to produce the documents named in the subpoena, the government's allegations would have been treated as proven.[84] This threat effectively compelled them to produce evidence against themselves.[85] Emphasizing the government's purpose in obtaining the subpoena and its effect on the interests protected by the Amendment led the Court

80. *See Boyd,* 116 U.S. at 617-18. The Boyds had supplied plate glass for a new federal building erected in Philadelphia. They had paid import duties for the glass actually used in the project, which was taken from their existing inventory. Their agreement with the federal government permitted the Boyds to import replacement glass without paying duties. The government asserted that the Boyds had attempted to defraud it by importing more glass than the agreement permitted. Brief for Plaintiffs at app. 1-6, *Boyd,* 116 U.S. 616; Brief for the United States, *id.* at 1-4. For a more detailed discussion of the facts, see Gerald F. Uelmen, *2001: A Bus Trip: A Guided Tour of the Fourth Amendment Jurisprudence,* CHAMPION, July 1992, at 6.

81. *Boyd,* 116 U.S. at 618, 621. The invoice was introduced into evidence over the Boyds' objections. The jury decided in the government's favor, and the 35 cases of plate glass were forfeited to the government. The Circuit Court affirmed the judgment of forfeiture. *Id.* at 618.

82. *Id.* at 621.

83. The Fifth Amendment provides, in relevant part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

84. *Boyd,* 116 U.S. at 620.

85. *Id.* at 630.

to the conclusion that a subpoena and a physical search differed only in degree, not kind.[86] This was a dispositive analogy to a Court that believed that the Fourth Amendment prohibited all government intrusions into "the sanctity of a man's home and the privacies of life."[87] The Amendment's underlying purposes—and not its literal language—were controlling.

Although the facts of the case were banal, it was appropriate that the Court's first opinion giving broad meaning to the Fourth Amendment involved a forfeiture action for non-payment of import duties, because cases involving the forfeiture of goods were important precedents for the creation of the Fourth Amendment—and for the creation of the nation as well.[88] The pivotal colonial cases, after all, involved not general warrants but the use of writs of assistance to enforce English trade and tariff laws. The "standard and principal action against violations [of these laws], in England and the colonies alike" since the thirteenth century had been the seizure and forfeiture of the offending goods.[89] The facts in *Boyd* thus evoked pre-Revolutionary disputes that directly influenced the drafting and ratification of the Fourth Amendment. From this historical perspective, a case in which the government sought to obtain forfeiture of private property because of violations of laws governing imports was an ideal vehicle for construing the Fourth Amendment.[90]

The *Boyd* opinion construed the Fifth Amendment as well, and the Court took a similarly expansive view of the command that no person "shall be compelled in any criminal case to be a witness against himself."[91] The Court could have interpreted the text of the Amendment narrowly, applying it only to criminal cases, and perhaps only to live, in-court testimony. The Boyds were not compelled to testify in court (or elsewhere), and the civil forfeiture action was not a criminal case. Nonetheless, a unanimous Court found that the statute authorizing the subpoena violated the Fifth Amendment by forcing the Boyds to give evidence that would support the government's efforts to obtain forfeiture of their property.[92]

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86. *Id.* at 634-35.

87. *Id.* at 630.

88. The most prominent case in the colonies involved the issuance of writs of assistance in Massachusetts. *See* notes 189-194 *infra* and accompanying text. Remembering James Otis' famous courtroom oration against the writs, John Adams wrote: "Mr. Otis's oration against *writs of assistance* breathed into this nation the breath of life." Letter from John Adams to H. Niles (Jan. 14, 1818), *in* 10 The Works of John Adams 276 (Boston, Little, Brown & Co. 1856). Adams concluded: "Then and there the child Independence was born." Letter from John Adams to William Tudor (Mar. 29, 1817), *in* 10 The Works of John Adams, *supra*, at 248.

89. M. H. Smith, The Writs of Assistance Case 11 (1978). Battles in English law over the government's power to seize and forfeit property can be traced to the 13th century and to statutes enacted as early as the year 1275. *Id.* at 11-12.

90. The opinion in Entick v. Carrington, 19 Howell's State Trials 1029 (1765), a famous 18th century English case involving searches for papers, had an even more direct influence on the *Boyd* opinion. *See* notes 189-194 *infra* and accompanying text.

91. U.S. Const. amend. V.

92. The justices unanimously agreed that the government action violated the Boyds' Fifth Amendment rights. Two justices concluded, however, that there had been no search and seizure, and therefore no violation of the Fourth Amendment. Boyd v. United States, 116 U.S. 616, 639-41 (1886) (Waite, C.J., and Miller, J., concurring).

The Supreme Court not only construed each Amendment individually, but it also interpreted them together. The Court adopted an expansive, structural theory in which the Fourth and Fifth Amendments were linked by principles of privacy, property, and liberty. The two Amendments ran together to create a zone of privacy into which the government could not intrude.[93] This conclusion flowed from a conceptual approach that emphasized the values and substantive rights promoted by the Amendments, and deemphasized the significance of the means used by the government to intrude upon them.

> It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his *indefeasible right of personal security, personal liberty and private property* .... Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers ... to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. *In this regard, the Fourth and Fifth Amendments run almost into each other.*[94]

The Court's conception of the relevant rights must be starting point for understanding this critical passage. First, these rights were *indefeasible*. This is the language of strong fundamental rights—rights that trump social policies, including the goals favored by political majorities and their elected representatives in the executive and legislative branches. Indeed, these rights are so strong that the Constitution prohibits the most minimal transgressions against them, as well as the most severe. Second, these rights are indefeasible not only because the fundamental constitutional text defines them, but also because they are natural rights that are embodied in the Bill of Rights. Finally, these rights work in harmony, defining and amplifying one another. Personal security, liberty, and private property are not discrete interests; they unite to define significant attributes of individual freedom in the democracy.

Boyd's narrow holding is a specific prohibition against government searches for and seizures of private papers, but it is this broad, structural interpretation of the Bill of Rights that captures the spirit of the opinion. The Court announced that it would interpret constitutional provisions protecting individual liberty expansively in order to enforce the values embodied in them; it would not be bound by restrictive canons of statutory construction. In particular, the Court's conclusion that the two Amendments run together to create a zone of individual privacy protected from government intrusions maximized individual freedom at the expense of government power.

The Court's opinion exemplified both the style of formalist reasoning and the exaltation of property rights for which the *Lochner* opinion has been vilified.[95] The Court identified antecedent liberty principles—including some not explicitly stated in the text of the Constitution[96]—and from those principles

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93. *Id.* at 621.

94. *Id.* at 630 (emphasis added).

95. *See, e.g.*, Amar, *supra* note 1, at 788 (criticizing opinions of the era, including *Boyd*, for exhibiting a property fetish).

96. *See Boyd*, 116 U.S. at 631-32:

deduced legal rules, which the Court then applied to resolve constitutional issues. The *Boyd* Court discovered these liberty principles within the realm of accepted legal sources, including preconstitutional Anglo-American case law and natural law concepts, particularly those found in common law property rules.[97]

Conversely, the *Boyd* Court eschewed arguments based upon social policy goals. For example, it rejected the government's "argument of utility, that such a search is a means of detecting offenders by discovering evidence."[98] Important societal interests—effective law enforcement[99] and the collection of import duties, then a significant source of revenues for the national government[100]—could not trump fundamental natural rights embodied in the common law and the Constitution. These rights, and the rules devised to enforce them, prevailed over conflicting social policies.

The *Boyd* Court, in effect, treated the law as a closed system. It relied upon sources encompassed within a broad definition of legal authority, including natural law, and emphasized its rejection of social policy arguments by quoting language from an important pre-Revolutionary English opinion: "If it is law, it will be found in our books; if it is not to be found there, it is not law."[101]

These books included the reports of the eighteenth century cases involving general warrants and writs of assistance that arose in England and the colonies, as well as those construing the relevant federal statutes. Justice Bradley's majority opinion enunciated mandatory constitutional rules that were based in large part upon the historical origins of the Fourth Amendment, including pre-Revolutionary Anglo-American political and legal disputes, and upon the legislative and judicial history of forfeiture statutes from the first Congress to the statute at issue in the case.[102] The opinion may have resorted to "foundational" values, but they were values with a substantial basis in real experience as well as in "eternal" principles of liberty.[103]

> [A]ny compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. . . . It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom.

97. *See Boyd*, 116 U.S. at 627.

98. *Id.* at 629 (quoting Entick v. Carrington, 19 Howell's State Trials 1029, 1073 (1765)).

99. *See id.* at 632 (noting that the subpoena power provided government officers with a "convenient method . . . for getting evidence in suits of forfeiture").

100. *See id.* at 636 (rejecting lower court decision upholding the subpoena power as necessary for efficient revenue collection); Michael J. Graetz, Federal Income Taxation: Principles and Policies 2 (2d ed. 1988) ("[T]rade tariffs remained the most significant single source of federal revenues until 1894.").

101. *See Boyd*, 116 U.S. at 627 (quoting *Entick*, 19 Howell's State Trials at 1066). This language was echoed by Dean Langdell in a speech made only a year after the *Boyd* decision and quoted earlier in this article. *See* note 36 *supra* and accompanying text.

102. *Boyd*, 116 U.S. at 623-38.

103. This use of history and precedent in a formalist opinion like *Boyd* is not identical to the historical contextualism of pragmatism. *See, e.g.*, Grey, *supra* note 39, at 12 (discussing the contextual element of pragmatist theory). Pragmatism emphasizes the significance of social context. Any reasonable pragmatist undoubtedly accepts history as a source of useful information about the relevant social context. *See* Dewey, *supra* note 48, at 31 (proposing use of "antecedent material and rules as guides of intellectual analysis but not as norms of decision"). But the unmistakable focus is on the here and now,

The Court used property law rules and concepts to define substantive Fourth Amendment rights. The government was entitled to search for and seize only those things in which it had a legally cognizable property interest. It had such an interest in contraband, imported goods on which duties had not been paid, certain "required records," and stolen property. But it had no such interest in the Boyds' private business records, which the government sought merely to use as evidence, and not under any claim that it held a property interest in the papers.[104]

The government's authority to search and seize, and the people's right to be free from such intrusions, thus rested partially upon classifications derived from property law. These property-based concepts became a fundamental part of Fourth Amendment doctrine and were not abandoned unequivocally by the Supreme Court for eighty years.[105] Indeed, by the 1920s, the last full decade of the *Lochner* era, the relationship between property rights and liberty was outcome determinative in some of the Court's most important decisions.

This conception of property rights probably strikes the contemporary reader as archaic, and perhaps as wrong. Over the past half-century the opposite presumption has become conventional wisdom. It permits government to exercise expansive regulatory and police powers over private property rights to promote the public good.[106] But at the end of the nineteenth century a contrary set of beliefs was commonly held,[107] and these beliefs were embodied in the *Boyd*

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and the future. *See, e.g.*, DEWEY, *supra* note 56, at 4. (He noted that to understand how a flower grows we must learn about the interactions of soil, air, water and sunlight. All are elements of the flower's environment, but a particular flower's growth depends on conditions in this growing season, not past seasons.). *See also* JOHN DEWEY, RECONSTRUCTION IN PHILOSOPHY vii-xiii, xi-xiv (enlarged ed. Beacon Press 1948) (1920) (contrasting traditional Western philosophical views that morality is fixed and eternal with idea that it depends on time and place); PEIRCE, *supra* note 50, at 261 ("The rational meaning of every proposition lies in the future."). Legal pragmatism also proposed that we determine what is desirable by looking at the consequences of present choices.

Formalism, by contrast, is more backward-looking. *See* note 53 *supra*. In *Boyd* the justices used history not so much to focus upon the consequences of their choices, but as a source of controlling principles and rules. Nonetheless, *Boyd* only partially supported Dewey's complaint that resort to natural law "may denote an attempt to settle what is desirable among consequences by reference to an antecedent and hence fixed and immutable rule." Dewey, *supra* note 48, at 26. *Boyd* also represented an attempt to define these foundational principles and rules in the context of the actual historical experience that generated them.

104. *Boyd*, 116 U.S. at 623. "The two things differ *toto coelo*. In the one case the government is entitled to the possession of the property; in the other it is not." *Id.* The Court later expanded the list of property the government was entitled to search and seize to include the instrumentalities by which crimes were committed. *See, e.g.*, Gouled v. United States, 255 U.S. 298, 308 (1921).

105. *See* Katz v. United States, 389 U.S. 347, 352-53 (1967).

106. *See, e.g.*, ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 1-4 (1993) (summarizing some aspects of the growth of the administrative state since the New Deal); Thomas C. Grey, *The Malthusian Constitution*, 41 U. MIAMI L. REV. 21, 21-26 (1986) (criticizing Richard Epstein's constitutionally based argument for dismantling the welfare state through adherence to traditional property rights); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986) (tracing the rise of the modern regulatory state from the Populist and Progressive eras to the consumer-environmentalist era of the 1970s).

107. The influence of the views about the nature of judicial review of legislation and the proper scope of police powers that became dominant during the *Lochner* era had varied throughout the nineteenth century. Advocacy of broad judicial review powers competed—often unsuccessfully—with arguments in favor of judicial deference to the acts of democratically elected legislatures. Frequently, economic and political events influenced the growth and decline of competing visions of the scope of

opinion. Private and government actors alike acted within separate spheres of power.[108] Therefore, the exercise of government power was invalid if it intruded into the protected sphere of private property rights.[109] Yet even these strong private rights were not absolute. Government could intrude into the private sphere—it could search and seize—when the private actor had no legal right to possess the property (stolen property, contraband), when the government had a superior claim to the property (imported goods upon which taxes were not paid), when the property posed a significant threat to the public welfare (criminal instrumentalities), or when the property fell within the proper realm of the police powers (required records). But if the property fell into none of these categories, or if it was classified as private papers, it was secure from government intrusion. Property rights were not absolute, but they supported a strong conception of liberty and a weak conception of police powers.

Arguably, the Fourth Amendment conception of property rights announced in *Boyd* was even stronger—and therefore the police power in this realm even weaker—than were the analogous rights announced in *Lochner*. The *Lochner* majority acknowledged that a State could exercise its police power to protect the health of workers and the public in the proper circumstances. The state could regulate where the nature of the employment was sufficiently hazardous—underground mining—or where the regulation advanced some important interest—mandatory public inoculations against contagious diseases.[110] The *Lochner* majority merely concluded that in that particular case neither the ends nor the means chosen to achieve them could justify an intrusion upon constitutionally protected liberty and property rights.[111] But *Boyd* appeared to announce a categorical rule that government could not search for or seize property, particularly private papers, in which it had no possessory or other property interest, even when it could assert a rational basis for the intrusion. The Fourth Amendment erected substantive boundaries which the Court patrolled with a heightened scrutiny, rather than the mere rationality standard it typically employs today.[112]

police powers and the power of the judiciary to review the acts of the state and federal legislatures. For accounts of the evolution of police power theory in the courts during the nineteenth century, see HAINES, *supra* note 41, at 177-82; Rabin, *supra* note 106, at 1192-93.

108. *See, e.g.*, Rabin, *supra* note 106, at 1193, 1208-09, 1230 (describing the Court's ideological commitment to separate spheres of public and private interests).

109. *See* Grey, *supra* note 106, at 30-31 (contrasting the "classical liberal" view that ownership rights were "nearly absolute in force but quite limited in scope," with the contemporary view that property consists of a bundle of rights—the "infinitely divisible claims to possession, use, disposition, and profit").

110. Lochner v. New York, 198 U.S. 45, 53-56 (1905) (citing Holden v. Hardy, 169 U.S. 366 (1898), which upheld a state law mandating an eight-hour workday for underground miners, and Jacobson v. Massachusetts, 197 U.S. 11 (1905), in which the Court upheld a compulsory vaccination law).

111. *See* Rabin, *supra* note 106, at 1230-31 (discussing post-*Lochner* decisions in which the Supreme Court upheld the exercise of the police power to regulate economic activity).

112. The Supreme Court adopted a rational basis test for scrutinizing legislation "affecting ordinary commercial transactions," in United States v. Carolene Products Co., 304 U.S. 144, 152 (1938). The Court appeared to retain a higher level of scrutiny for legislation falling within the scope of the first ten Amendments. *Id.* at 152 n.4. For a discussion of the contemporary use of mere rationality scrutiny in Fourth Amendment case law, see notes 319-320 *infra* and accompanying text. *See also* Tracey

In the Fourth Amendment context even the powerful government interest in enforcing the criminal and revenue laws was insufficient to trump some rights based in property law. Thus the criticism frequently leveled at *Lochner*—that it sanctified property rights—arguably could be leveled even more strongly at *Boyd* and its progeny.

This attribute of Fourth Amendment case law should be of interest to those who complain that the Court's *Lochner* era due process theory erred by elevating economic and property interests to the level of fundamental rights, while contending that Fourteenth Amendment liberty does protect certain rights not related primarily to economic activity from state action. They include the intimate behaviors associated with marriage and procreation,[113] abortion,[114] and certain liberty interests relating to education possessed by teachers, students, and parents.[115] Although the Fourth Amendment protects fundamental rights to individual autonomy in noneconomic realms of life,[116] the *Boyd* decision is provocative precisely because it defined this realm of personal autonomy largely in terms of property rights. And this interpretive approach is consistent with the text of the Amendment, which specifically links some aspects of liberty and privacy to property, and a person's relationship to it.

One might dismiss this as merely an aberration, as an example of the "property fetish[ ]"[117] of that era. But before one dismisses *Boyd* too quickly, it is worth remembering the important role this decision has played in the history of the Fourth Amendment. It has been praised by prominent advocates of individual liberty like Justices Brandeis,[118] Frankfurter,[119] Black,[120] and Brennan,[121]

Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 199-200 (1993) (arguing that the Supreme Court applies a "test that approximates the rational basis standard").

113. Griswold v. Connecticut, 381 U.S. 479, 482, 486 (1965) (addressing "a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment," and striking down state statutes criminalizing the use of contraceptives by married couples and the distribution of information about contraception and contraceptives to married couples).

114. Roe v. Wade, 410 U.S. 113, 153 (1973) (The "right of privacy, whether it be founded in the Fourteenth Amendment[ ] . . . or . . . the Ninth Amendment[ ] . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

115. Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (finding that the liberty interests in education are part of "the liberty of parents and guardians to direct the upbringing and education of children under their control"); Meyer v. Nebraska, 262 U.S. 390, 394-401 (1923) (concluding that a state statute prohibiting foreign language instruction violated "the liberty guaranteed . . . by the Fourteenth Amendment"). Both *Meyer* and *Pierce* involved economic activity. Meyer earned his living as a teacher, and the private and parochial schools involved in *Pierce* were profitable economic entities. But the Court's opinions rested in large part upon a broad conception of liberty that was not primarily economic in nature. In *Pierce*, for example, the Court asserted that "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 535.

116. *See* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) ("There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth.").

117. *See* Amar, *supra* note 1, at 788 (criticizing the "property worship" of the *Lochner* era and noting that the "spirit" of *Boyd* and its progeny was "akin" to *Lochner's*).

118. Olmstead v. United States, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting) (stating that *Boyd* is "a case that will be remembered as long as civil liberty lives in the United States").

119. Davis v. United States, 328 U.S. 582, 606-08 (1946) (Frankfurter, J., dissenting) (citing *Boyd* as a seminal case for the protection of individual liberty).

none of whom is likely to be classified as a supporter of *Lochner*,[122] and continues to be cited by justices more than a century after it was decided.[123] *Boyd* has survived in Fourth Amendment discourse because of the power of its conception of individual liberty. This vision of liberty rested upon theoretical foundations shared with *Lochner*, including a belief in strong individual rights based upon natural law and common law sources, the theory that neither government power as limited by the Constitution nor mere social policies could defeat these indefeasible rights, the linkage of liberty and property rights, and the deductive application of rules derived from these foundational principles.

C. *Formalism and the Exclusionary Rule*

The primary contemporary remedy for violations of the Fourth Amendment is exclusion of evidence discovered as a result of government transgressions. The exclusionary remedy is at least implicit in *Boyd.* That opinion suggested a broad exclusionary rule: Even lawful means, including valid search warrants and subpoenas, could not justify compulsory production or seizure of any private property unless the government could establish that it had some property interest in the item. The facts at issue in *Boyd* also suggested a more specific exclusionary rule: The government could not search for and seize—directly or indirectly—private papers, even if it used otherwise lawful means. Whether broad or narrow, a constitutional rule of exclusion conflicted with the then prevalent common law rule of evidence. This latter rule was central to the Court's next important search and seizure decision.

Although the Supreme Court construed the Fifth Amendment privilege against self-incrimination in a series of important cases in the 1890s,[124] after *Boyd* it issued no significant Fourth Amendment opinions until early in the next century. The first of these cases demonstrated the important role that common law rules could play in formalist reasoning.

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120. Schmerber v. California, 384 U.S. 757, 776 (1966) (Black, J., dissenting) ("The liberal construction given the Bill of Rights' guarantee in [*Boyd*] . . . makes that one among the greatest constitutional decisions of this court." (citation omitted)).

121. Lopez v. United States, 373 U.S. 427, 455, 459-60 (1963) (Brennan, J., dissenting) (citing *Boyd* as an important case for civil liberty and reaffirming the Court's adherence to its principles).

122. *See, e.g.*, Hugo Black, Jr., My Father: A Remembrance 82-84, 87-88 (1975) (relating Justice Black's efforts as a senator to enact legislation to shorten working hours, abolish child labor, and establish a minimum wage); Gunther, *supra* note 6, at 445 (describing Justice Brandeis as one of the prominent dissenters from Supreme Court decisions that struck down statutes regulating economic activity); Roger K. Newman, Hugo Black: A Biography 144-45, 154-56, 175-83, 224-30 (1994) (describing Black as an ardent supporter of New Deal reforms).

123. Some prominent examples from recent cases include: Florida v. Bostick, 501 U.S. 429, 440 (1991) (Marshall, J., dissenting) (citing *Boyd* for the proposition that "the effectiveness of a law enforcement technique is not proof of its constitutionality"); Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 474 (1990) (Stevens, J., dissenting) (citing *Boyd* for the proposition that government intrusions that seem "diaphanous today may be intolerable tomorrow"); Brower v. County of Inyo, 489 U.S. 593, 596 (1989) (citing *Boyd* to support the proposition that the Fourth Amendment addresses intentional misuses of government power); Florida v. Riley, 488 U.S. 445, 462 (1989) (Brennan, J., dissenting) (citing *Boyd* for the proposition that the Fourth Amendment protects a person's indefeasible right of personal security).

124. Bram v. United States, 168 U.S. 532, 542 (1897); Brown v. Walker, 161 U.S. 591, 610 (1896); Counselman v. Hitchcock, 142 U.S. 547 (1892).

In *Adams v. New York*[125] the defendant challenged his conviction under state anti-gambling laws, arguing that the search, seizure, and use of his private papers violated the Fourth and Fifth Amendments and, therefore, violated the Privileges and Immunities, Due Process, and Equal Protection Clauses of the Fourteenth Amendment.[126] Police officers with a warrant for gambling paraphernalia had searched the defendant's office and had seized both policy slips used for illegal gambling and private papers not covered by the warrant. Adams objected to the seizure of these private papers and their introduction into evidence.

Adams' legal arguments relied on *Boyd*, and both the spirit and the letter of the opinion supported his position. The police had engaged in a literal search and seizure, and this was a criminal case. *Boyd* had stressed that it was not the means used by the government, but the nature of the citizen's privacy interests that mattered, and had established a rule prohibiting seizure or compulsory production of private papers for use as mere evidence. For the government to prevail under *Boyd*, it would have to establish some property interest in the items seized. It had no such interest in the private papers, but it could seize the policy slips as instrumentalities of a crime.

A unanimous Supreme Court ruled against Adams on every issue. Although the Court could have avoided construing the relevant provisions of the Bill of Rights because the case involved state rather than federal actors,[127] the opinion took another approach. The justices did "not feel called upon to discuss" the Fourteenth Amendment incorporation issues because they concluded that the use of these private papers as evidence violated neither the Fourth Amendment nor the Fifth Amendment.[128]

The *Adams* Court did not overrule *Boyd*. Instead, it distinguished *Boyd*[129] and concluded that a contradictory common law rule of evidence was controlling. A line of cases decided primarily by state courts had enunciated a common law evidence rule dictating that "the courts do not stop to inquire as to the means by which the evidence was obtained."[130] This rule prohibited collateral judicial inquiry to determine whether evidence offered in court had been obtained unlawfully. As long as the evidence was relevant, material, and competent, it was admissible even if obtained unlawfully.[131] Defendants whose property rights had been violated were left with civil trespass actions (and perhaps criminal prosecutions of the trespassers) as their only remedies.[132]

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125. 192 U.S. 585 (1904).

126. *Id.* at 587-88.

127. In 1904 the Court still adhered to the rule that the Bill of Rights only limited the federal government. Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 153, 156-57 (1833).

128. *Adams*, 192 U.S. at 594.

129. *Id.* at 597-98; see notes 138-139 *infra* and accompanying text. The Court's analysis provides a good example of the strong formalist tendency to resolve new cases by drawing analogies to existing law rather than by considering substantive reasons. *See, e.g.*, SUMMERS, *supra* note 33, at 138-39.

130. *Adams*, 192 U.S. at 594.

131. *Id.* at 594-95.

132. *Id.* at 596.

The Court could reach this decision without overruling *Boyd* because of both the factual complexity of experience and the existence of alternative rules relevant to different attributes of the same event.[133] The existence of rules that dictated alternative outcomes for the same event allowed formalist judges flexibility within the system of rule-based decisionmaking.[134] Rules are generalizations that address both the future and the past.[135] As generalizations rules emphasize some characteristics of both the rule-generating events and those to which the rule will be applied in the future, while suppressing other characteristics of those events. A decisionmaker may conclude that the properties suppressed by a particular rule are relevant to the events in the instant case, and choose to apply an alternative rule that emphasizes those relevant characteristics while suppressing others accentuated by the rejected rule.[136] This enables the decisionmaker to avoid the result indicated by the rule. The opinion in *Adams* employed this technique, distinguishing the facts of the case from those cited by the Court in *Boyd*, while emphasizing the facts relevant to the application of the common law rule permitting admission of the evidence.

After asserting that the "weight of authority" supported the rule against collateral inquiry,[137] the Court distinguished *Boyd* on its facts, noting that *Adams*

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133. *See, e.g.*, Hart, *supra* note 32, at 610 (stating that a judge who succumbs to formalistic decisionmaking in the penumbral area of a rule's meaning "either does not see or pretends not to see that the general terms of this rule are susceptible of different interpretations and that he has a choice left open uncontrolled by linguistic conventions").

134. *See, e.g.*, Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life 188 (1991) (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* Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for The Worse?*, 41 Stan. L. Rev. 871, 888-89 (1989) (stating that past cases can exemplify an "infinite number of rules" that an interpreter can select consistent with precedent, so long as the interpreter denies "that there are any natural . . . or conventional categories that would limit the rules he might choose").

135. For a discussion of the temporal issue, see MacCormick, *supra* note 53, at 75 (explaining that the constraints that formal justice imposes are "forward looking as well as backward-looking").

136. Forty years ago the posted speed limits on some highways in this country was "reasonable and proper." *See, e.g.*, Iowa Code Ann. § 321.285 (West 1949). The statute's legislative history states that the speed limit on Iowa highways was "reasonable and proper" until 1957, when the legislature imposed a speed limit of "[s]ixty miles per hour from sunset to sunrise." Iowa Code Ann. § 321.285(5) (West Supp. 1965). Today most speed limits are numerical and 55 miles per hour is still common on many roads. The contrasting speed limits—55 miles per hour and reasonable and proper—serve as useful examples of the ways rules emphasize or suppress attributes of relevant events. 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 characteristic the numerical rule also requires the rule applier to disregard characteristics of a particular driving experience that would be relevant 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 numerical rule because of these reasons would be ignoring the generalization embodied in the rule precisely because she chose to emphasize these characteristics suppressed by the rule.

137. *Adams*, 192 U.S. at 594. The common law rule was itself the subject of criticism in the nineteenth century. One provocative criticism argued that the no collateral inquiry rule rested upon a misreading or miscitation of earlier cases that had nothing whatsoever to do with the search and seizure

involved a warrant-based search and seizure by government agents, and not a judicial subpoena compelling citizens to produce their own records.[138] Of course, the existence of a literal search and seizure would seem to make *Adams* a more appropriate candidate for exclusion of evidence under the Fourth Amendment than was *Boyd.* But a search warrant does not compel a person to produce the evidence—as does a subpoena—and therefore does not require conduct implicating the Fifth Amendment prohibition against compulsory self-incrimination.[139] The Court's emphasis upon the officers' use of a warrant is also noteworthy because it serves as a harbinger of its later reliance upon the Warrant Clause to determine whether government conduct violates the Amendment. A valid warrant was the procedural prerequisite for a lawful search.

The opinion emphasized that the officers had discovered Adams' papers while executing a valid search warrant for gambling paraphernalia. Even *Boyd* had recognized the validity of government searches for and seizures of criminal instrumentalities. The Court stressed that the means employed were legitimate and the government had a recognized interest in the property described in the warrant. Because the government was executing a lawful warrant for gambling equipment—the instrumentalities of a crime—it could seize other evidence it discovered in the search.[140] The government had no property interest in Adams' private papers, but it could seize them as well.

The *Boyd* and *Adams* opinions selected different rules indicating inconsistent results. The choice between conflicting rules relevant to a specific event can appear to be arbitrary, particularly when the legal system does not arrange the alternative rules in an explicit hierarchy. In *Boyd* and *Adams*, for example, the justices obviously disagreed about the hierarchy in which the relevant rules were arrayed.[141] Often a judge's hierarchical arrangement of rules rests upon a value choice, and one of the virtues of formalist opinions like *Boyd* and *Adams* is that the dispositive value choices were apparent. One may disagree with the decisionmakers about these value choices, but at least they can be identified. For example, *Boyd* rested upon an explicit value choice protecting individual

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of private property. *See, e.g.*, J. F. Ramage, *Evidence Illegally Obtained*, 42 CENT. L.J. 392 (1896). *But see* Comment, 46 CENT. L.J. 211 (1898) (discussing a state court opinion disputing this interpretation of the seminal cases and refusing to exclude illegally seized evidence).

138. 192 U.S. at 597-98.

139. *Id.* In contrast to *Boyd*, the Court held that the government had not violated the Fifth Amendment because the defendant "was not compelled to testify" in the criminal case. *Id.* at 598.

140. *Id.* This reasoning suggests the contemporary "plain view" doctrine. *See, e.g.*, Horton v. California, 496 U.S. 128, 133-42 (1990) (holding that the Fourth Amendment does not prohibit the seizure of evidence in plain view even if discovery was not inadvertent); Arizona v. Hicks, 480 U.S. 321, 326-28 (1987) (using the probable cause standard to define when it is immediately apparent that property is related to crimes); Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971) (holding that items inadvertently found in plain view that were not included in a search warrant may be seized if it is immediately apparent that they constitute evidence).

141. *See* SCHAUER, *supra* note 134, at 190-91 (arguing that the rule with local priority will typically prevail over the more general one 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 requirement, 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 automobile exception to the general rule requiring warrants should not apply to a search of the contents of a package within an automobile).

liberty and privacy from government intrusions, while *Adams* suppressed those values to permit government agents to exercise more power, and to permit admission of evidence relevant to determining truth in the dispute.[142]

These Fourth Amendment formalist decisions thus contradict one criticism leveled at *Lochner's* substantive due process reasoning: The majority opinion in *Lochner* allegedly rested upon the political and social values of the majority, but disguised this choice by claiming to be applying mandatory, fundamental, legal rules.[143] When one reads *Lochner* with the turn-of-the-century Fourth Amendment cases in mind, it becomes apparent that the majority's value choice in *Lochner* also was explicit. The majority opinion described the rights of the employer and employee in terms of liberty, and contrasted those rights with the states' police power to enact legislation advancing legitimate health, safety, and welfare programs.[144] The majority openly justified its decision in terms of rules favoring liberty[145] and deployed these rules to explain why the social policy arguments offered by the laws' proponents were not sufficient to trump these fundamental values.[146]

Making a choice from among rules to advance a preferred value is an instrumental use of law,[147] and from the contemporary perspective it is tempting to classify *Adams* as an example of pragmatist decisionmaking in which the

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142. The conception of discrete spheres of rights and powers supplied one of the justifications for the no collateral inquiry rule, and it is a justification that seems archaic today. The Fourth Amendment and its equivalent provisions in state constitutions limit government conduct, but not the conduct of private actors. Today a search by a government agent is considered a government search. According to some nineteenth century judges, an illegal search, even by a government agent, did not constitute government conduct and, therefore, the citizen's constitutional rights were not violated even by the unlawful search and seizure. *See, e.g.*, Williams v. State, 28 S.E. 624 (Ga. 1897):

> If an official, or a mere petty agent of the State, exceeds or abuses the authority with which he is clothed, he is to be deemed as acting, not for the state, but for himself only; and therefore he alone, and not the state, should be held accountable for his acts. If the constitutional rights of a citizen are invaded by a mere individual, the most that any branch of government can do is to afford the citizen such redress as is possible, and bring the wrongdoer to account for his unlawful conduct.

Id. at 627.

143. *See* note 75 *supra.*

144. *See* Lochner v. New York, 198 U.S. 45, 53 (1905) ("The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment. . . . The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right." (citation omitted)).

145. *See id.* at 53-54, 56-58, 64.

146. The *Lochner* Court did not characterize liberty of contract as a right that never could be defeated by legislation designed to advance health, safety, and welfare. Indeed, it stressed that "[b]oth property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State" in the proper exercise of its police powers without interfering with the rights protected by the Fourteenth Amendment. *Id.* at 53. The majority concluded that the reasons advanced in support of the New York statute simply were not sufficiently compelling to defeat a fundamental liberty right. It offered several justifications. It noted that the Court had upheld state legislation regulating dangerous forms of employment, like underground mining. *Id.* at 54-56. Working as a baker, on the other hand, was not as unhealthy for the employees. Similarly, there was no connection between limiting the baker's work day to ten hours and protecting the health and safety of the public. *Id.* at 57-62.

147. Any legal decision can, and probably does, serve some instrumental functions. This was true for formalist reasoning, and leading pragmatist critics of formalism recognized this. *See, e.g.*, Dewey, *supra* note 48, at 25-26 (describing instrumental functions served by seventeenth and eighteenth century natural law theories).

justices balanced competing interests and decided that the need to admit probative evidence of a defendant's guilt outweighed the defendant's private property rights and his individual interest in being free from government intrusions, particularly because the officers were acting pursuant to a valid search warrant. This is the approach the Court has used repeatedly in recent decisions limiting the scope of the exclusionary rule[148]—decisions that produce outcomes consistent with the result in *Adams*.

But treating *Adams* as an example of pragmatist decisionmaking commits the error of confusing the dominant legal consciousness of the contemporary era—which rests upon pragmatist ideas[149]—with the different legal consciousness prevalent at the turn of the century.[150] This error obscures rather than clarifies the nature of formalist decisionmaking. In *Adams* the Court did not justify its decision with the overt cost-benefit calculus that dominates contemporary debate about the exclusionary rule.[151] Instead it presented rule-based

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148. *See* Cloud, *Pragmatism, supra* note 1 at 226-47.

149. Here is a sampling of the commentary asserting that pragmatism permeates contemporary legal thought in this country: "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). "[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, *supra* note 33, at 35. Summers also has asserted that "[d]uring 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 bench and bar. Many of its tenets continue to be influential in the 1980s." *Id.* at 19. For other authorities on pragmatism's pervasive influence, see 1 POUND, *supra* note 49, at 91; Hart, *supra* note 32, at 606-12; Tushnet, *supra* note 31, at 1519-44; Unger, *supra* note 49, at 564-67.

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 works "in the context of a legal world in which 'we are all realists now.' " Peller, *supra* note 5, at 1152. His use of the term "realist" apparently includes leading pragmatist thinkers. *Id.* at 1225 nn.149-50 (citing Holmes and Pound); Peller, *supra* note 33, at 308 (Pound and Felix Cohen). For additional discussion see Moore, *supra* note 134, at 872 ("[T]hose badly misnamed 'Legal Realists' have changed significantly the way we now theorize about and practice law. Indeed, [they] 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."). These recent attributions of influence to legal realism reflect the significance of legal pragmatism, either indirectly, because legal realism is a descendant of pragmatism, or directly, because the legal realist label frequently may be a misnomer for pragmatism. *See, e.g.,* SUMMERS, *supra* note 33, at 36-37 (arguing that most legal realists are not "realists" in the traditional philosophical sense and we should treat them as pragmatic instrumentalists).

150. As recently as 1930 Jerome Frank complained that basic attributes of the formalist views about law and legal decisionmaking were still part of the conventional views dominant within the United States legal culture. *See* FRANK, *supra* note 58, at 10-12, 53-56.

151. Many recent judicial opinions assert that the sole purpose of the exclusionary rule is to deter police misconduct and conclude that the benefits of applying the rule must outweigh its costs. *See, e.g.,* United States v. Leon, 468 U.S. 897, 918-21 (1984) (allowing good faith reliance on a search warrant lacking probable cause); Nix v. Williams 467 U.S. 431, 444-46 (1984) (allowing admission of unlawfully discovered evidence if the state can establish that it would have inevitably discovered the evidence lawfully). Some scholars have responded by subjecting the exclusionary rule to empirical analysis. *See, e.g.,* Thomas Y. Davies, *A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests,* 1983 AM. B. FOUND. RES. J. 611, 619-24 (arguing that the number of arrests "lost" due to the exclusionary rule is lower than critics assume; concluding that the rule's cost is marginal); Myron W. Orfield, Jr., Comment, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers,* 54 U. CHI. L. REV. 1016, 1054 (1987) (concluding that while the exclusionary rule has costs, when "reinforced by institutional practices

arguments both rejecting and distinguishing *Boyd*'s exclusionary principles. The opinion was framed as a choice between conflicting rules that advanced competing values. This choice was justified by resort to classic common law case analysis, not as a policy choice arrived at by balancing interests.[152]

However, this choice among competing rules was not permanent, and when the Court abandoned the *Adams* "no collateral inquiry" rule, it adopted a clear exclusionary rule based upon the Court's reasoning in *Boyd.* That decision was *Weeks v. United States,*[153] commonly cited as the decision adopting the exclusionary rule in federal cases. The case is more significant for this article, however, because it reveals a return to the version of Fourth Amendment formalism articulated in *Boyd,* and because it added a building block to the interpretive theory emphasizing the Warrant Clause.

Weeks was suspected of illegal gambling activities. Local and federal agents acting without a search warrant entered his home and seized his personal property, including papers. Weeks filed timely pretrial motions for the return of his property and to exclude it from use as evidence at trial. The trial court ordered the return of the items it found were irrelevant to the criminal charge of using the mails to conduct an illegal interstate lottery. But the trial court admitted in evidence other items relevant to the charges against Weeks, including personal letters implicating him in the lottery scheme. The trial court adhered to the "no collateral inquiry" rule followed in *Adams.*

A unanimous Supreme Court held that the denial of Weeks' motions and the use of his personal correspondence as evidence at trial violated the Fourth Amendment.[154] The Court embraced *Boyd's* emphasis upon the history of the Amendment and the values it embodied, and confirmed that these background justifications had produced indefeasible rights embodied in mandatory rules:

> The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.[155]

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also prompted by the rule, [it] deters unlawful police searches" by officers in the Narcotics Section of the Chicago Police Department); Richard A. Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases,* 57 WASH. L. REV. 635, 638-41 (1982) (applying economic analysis to argue that the exclusionary rule is a "deadweight loss" and "produces overdeterrence").

152. Similarly, the *Lochner* Court did not balance competing interests. It defined separate spheres of rights and powers, then decided which prevailed in that dispute:

> Therefore, when the State, by its legislature, in the assumed exercise of its police powers, has passed an act which seriously limits the right to labor or the right of contract . . . it becomes of great importance to determine which shall prevail—the right of the individual to labor for such time as he may choose, or the right of the State to prevent the individual from laboring or from entering into any contract to labor, beyond a certain time prescribed by the State.

Lochner v. New York, 198 U.S. 45, 54 (1905).

153. 232 U.S. 383 (1914).

154. *Id.* at 398. "Among the papers retained and put in evidence were a number of lottery tickets and statements with reference to the lottery . . . and a number of letters written to the defendant in respect to the lottery . . . ." *Id.* at 388-89.

155. *Id.* at 393.

The Court's value choice treated these "principles of humanity and civil liberty"[156] as the source of rules that trumped both social policies favoring efficient law enforcement and the conflicting evidentiary rule it had relied upon in *Adams*. The Fourth and Fifth Amendments imposed mandatory duties upon the federal courts (and other federal officials) to enforce the Constitution's restraints upon the exercise of government power, particularly in light of the "tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions."[157]

The Court concluded that both preconstitutional history and its own decisions had established the fundamental principles "that a man's house was his castle"[158] that could not be searched unless authorized by a warrant, and that papers were fully protected by the Fourth Amendment. Because the government had obtained Weeks' papers by a warrantless search of his home, the papers had to be excluded as evidence and returned to the defendant. The Court here translated the broad principles of personal liberty announced in *Boyd* into clear, mandatory, formal rules.

In contemporary theory, the home is still the place where the Fourth Amendment provides the most protection for privacy and liberty.[159] This is not inconsistent with the Amendment's text, and seems to comport with any reasonable understanding of the nature of private behavior and personal autonomy. Where else but the home ought we expect to be most free from governmental intrusions? The home is the site where locational privacy is most important. Property and privacy rights coexist here, and *Weeks* confirmed that government must at least satisfy the Fourth Amendment's most stringent procedural requirements before it can intrude in this place.

But *Weeks* is not remembered as an opinion establishing that principle; it is best known today as the decision in which the Court explicitly announced a Fourth Amendment exclusionary rule. The opinion seemed to reject the common law rule that a court would not conduct a collateral inquiry into the means by which otherwise admissible evidence was obtained.[160] Nonetheless, the

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156. *Id.* at 391 (quoting Bram v. United States, 168 U.S. 532, 544 (1897)).

157. *Id.* at 392.

158. *Id.* at 390.

159. *See, e.g.*, Payton v. New York, 445 U.S. 573, 589-90 (1980) ("In [no setting] is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home . . . . [T]he Fourth Amendment has drawn a firm line at the entrance to the house.").

160. During the *Lochner* era the *Weeks* decision drew a mixed response from commentators and lawmakers in the United States. Dean Wigmore was the most prominent academic critic of the exclusionary rule. *See, e.g.*, 4 John Henry Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law §§ 2183-2184 (2d ed. 1923); 4 John Henry Wigmore, A Treatise on the System of Evidence in Trials at Common Law § 2264 (1st ed. 1905); John H. Wigmore, *Using Evidence Obtained by Illegal Search and Seizure*, 8 A.B.A. J. 479, 481-84 (1922); *see also* Knute Nelson, *Search and Seizure:* Boyd vs. United States, 9 A.B.A. J. 773, 776 (1923). Other commentators favored the doctrine. *See, e.g.*, Osmond K. Fraenkel, *Concerning Searches and Seizures*, 34 Harv. L. Rev. 361, 372, 385 (1921) [hereinafter Fraenkel, *Concerning Searches and Seizures*]. Still others neither favored nor disapproved it. *See, e.g.*, 4 Burr W. Jones, Commentaries on the Law of Evidence in Civil Cases §§ 2075-2079 (James M. Henderson ed., 2d ed. 1926);

Several states also adopted the exclusionary rule. *See* Thomas E. Atkinson, *Prohibition and the Doctrine of the* Weeks *Case*, 23 Mich. L. Rev. 748, 764 (1925) (disputing the accuracy of the "common statement that the great weight of authority in the state courts" is against the exclusionary rule and

Court avoided overruling *Adams*. It distinguished the facts of the two cases: *Weeks* involved a warrantless search, but in *Adams* the investigating officers had possessed a valid search warrant.[161] The legitimacy of a search depended, in part, on compliance with the Warrant Clause, and this allowed the Court to distinguish *Adams* without overruling it. The *Weeks* opinion also emphasized the rights-based formalism of *Boyd*, including the nexus between property and liberty rights.

Although a valid warrant was necessary to justify the search of Weeks' home, even a warrant could not authorize a search for some property. The Court reaffirmed that compulsory production of private papers, whether done by warrant or subpoena, embodied the substance of a Fourth Amendment violation.[162] A warrantless seizure of papers violated the Constitution, and a seizure of papers could be unlawful even if conducted pursuant to a "warrant supposed to be legal."[163] Full compliance with the Amendment's *procedural* requirements could not justify intrusions upon some kinds of property because the prohibition against *unreasonable* searches and seizures also has a *substantive* dimension.

Papers received special constitutional protection. Although the evidence in dispute in *Weeks* included other kinds of property, the opinion focused on the private papers seized by the government. The most important were letters written by a third party *to* the defendant.[164] The Court concluded that "[i]f letters and private documents can thus be seized and held and used in evidence against

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examining the cases to establish that a "careful examination of the cases will show that there is practically no preponderance on either side"); Osmond K. Fraenkel, *Recent Developments in the Law of Search and Seizure*, 13 MINN. L. REV. 1, 2-6 (1928) [hereinafter Fraenkel, *Recent Developments*] (concluding that by 1928 eighteen states had adopted the exclusionary rule, nineteen had rejected it, six were "non-committal," and five had not revisited the issue since *Weeks*, but had earlier rules adopting the no collateral inquiry rule).

161. *Weeks*, 232 U.S. at 395-96.

162. *Id.* at 397 (citing Hale v. Henkel, 201 U.S. 43, 76 (1906), which in turn cited *Boyd*).

163. *Id.* at 397.

164. *Id.* at 389, 393. Equating papers created by Weeks with letters written to him by a third party may have blurred common law distinctions between the recipient of a letter and the author developed in the context of civil disputes. The recipient owned the paper on which the letter was written, which was treated as his personal property. The sender, however, retained an author's right of first publication. *See* Mary Sarah Bilder, *The Shrinking Back: The Law of Biography*, 43 STAN. L. REV. 299, 325 (1991) (noting that under the common law the sender of a letter retains the copyright, "even though the recipient owns the physical object"); Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 211-12 & n.1 (1890) (explaining how courts had adopted property theory as the principle protecting publication of private letters); Note, *Personal Letters: In Need of a Law of Their Own*, 44 IOWA L. REV. 705, 705 (1959) (noting that the recipient of a letter might treat it "as he wishes so long as he does not violate" the sender's right of first publication); Alan Lee Zegas, Note, *Personal Letters: A Dilemma for Copyright and Privacy Law*, 33 RUTGERS L. REV. 134, 136-41 (1980) (noting the common law right of the sender of a letter to "first publication").

The *Weeks* Court may have considered the common law distinction irrelevant in the context of a government search for papers to be used as evidence in a criminal or quasi-criminal proceeding. The paper subpoened in *Boyd*, for example, was an invoice for an earlier shipment of glass, and the Boyds had cabled the English exporting firm that had shipped the glass to obtain a copy. The record is unclear, but it appears likely that this invoice had been prepared by the third-party shipper. Brief of the United States at 3-4, *Boyd*, 116 U.S. 616. This private paper was protected from search and seizure regardless of the author's identity.

a citizen accused of an offense, the protection of the Fourth Amendment . . . is of no value, and . . . might as well be stricken from the Constitution."[165]

From the perspective of Fourteenth Amendment doctrine, we might describe the decision as one employing varying levels of scrutiny to judge the constitutionality of government intrusions upon property rights. If the property consisted of papers, the Court employed something akin to strict scrutiny. Although the opinion seems to announce a rule even more restrictive than strict scrutiny—an absolute ban on searches for private papers—it is hard to imagine that compelling state interests would not prevail in some circumstances. The Court measured intrusions into the home and upon other kinds of property against a lower level of scrutiny, but one more restrictive than a mere rationality test.[166] A search or seizure was not constitutional simply because government actors could assert a rational basis for this conduct. Instead, the government had to satisfy both the procedural requirements set out in the Warrant Clause and substantive restrictions derived from property law.

Searches and seizures of property thus were subject to both procedural and substantive limitations. All intrusions had to satisfy the procedural rules. The substantive restrictions, however, established a hierarchical order based upon the nature of the property. Private papers sat at the top, immune from seizure unless they were stolen, contraband, or criminal instrumentalities. Property fitting into one of those categories lay at the bottom of the substantive hierarchy. Government could seize these items because it had a recognized property or possessory interest in them. And no matter where property fell in this pecking order, its physical location was relevant. Officers could seize contraband found in open fields without a warrant.[167] But they violated the Amendment by conducting a warrantless search for the same item in the suspect's home. The warrantless search for Weeks' private papers thus intruded into the most protected place to seize the most protected property, and even flunked the procedural test.

This analysis demonstrates that the common contemporary understanding of the famous *Weeks* decision is inadequate in three important respects. First, it overstates the decision's role in creating the exclusionary rule. The foundations for the exclusionary rule were established thirty years earlier in *Boyd*.[168] Sec-

165. *Weeks*, 232 U.S. at 393.

166. *See, e.g.*, United States v. Carolene Products Co., 304 U.S. 144, 152-53 (1938) (establishing rational basis test in which courts presume validity of statutes regulating economic activity); United States v. Lopez, 115 S. Ct. 1624, 1651 (1995) (Souter, J., dissenting) ("In reviewing congressional legislation under the Commerce Clause, we defer to what is often a merely implicit congressional judgment . . . 'if there is any rational basis for such a finding.' " (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 276 (1981)).

167. Hester v. United States, 256 U.S. 57, 59 (1924) ("[T]he Fourth Amendment . . . is not extended to the open fields.").

168. *See* text accompanying note 124 *supra*. Years before the Court's decision in *Weeks*, commentators cited *Boyd* as a precedent defeating the no collateral inquiry rule and supporting the suppression of evidence. *See, e.g.*, Ramage, *supra* note 137, at 393-95. More than a decade after *Weeks*, commentators still recognized that *Boyd*, not *Weeks*, laid the foundation for the exclusionary rule. *See, e.g.*, Forrest Revere Black, *An Ill-Starred Prohibition Case:* Olmstead v. United States, 18 GEO. L.J. 120, 122 (1930) ("[T]he federal exclusion rule is a creature of judicial decision in the Boyd case . . . ."); Chas. E. Carpenter, *Search and Seizure—Admissibility of Evidence Illegally Obtained:* The State of

ond, it glosses over the differences between papers and other forms of property. Third, it ignores the formalist theories upon which the opinion was based.

In fact, failing to recognize the formalist origins of *Weeks* prevents us from fully understanding the Court's opinion. Contemporary critics of the exclusionary rule typically rely on pragmatist arguments, claiming that the costs to society of suppressing evidence outweigh the social benefits.[169] But suppression of evidence is perfectly sensible if we apply a strong definition of personal liberty grounded in private property rights. If the government is not entitled to seize some tangible item because it can assert no property or possessory interest in the thing, then of course the item should be returned to the person with a lawful right to possess it. And this becomes even more important if the property consists of personal papers that express a person's thoughts in written form. The exclusionary rule makes the *most sense* as a device for protecting liberty and privacy interests when those interests are firmly attached to a relatively absolutist view of property rights. It also makes the most sense when applied to papers, which can represent the nexus of Fourth Amendment rights and the Fifth Amendment privilege against self-incrimination. This nexus becomes even more important for understanding the implications of the next important example of Fourth Amendment formalism.

The opinion in *Weeks* was a logical extension of *Boyd's* Fourth Amendment formalism. But the Court would soon extend the property-based notion of liberty[170] even further, and in the process facilitate the eventual demise of the

Oregon v. McDaniel, 4 OR. L. REV. 160, 168 (1925) (stating that *Boyd* overturned the rule that the admissibility of evidence is not affected by the means by which it was obtained); Comment, *The Meaning of the Federal Rule on Evidence Illegally Obtained*, 36 YALE L.J. 536, 536-37 (1927) (stating that *Boyd* was the origin of the federal rule of exclusion).

169. Suppression of evidence serves only one purpose in the Court's recent decisions: deterring police misconduct. United States v. Leon, 468 U.S. 897, 916 (1984). The majority opinion in *Leon* exhibited a pragmatic concern with consequences by focusing upon statistical analyses of the impact of the exclusionary rule on the prosecution and conviction of suspected criminals, and exhibited relatively little concern for rights claimed by the defendants. *See id.* at 907 n.6. Earlier Supreme Court opinions recognized additional justifications for the exclusionary rule. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 651 (1961) (preserving the integrity of the judicial process listed as a justification for exclusion).

170. Common law property rules also could lead to decisions favoring the government. Justice Holmes' cryptic opinion in *Hester v. United States*, 265 U.S. 57 (1924) is a good example. Federal revenue agents trespassing on private property observed illegal liquor trafficking. *Id.* at 58. They chased the participants, arrested them, and recovered contraband alcohol. A unanimous Court concluded that there was no "illegal search or seizure" within the meaning of the Fourth Amendment for several reasons. *Id.* The final reason was the one for which the case is best known: The events had transpired in open fields, not in a home or other place protected by the amendment. *Id.* at 59. Although the parties relied upon the usual Fourth Amendment precedents in their arguments, the opinion cited no cases. The only legal authority cited was Blackstone, for the dispositive rule that the distinction between a house and open fields "is as old as the common law." *Id.* The distinction became known as the "open fields" doctrine, which dictates that the Fourth Amendment protects houses and their "curtilage," but not open fields, from warrantless searches and seizures. *See* United States v. Dunn, 480 U.S. 294, 301-03 (1987) (applying a four-factor test and holding that a barn was in open fields and not within the curtilage of the house and thus not protected by the Fourth Amendment); Oliver v. United States 466 U.S. 170, 183-84 (1984) (holding that "open fields" are not protected by the Fourth Amendment).

The other justifications for the decision in *Hester* anticipated doctrines the Court adopted nearly half a century later. Holmes concluded that no illegal search or seizure occurred because the criminals' own acts disclosed the evidence. *Hester*, 265 U.S. at 58. This reasoning is analogous to the contemporary view that the Amendment does not protect what one knowingly exposes to the public. *See* Katz v.

entire analytical construct. In *Gouled v. United States*,[171] the Court explicitly adopted a two-step analysis that built upon *Boyd* and *Weeks*. The Court concluded that a search or seizure of a home or office satisfied the Fourth Amendment only if two tests were satisfied. The first required compliance with the Fourth Amendment's Warrant Clause. Searches and seizures conducted pursuant to warrants satisfying the requirements of probable cause, particularity, and an oath, were defined as not unreasonable, and therefore not unconstitutional. The absence of a valid warrant, however, meant that a search or seizure was both unreasonable and unconstitutional.[172]

If the government satisfied this threshold requirement, a second inquiry still remained. A unanimous Court held that under *Boyd* and *Weeks* a valid warrant could authorize the search of a home or office for papers,

> only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken.[173]

The Court emphasized the central role played by property law concepts in Fourth Amendment analysis more emphatically than it had in *Boyd*. Even a valid search warrant could not justify the search of a home or office unless the government could demonstrate that the items sought could be classified as property in which the possessor could not assert a legitimate or superior interest. The Court reaffirmed that these categories of seizable property included stolen or forfeited property, property concealed to avoid payment of duties, required records, counterfeit currency, and various criminal instrumentalities, including burglars' tools, weapons, and gambling implements.[174] None of these classes of property were seizable because the government wanted to use them as evidence. They were only seizable because of their legal status as property in which the possessor either had no protected interest or an interest inferior to that possessed by the government or some other private citizen.

Boyd's interpretive linkage of the Fourth Amendment with the Fifth Amendment privilege against self-incrimination suggested that papers could be

United States, 389 U.S. 347, 351 (1967) (establishing the reasonable expectation of privacy standard). The Court's fact analysis in *Hester* suggests other contemporary doctrines, including the plain view and hot pursuit exceptions to the warrant rule. *See* Arizona v. Hicks, 480 U.S. 321, 326 (1987) (plain view); Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971) (plain view); Warden v. Hayden, 387 U.S. 294, 298-99 (1967) (hot pursuit as exigent circumstance). The *Hester* opinion thus has a very "modern" resonance. Yet at the same time the opinion rested in large part upon the hoary distinction between the home and its curtilage and open fields lying beyond the curtilage. For all of the opinion's modernity, constitutional doctrine again was defined in terms of property law concepts.

171. 255 U.S. 298 (1921), *overruled by* Warden v. Hayden, 387 U.S. 294 (1967).

172. 255 U.S. at 308. *Gouled's* little-known companion case, Amos v. United States, 255 U.S. 313 (1921) emphasized the importance of this threshold inquiry. Federal agents searched Amos' home without a warrant and seized liquor that violated revenue and prohibition laws. *Id.* at 314. Although the contraband liquor was lawfully seizable under the second prong of the *Gouled* analysis, the absence of a warrant dictated exclusion. *Id.* at 315-16.

173. *Gouled*, 255 U.S. at 309 (citing Boyd v. United States, 116 U.S. 616, 623, 624 (1886)).

174. *Id.* at 308.

treated differently from other tangible personal property. Papers, after all, possess inherent testimonial attributes. Most property does not. The *Gouled* Court explicitly obliterated this distinction, declaring that for Fourth Amendment purposes papers possess "no special sanctity" when compared to other forms of property.[175]

This conclusion was a double-edged sword. Officers armed with a valid warrant could search for and seize papers in which government had a legal interest. There could be no doubt that papers could be seized if they were classified as contraband or criminal instrumentalities. On the other hand, the Fourth Amendment prohibited the search and seizure of *any property*—not just papers—in which the government could not assert a superior interest, and which it wanted for use solely as evidence against the suspect.

The search and seizure of Gouled's papers, even with a warrant, violated the Fourth Amendment. Although at least one document might have been classified as the instrumentality of a crime, the government's asserted interest in all of the papers was solely to use them as evidence against the defendant. All property sought for use as "mere evidence" now was exempt from seizure under the Fourth Amendment.[176]

Even legitimate methods could not be used to invade some protected rights—and the nature of these rights was defined primarily by property law.[177] The Court held that the common law evidence rule barring collateral judicial inquiry about the means by which competent evidence was obtained could not outweigh a person's fundamental constitutional rights. "A rule of practice must not be allowed for any technical reason to prevail over a constitutional right."[178] Instead, the Court reaffirmed that constitutional provisions protecting liberty were to be liberally construed and proclaimed that it was deciding the case in "the spirit" of *Boyd*, *Weeks*, and other cases that had favored individual rights over government interests.[179]

Gouled was the "high water mark" of the theory linking private property and an expansive vision of liberty based on indefeasible rights.[180] But the rigid constraints placed on law officers by applying the "mere evidence rule" to all types of property contributed to the demise of the conceptual linkage between

175. *Id.* at 309.

176. The Court also rejected the common law collateral inquiry rule. *Id.* at 312-13.

177. *See, e.g.*, *id.* at 303-04 (emphasizing the liberty rights protected by the founders, the Fourth and Fifth Amendments, and the Court's decisions in cases such as *Boyd* and *Weeks*).

178. *Id.* at 313. In *Gouled*'s companion case, the Court similarly rejected the common law rule requiring a party to move for the return of his property before trial as a predicate for a trial motion for exclusion. Amos v. United States, 255 U.S. 313, 316-17 (1921).

179. *Gouled*, 255 U.S. at 304.

180. Some *Lochner* era commentators construed *Boyd* as establishing limits on government power that were broader than even the mere evidence rule defined in *Gouled*. For example, one author asserted that *Boyd* stood for the proposition that "any search and seizure is unreasonable that obtains evidence incriminating the person whose premises are searched." Note, *Seizure of Incriminating Evidence at Time of Prisoner's Arrest*, 24 HARV. L. REV. 661, 661 (1910). Of course, *Boyd* did not go this far. This author missed the significance of the property law analysis in *Boyd*, *see* text accompanying notes 104-123 *supra*, as well as the significance of papers as property, *see* notes 184-188 *infra* and accompanying text.

Fourth Amendment rights and property law.[181] This restriction on the power of police and prosecutors was so severe that inevitably it had to be discarded. One example should suffice. Imagine that police officers investigating a murder obtain a valid warrant to search the home of the primary suspect. While searching a cabinet in the home they discover what appears to be the instrumentality of the crime—let's say a bloody knife, along with a bloody shirt. The mere evidence rule authorized seizure of the knife and its use as evidence at the trial because it was classified as an instrumentality of the crime. But since the government possessed no recognized property interest in the shirt—it was not contraband, stolen property, or a criminal instrumentality—a rigid application of the rule would prohibit seizure of the shirt for use only as evidence against the suspect. As a practical matter, this broad limitation on the investigation and prosecution of crimes has little to recommend it when applied to all kinds of property.[182] It took nearly half a century, but eventually the Court abandoned the mere evidence rule.[183]

Gouled's extreme version of the mere evidence rule was flawed precisely because it obliterated the special character of papers, treating them as no different from any other type of property for Fourth Amendment purposes. Both *Boyd* and *Weeks* had restricted searches and seizures to the same legal classifications of property, but the outcomes in both cases turned on the right to seize papers, whose *contents* would be used as evidence against those who wrote or possessed them. The fact that the government wanted to seize inherently testimonial papers for use against Boyd and Weeks triggered the Fifth Amendment analysis that was critical to these earlier opinions. Indeed, in *Boyd* two justices dissented from the conclusion that the subpoena at issue violated the Fourth Amendment, but joined in the unanimous opinion that the subpoena for documents violated the Fifth Amendment privilege against self-incrimination.[184] This highlights an important distinction between papers and other types of property in the context of a government search for evidence.

The very nature of papers dictates that government efforts to obtain them for use in criminal cases usually will implicate both Fourth and Fifth Amendment issues. The Fifth Amendment prohibits government efforts to compel testimony.[185] The purposes underlying this prohibition go to the core of the

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181. *See, e.g.*, Russell W. Galloway, Jr., *The Intruding Eye: A Status Report on the Constitutional Ban Against Paper Searches*, 25 How. L.J. 367, 380-86 (1982) (discussing the "erosion" of the ban on paper searches); Note, *The Life and Times of* Boyd v. United States *(1886-1976)*, 76 MICH. L. REV. 184, 191 (1977) (noting the Supreme Court's eventual displeasure with a strict application of the mere evidence rule).

182. *See* United States v. Mills, 185 F. 318, 319 (C.C.S.D.N.Y. 1911) (suggesting in dictum that the seizure of bloody knife and shirt incident to arrest has always been permitted, but following *Boyd* in excluding the use of business books and papers in a criminal prosecution for conspiracy to evade import duties).

183. Warden v. Hayden, 387 U.S. 294, 300-10 (1967) (characterizing the mere evidence rule as inefficient and asserting that the Fourth Amendment does not require it because the Amendment's procedural protections are sufficient).

184. Boyd v. United States, 116 U.S. 616, 639-41 (1886).

185. In recent years the Supreme Court has explicitly limited the scope of the privilege against self-incrimination to evidence that is testimonial in nature. *See, e.g.*, Schmerber v. California, 384 U.S. 757, 761 (1966) (holding that only "evidence of a testimonial or communicative nature" is protected).

concepts of liberty embodied in the Bill of Rights. They include a philosophical belief in individual autonomy and human dignity that is partially implemented by the adversarial justice system, which requires that the government must produce its own evidence if it wishes to convict and punish a person for criminal activity, and that person cannot be required to assist in the process.[186]

The relevance of the Fifth Amendment is obvious if the government attempts to force someone to testify orally. But the analysis is more complicated when the evidence is contained in documents. When the potential evidence is papers, the government has two options if it wishes to obtain them without the voluntary cooperation of the possessor. It can obtain a subpoena, which involves direct compulsion that implicates the Fifth Amendment. The government is commanding a person to act, and to risk penalties for failing to act. This kind of compulsion is analogous to compelling someone to testify orally. Even the Court's recent subpoena cases, which rest upon a parsimonious view of how the Fifth Amendment protects papers, recognize that the act of producing documents pursuant to a subpoena can have testimonial characteristics.[187] Although the Supreme Court's recent decisions do not protect the *contents* of documents unless the government compels the defendant to create the document,[188] the Court's approach at the turn of the century seems intuitively correct and is more consistent with the history and background justifications of the Fourth and Fifth Amendments.

A very different kind of coercion exists when the government utilizes a warrant to search for documents. The possessor is not necessarily compelled to cooperate with the search for evidence; indeed she may not even be present during the search. The warrant process obviously implicates the Fourth Amendment, but also implicates the Fifth Amendment when we recognize the special character of documents.

The contents of documents, whether prepared by individuals for personal or business purposes, represent the physical manifestation of the author's ideas. As the expression of the drafter's thoughts, the *contents* of papers carry testimonial implications analogous to oral statements. The use of government power, whether by subpoena or warrant, to compel production of papers for use as evidence at trial, inevitably implicates the Fifth Amendment privilege held by the author. The author's thoughts, often expressed in words, are forcibly obtained for use against her. To permit this is to obliterate the values underly-

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186. The Supreme Court has often cited these purposes in its opinions interpreting the Fifth Amendment privilege. *See, e.g.*, Colorado v. Connelly, 479 U.S. 157, 176-77 (1986) (Brennan, J., dissenting); Miranda v. Arizona, 384 U.S. 436, 458-65 (1966); Bram v. United States, 168 U.S. 532, 543-45 (1897); Counselman v. Hitchcock, 142 U.S. 547, 563-66 (1892).

187. *See, e.g.*, Braswell v. United States, 487 U.S. 99, 104 (1988); *Doe*, 465 U.S. at 610-12. The Court's decisions over the past two decades have weakened substantially the constitutional protections for papers. *See, e.g.*, Andresen v. Maryland, 427 U.S. 463, 475-83 (1976); Fisher v. United States, 425 U.S. 391, 414 (1976). The Amendment also does not protect against disclosure of some documents whose creation is compelled by the government. Such "required records" have been exempted from the privilege at least since *Boyd*. *See Boyd*, 116 U.S. at 627.

188. *Doe*, 465 U.S. at 610.

ing both the Fourth and Fifth Amendments. When papers are the target, often both Amendments are implicated.

This is one of the Court's most important insights in the *Boyd* and *Weeks* decisions. The Fourth and Fifth Amendments both exist for the very purpose of limiting government power and augmenting individual autonomy; they rest upon comparable value choices. When the government searches for and seizes papers—property that embodies ideas that can be used to convict a person—both Amendments come into play.

This helps explain why the eighteenth century English case *Entick v. Carrington*[189] played a central role in both of these *Lochner* era opinions. *Entick* was important because it rejected searches directed at private *papers*.[190] General warrants were odious, but even specific warrants that named the person whose property was to be searched and seized were unreasonable when papers were the target.[191] The opinion recognized that some property was subject to seizure by the government for "the sake of justice and the general good,"[192] but this license did not extend to papers, even when they were needed to punish violations of seditious libel or criminal laws.[193] Lord Camden's opinion treated this special protection for papers as an established principle of English common law: "There is no process against papers . . . . [O]ur law has provided no paper-search to help forward the convictions."[194] This rule rested in part on the fact that papers embody the author's thoughts: allowing searches and seizures of papers exposed a person's "most valuable secrets" to government agents.

Thus the value choice that drove the decisions in *Boyd* and *Weeks* was consistent with a common law principle at least a century old, and with a case that was important in the framing of the Fourth Amendment. *Boyd*, therefore, was decided at the confluence of the two lines of pre-Revolutionary cases most directly linked to the drafting of the Fourth Amendment—the colonial writs of assistance cases[195] and the eighteenth century English cases involving the use of general warrants to search for papers.[196]

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189. Entick v. Carrington, 19 Howell's State Trials 1029 (C.P. 1765) (ruling that the search for and seizure of papers of a suspect accused of seditious libel was contrary to English law).

190. Carrington and other king's messengers entered John Entick's home forcibly, read his books and papers, and seized several hundred pamphlets and charts. *Id.* at 1030-32.

191. Most of the famous eighteenth century English search and seizure cases involved warrants that were general because they failed to identify the people who were the targets of the searchers. The warrant in *Entick*, however, specifically named him as the person whose property was the object of the search, and therefore was not general in this sense. *Id.* at 1034. For an analysis of the definition of general warrants in these cases, and its significance for Fourth Amendment theory, see Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 VA. L. REV. 869, 877-80 (1985).

192. *Entick*, 19 Howell's State Trials at 1066.

193. *Id.* at 1072-73.

194. *Id.* at 1073. In the years following *Boyd*, a number of state courts also recognized that the limitations on both searches and seizures and the power to compel incriminating evidence coalesce when papers are the object of government attention. *See, e.g.*, Blum v. State, 51 A. 26, 29-30 (Md. 1902) (tracing the *Boyd* doctrine as far back as the opinion in Rex v. Cornelius, 2 Strange 1210 (1795)).

195. *See* notes 88-89 *supra* and accompanying text.

196. The important pre-Revolutionary English cases also suggest substantive connections between the principles embodied in the Fourth and Fifth Amendments. *See, e.g.*, Wilkes v. Wood, 98 Eng. Rep. 489, 490 (C.P. 1763) (rejecting general paper searches as an example of forced self-incrimination).

Nonetheless, the *Boyd* and *Weeks* opinions both blurred the distinction between papers and other types of property. The extreme form of the mere evidence rule articulated in *Gouled* explicitly rejected the unique character of papers and lumped them together with all other property. This doomed the doctrine, for the linkage of the Fourth and Fifth Amendments was central to the reasoning in *Boyd* and *Weeks*.

Conversely, this reasoning suggests that most property can be the legitimate object of a valid search warrant, but some property—that which contains testimonial characteristics equivalent to oral testimony—cannot.[197] By severing the once well-established rule prohibiting paper searches[198] from the radical mere evidence rule of *Gouled*, it is possible to conceptualize a theory of the Fourth Amendment that provides the kinds of protections for privacy and autonomy described as long ago as *Entick*, that rests upon the values embodied in the Fourth and Fifth Amendments, and yet does not erect unjustifiable barriers to law enforcers. The Fourth Amendment formalists were correct in recognizing that the text links property and liberty. But ultimately they erred by choosing to treat all property equally for purposes of preserving the values embodied in this and other parts of the Bill of Rights, and this error played an important role in the eventual demise not only of the mere evidence rule, but also the theoretical construct of Fourth Amendment formalism.[199]

197. This discussion does not focus upon searches within homes, but the same principle applies. The early common law and Fourth Amendment cases linked papers and homes as the most protected kinds of property. *See, e.g.*, Asher L. Cornelius, The Law of Search and Seizure 12-15 (2d ed. 1930) (*Lochner* era treatise reviewing Anglo-American case law and other authorities); Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union 364-73 (6th ed. 1890). The home, of course, has long been treated as the place receiving the highest level of protection against searches and seizures. *See, e.g.*, Payton v. New York, 445 U.S. 573, 585-95 (1980). Homes can be searched, but only if the government satisfies the procedural requirements established in the Warrant Clause.

198. For a historically based discussion of the rule against paper searches which survived until the mid-1960s, see Galloway, *supra* note 181, at 382-88.

199. The Court did not abandon the mere evidence rule until 1967, six years after it imposed the Fourth Amendment exclusionary rule upon the states as part of the process of selective incorporation of parts of the Bill of Rights into the Due Process Clause. *See* Mapp v. Ohio, 367 U.S. 643, 655-60 (1961). Before 1961, the Court's Fourth Amendment decisions, therefore, commonly arose in federal prosecutions. Because federal criminal law applied to a limited number of crimes, prior to incorporation many of the search and seizure cases that reached the Supreme Court involved economic activity—albeit usually illicit activity. During the *Lochner* era, for example, the Court's cases involved: failure to pay import duties (Boyd v. United States, 116 U.S. 616 (1886)); corporate antitrust crimes (Hale v. Henkel, 201 U.S. 43 (1906)); illegal wagering (Weeks v. United States, 232 U.S. 383 (1914)); bootlegging and other violations of the prohibition laws (Olmstead v. United States, 277 U.S. 438 (1928); Marron v. United States, 275 U.S. 192 (1927); Carroll v. United States, 267 U.S. 132 (1925); Hester v. United States, 265 U.S. 57 (1924); Gouled v. United States, 255 U.S. 298 (1921)).

After incorporation of the Fourth Amendment and the exclusionary rule into the Due Process Clause of the Fourteenth Amendment, the Court's search and seizure decisions applied directly to investigations and prosecutions carried out by the states, and the Court began to review more cases involving garden variety crimes arising under state law. *See, e.g.*, Florida v. Bostick, 501 U.S. 429 (1991) (illegal drug trafficking); Arizona v. Hicks, 480 U.S. 321, 323 (1987) (theft); Massachusetts v. Sheppard, 468 U.S. 981, 984 (1984) (murder); Mincey v. Arizona, 437 U.S. 385, 387 (1978) (murder, assault, and narcotics violations); Coolidge v. New Hampshire, 403 U.S. 443, 445 (1971) (murder); Warden v. Hayden, 387 U.S. 294, 297 (1967) (armed robbery); Schmerber v. California, 384 U.S. 757, 758 (1966) (driving under the influence of alcohol). It is possible that the mere evidence rule, with its basis in

Of greater importance in bringing about the demise of formalism in all areas of legal theory, however, were the momentous social, political, and economic changes that occurred during the twentieth century,[200] and the attendant emergence of pragmatism as a theory popular among those who advocated social change. Indeed, as the successful advocacy of pragmatist ideas swept away old doctrines in philosophy, politics, economics, education, and elsewhere,[201] it was no surprise that it would supplant formalism in law as well.[202] It probably also should be no surprise that pragmatist ideas began to appear more frequently in Fourth Amendment case law within a few years after Justice Holmes was appointed to the Court.

III. PRAGMATISM EMERGES IN FOURTH AMENDMENT THEORY

In recent decades the Court has rejected the basic tenets of nineteenth century formalism, including the conception of indefeasible individual rights grounded in natural law and the common law, and the idea that decisions should be based upon formal reasons found within the legal system. Instead the Court now decides cases by employing consequential reasoning that emphasizes not individual rights but the instrumental use of the law to achieve social and government policy goals. The Court's consequential reasoning magnifies the importance of substantive reasons derived from sources extrinsic to the

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property rights, might have survived longer had the Fourth Amendment not been extended to entire classes of state law crimes, many of which were not primarily economic in nature.

200. For an interesting recent discussion of these issues, see HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 150-205 (1993). Professor Gillman rejects any proposals for a return to *Lochner* era jurisprudence precisely because it was the product of a set of assumptions about social equality and factions that were relevant to the early days of the Republic, but which are now irrelevant because of the economic and social changes of the 19th and 20th centuries.

> [T]his tradition was developed at a time when capitalist forms of production were in their infancy, and was grounded explicitly in the belief that commercial development in the New World would not lead to the kind of 'European' conditions that might justify special government protections for dependent classes. This was an assumption that was meaningful at the beginning of the nineteenth century but much less so by the beginning of the twentieth. The crisis in American constitutionalism that we associate with the *Lochner* era was triggered by the judiciary's stubborn attachment to what historical participants perceived to be an increasingly anachronistic jurisprudence, one that had lost its moorings in the storm of industrialization.

Id. at 11.

201. The impact of pragmatist theory has not, of course, been limited to the world of the law. *See, e.g.*, PATTERSON, *supra* note 48, at 486 (noting that although John Dewey was not one of the founders of the pragmatist movement, through his "profound influence on American public school education and its teachers he has probably done more than any of the founders to make it the typically American way of thinking").

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. The history of that scholarly and professional "revolt" has been chronicled extensively. Antiformalist theories of the era "cannot be fully understood without some sense of their relation to the ideas which dominated the nineteenth century." WHITE, *supra* note 16, at 11. *See* ATIYAH & SUMMERS, *supra* note 16, at 244-66; 1 POUND, *supra* note 49, at 21-27; 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).

202. *See* note 76 *supra*.

legal system and discounts the importance of formal reasons, including rules announced in earlier opinions. Rather than decide cases by identifying foundational principles and rules and applying them deductively, in the 1990s the Court is likely to balance interests, reasoning more like a policy-driven legislature than a nineteenth century court.[203]

At the beginning of this century, however, Supreme Court justices other than Holmes and Brandeis were more tentative when they used pragmatist reasoning to interpret the Fourth Amendment. Unlike recent opinions, which exhibit a robust instrumentalism and consequentialism, many of these early cases reveal a much more limited use of pragmatist ideas about law. Often these ideas were not the only justifications given for a decision; instead, justices employed pragmatist reasoning as a supplemental justification for a decision based primarily upon formalist analysis. Often the pragmatist arguments were used to fill gaps left by inartful or confused formalist reasoning. Formalist and pragmatist reasoning thus might be combined in these early cases, with the former used to bolster the more important traditional analysis.

The first of these opinions was *Hale v. Henkel*,[204] which the Court decided only two years after *Adams v. New York* and less than a year after *Lochner*. Hale refused either to testify or to comply with a grand jury subpoena for records of the corporation for which he was secretary and treasurer. He invoked the Fifth Amendment privilege against self-incrimination, but did not claim that the subpoena violated the Fourth Amendment. The Supreme Court held that only natural persons possessed the Fifth Amendment privilege, and corporations did not. The Court then concluded, apparently on its own motion,[205] that corporations *were* protected by the Fourth Amendment against unreasonable searches and seizures. These incongruous results were justified in a remarkable blend of formalist and pragmatist arguments.

The opinion rested in part upon formalist ideas about natural rights coupled with inconsistent conceptions about the nature of corporations. The Court first concluded that corporations were artificial entities not protected by the Fifth Amendment privilege against self-incrimination.[206] Unlike a natural person, whose natural rights existed before the creation of the state,[207] a corporation was an artificial creature of the state, and owed duties to its creator. The state was entitled to require its creation to produce information about its activities, and the Fifth Amendment did not dictate otherwise. This was consistent with a vision of a legal system in which actors, including the state, the individual, and

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203. *See* Aleinikoff, *supra* note 15, at 963-72; Cloud, *Pragmatism*, *supra* note 1, at 233-47; Strossen, *supra* note 1, at 1178-84.

204. 201 U.S. 43 (1906).

205. *Id.* at 70-71.

206. *Id.* at 74-75. For a discussion focusing upon this aspect of the opinion, see Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 592-93, 621-27 (1990).

207. *Hale*, 201 U.S. at 74.

the corporate entity, each possessed separate, distinct, sometimes mutually exclusive rights and powers.[208]

For Fourth Amendment purposes, however, the Court conceptualized the corporation as a natural entity, an association of natural persons gathered into a collective legal entity that "waives no constitutional immunities appropriate to such a body."[209] The Court decided that these immunities included the Fourth Amendment right to be free from unreasonable searches and seizures. The conflicting definitions of corporate personhood were palpably irrational, even to some members of the Court,[210] and this may have spurred the Court to turn elsewhere to find support for its decision.

The Court supplemented its formalist arguments with an overt use of pragmatist reasoning. For example, state authority to examine a corporation's books and records, and to compel a corporate employee to testify about corporate activities, was not justified solely on the grounds that the state had chartered this entity and therefore had a sovereign's power to investigate the activities of its creature. Pragmatic considerations of public necessity led to the same conclusion. The Court opined that a corporation's conspiracies to violate the recently enacted antitrust laws ordinarily could be proven only by the testimony of corporate agents or employees. Allowing a corporate officer to assert the Fifth Amendment privilege on behalf of the corporation "would practically nullify the whole act of Congress. Of what use would it be for the legislature to declare these combinations unlawful if the judicial power may close the door of access to every available source of information upon the subject?"[211]

The Court justified the use of subpoenas to obtain books and papers with a similarly pragmatic analysis: "[I]t would be 'utterly impossible to carry on the administration of justice' " without use of this device.[212] But the Court also used pragmatist arguments to justify its conclusion that the Fourth Amendment protected corporations, as well as natural persons, from *unreasonable* searches and seizures. Not only were corporations natural entities possessing Fourth Amendment rights, but they also were "a necessary feature of modern business activity, [whose] aggregated capital ha[d] become the source of nearly all great enterprises."[213] Just as public need dictated that corporations not possess the power to resist a valid subpoena, public necessity required that corporations be protected from oppressive investigations that prevented them from serving their social functions.

The introduction of pragmatist reasoning allowed the Court to consider the practical problems facing law enforcers and private citizens alike—in this case problems arising along with the emergence of the twentieth century regulatory

208. *Id.* at 74-75 (discussing distinctive and overlapping rights and powers of natural persons, corporations, states chartering corporations, and the national government's power over interstate commerce).

209. *Id.* at 76.

210. *See* note 214 *infra* and accompanying text.

211. *Hale,* 201 U.S. at 70.

212. *Id.* at 73 (citation omitted).

213. *Id.* at 76. Justice Harlan, the only justice remaining from the *Boyd* Court, wrote a concurring opinion exhibiting a similar combination of formalism and pragmatism. *Id.* at 77-79.

state. To the contemporary reader, this discussion of social needs and interests likely makes more sense than does the Court's preposterous classifications of the same corporation as both an artificial and a natural entity.

But formalist theory in fact provided the means for a more rational disposition of the case. Justice McKenna's concurring opinion demonstrated how formalist reasoning could produce a more internally coherent analysis—albeit one that offered business interests even less protection from government investigations. He concurred in the judgment, but complained that *Boyd* had established that the Fourth and Fifth Amendments were to be interpreted in light of one another. Therefore, if the Court were to adhere to the rule of that case, "and if its reasoning remains unimpaired . . . it would seem a strong, if not an inevitable conclusion, that if corporations have not such immunity they can no more claim the protection of the Fourth Amendment than they can of the Fifth."[214] In other words, faithful adherence to precedent dictated that, unlike individuals, corporations possessed neither right.

The majority opinion obviously did not formally apply the "rule" established in *Boyd.* As Justice McKenna pointed out, the Court's inconsistent application of the two Amendments to corporations made little sense in light of this precedent. It was sensible only as a pragmatic compromise between government regulatory and law enforcement needs and corporate interests in being free from unjustifiably broad subpoenas.[215] But the Court's pragmatist reasoning did not stand alone; it served rather as an added justification for an opinion couched largely in the conceptual language common in nineteenth century formalist reasoning.[216]

214. *Id.* at 83 (McKenna, J., concurring). The two dissenting justices cited *Boyd* in support of their arguments that corporations possess some constitutional rights. *See id.* at 83-87 (Brewer, J., dissenting). During the preceding two decades the Court had held that corporations were persons within the meaning of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Minneapolis & St. Louis Ry. v. Beckwith, 129 U.S. 26, 28 (1889); Santa Clara County v. Southern Pac. R.R., 118 U.S. 394, 396 (1886). Corporations' property rights were protected by the Fifth Amendment Due Process Clause. Noble v. Union River Logging R.R., 147 U.S. 165, 176 (1893).

215. *Hale,* 201 U.S. at 76-77. *See* Stephen A. Saltzburg, *The Required Records Doctrine: Its Lessons for the Privilege Against Self-Incrimination,* 53 U. Chi. L. Rev. 6, 37-38 (1986) (describing the decision in *Hale* as a "sensible compromise in [the Court's] treatment of corporations").

216. *Hale* lends some support to the argument that turn-of-the-century constitutional formalism attempted to implement a powerful conception of the nature of individual liberty rather than take sides in disputes between economic classes. For examples of the ongoing debate about the role of class politics in *Lochner* era Fourteenth Amendment decisionmaking, *see* Haines, *supra* note 41, at 151-52, 157-59; Sunstein, *supra* note 6, at 880-81.

Over the past quarter century, a number of scholars have offered revisionist theories challenging the argument that *Lochner* exemplifies radical judicial lawmaking supporting businesses and corporations in a class struggle with labor. *See, e.g.,* Mary Cornelia Porter, *Lochner and Company: Revisionism Revisited, in* Liberty, Property, and Government: Constitutional Interpretation Before the New Deal 11, 17-28 (Ellen Frankel Paul & Howard Dickman eds., 1989) (discussing various commentators' challenges to the portrayal of the *Lochner* era Court as pro-business and anti-labor). One revisionist argument posits that *Lochner* exemplifies the theory that government should act only for the general welfare, and should not act to benefit particular groups, factions, or classes. Some of these revisionist scholars trace this theory to the ideology of the Framers and to principles of Jacksonian democracy. *See, e.g.,* Gillman, *supra* note 200, at 33-60. Professor Gillman argues that the Court's decisions were not radical, but were based upon democratic theories well-established in legal theory and case law long before 1900; and these decisions did not support the ruling class, but attacked class preferences. He also provides a useful brief survey of some of the recent revisionist scholarship. *See id.* at 1-10; *see also*

Over time, pragmatist reasoning became more important in Fourth Amendment theory. The 1925 decision in *Carroll v. United States*[217] is the leading *Lochner* era example. Like *Hale v. Henkel,* this opinion combined pragmatist and formalist reasoning, but it is the pragmatist analysis of the issues in *Carroll* that survives in Fourth Amendment theory. The Court reasoned instrumentally to justify a socially desirable result. Instead of focusing upon the relationship between property rights, liberty, and privacy, the Court emphasized the social problems addressed by Congress in the prohibition laws and the difficulties facing executive branch members who enforced the laws in question, and created an exception to the warrant rule announced in earlier opinions.

Carroll was a prohibition case.[218] Federal agents stopped an automobile in which Carroll and a companion were travelling on a public highway. The

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Sunstein, *supra* note 6, at 874 (arguing that the *Lochner* Court considered neutrality a constitutional requirement and the government violated this requirement where it altered the common law distribution of entitlements).

Turn-of-the-century judges and commentators also traced the sources of their theories about Fourth Amendment liberty back to the Founders as well as to pre-Revolutionary English legal theory, including not just the famous eighteenth century cases, but also much earlier common law decisions and political disputes. *See* Andrew Alexander Bruce, *Arbitrary Searches and Seizures as Applied to Modern Industry,* 18 THE GREEN BAG 273, 273-76 (1906); notes 41-46 *supra* and accompanying text. From this perspective, *Lochner* represents an expansive notion of the fundamental right to be free from the improper exercise of government power. This conception of liberty can have varying appeal in different legal and factual settings. I suspect that many who reject *Lochner* and its ilk, yet find merit in substantive due process decisions protecting primarily noneconomic interests, including marital and procreative privacy, *see* notes 113-115 *supra* and accompanying text, might approve the broad conception of individual privacy and liberty that energized many of the Fourth Amendment cases of the era.

In some ways the Court's *Lochner* era Fourth Amendment decisions were consistent with this revisionist analysis. As *Hale* demonstrates, the Court was not unduly deferential to corporate and business interests. In fact, the search and seizure cases often protected the interests of individuals who could hardly be considered part of any economic elite. One of its most important decisions, for example, used property-based concepts to protect the privacy and liberty rights of a gambler. *See* Weeks v. United States, 232 U.S. 383 (1914). The Court analyzed the Fourth Amendment interests of bootleggers, gamblers, and other common criminals by employing the same kinds of theories and reasoning it employed under the Fourteenth Amendment to evaluate legislation regulating the activities of legitimate businesses and corporations. *See, e.g.,* VOORHEES, *supra* note 42, at 8 (stating that under our laws, "the humblest member of society has rights and remedies for the infraction of those rights, that are not exceeded by [those] of any other man, no matter how high his station").

217. 267 U.S. 132 (1925).

218. The advent of prohibition stimulated Fourth Amendment litigation. Federal officers now were charged to search for and seize a new class of contraband, probably the most widely used and popular contraband in the nation's history. As a result, the number of cases involving search and seizure issues exploded during the 1920s, as did the number of law review articles about search and seizure issues. *See, e.g.,* Ben Ely, Jr., *"Probable Cause" in Connection with Applications for Search Warrants,* 13 ST. LOUIS L. REV. 101, 117-19 (1928) (analyzing issues raised in the context of search warrants for intoxicating liquors); Fraenkel, *Recent Developments, supra* note 160, at 1 & n.2 (noting "the rapid development of the subject under prohibition" and citing more than two dozen articles on search and seizure published between 1922 and 1928); Glenn D. Roberts, *Does the Search and Seizure Clause Hinder the Proper Administration of the Criminal Justice?,* 5 WIS. L. REV. 195, 195-96 (1929) (noting the increase in criminal cases resulting from passage of the "Volstead Act and the various state dry laws" and asserting that no single "law has ever raised the almost innumerable constitutional questions which have arisen under prohibition"); *see also* Atkinson, *supra* note 160, at 774; Fraenkel, *Concerning Searches and Seizures, supra* note 160, at 372, 385; John B. Wilson, *Attempts to Nullify the Fourth and Fifth Amendments to the Constitution,* 32 W. Va. L.Q. 128, 128 (1926) (noting that search and seizure issues "were comparatively infrequent in the courts" before passage of the National Prohibition Act); John E. F. Wood, *The Scope of the Constitutional Immunity Against Searches and Seizures,* 34 W. Va.

agents searched the car and discovered illegal liquor, then arrested the two men. The Court affirmed the defendants' convictions for the misdemeanor of transporting illegal liquor.[219] The outcome depended upon the constitutionality of the warrantless seizure and search of the automobile. In deciding the case the Court announced what came to be known as the automobile exception to the warrant rule: "[I]f the search and seizure without a warrant are made upon probable cause . . . that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid."[220]

Chief Justice Taft began his opinion with a lengthy review of the legislative history of the prohibition statutes authorizing searches and seizures for liquor. The National Prohibition Act declared it unlawful to possess intoxicating liquor and provided that "no property rights shall exist in such liquor."[221] The statute thus employed a classification consistent with the property analysis central to Fourth Amendment formalism—liquor was contraband for which the government, not the private citizen, possessed the superior property interest. Government agents could seize this contraband as long as they used legitimate means. The opinions in *Gouled* and *Weeks* suggested that once the government's property right was established, a warrant was the procedural prerequisite for a valid search and seizure.[222]

The Prohibition Act authorized the issuance of search warrants, but provided that no warrant could issue to search a "private dwelling" unless the place was being used for the sale of intoxicating liquor (or for some other business purpose). The statute also commanded law officers who discovered liquor being transported in any vehicle to seize the contraband and the vehicle, and arrest the people involved.[223] A supplemental statute provided that officers enforcing the Prohibition Act committed a misdemeanor if they searched a private dwelling without a search warrant or searched any other building or property maliciously and without reasonable cause.[224]

L.Q. 1, 23 (1927) (discussing the development of "intoxicating liquor" as an object of search and seizure).

A number of these articles advocated the use of pragmatist methods in constitutional interpretation. *See, e.g.*, J. Newton Baker, *Searches and Seizures under the National Prohibition Act*, 16 Geo. L.J. 415, 421-31 (1928) (discussing search and seizure procedure and prohibition); Comment, *supra* note 168, at 536-37 (reporting that since the exclusionary rule derived from *Boyd* affected few cases prior to prohibition, the *Boyd* Court "was confronted with no practical difficulty in adopting a policy based purely upon history"). Others supported *Boyd*, *Weeks*, and the other leading formalist opinions and often criticized the Supreme Court and other courts for employing interpretive methods that were essentially pragmatist in nature. *See, e.g.*, Black, *supra* note 168, at 122-125 (condemning the *Olmstead* decision, discussed at notes 249-288 *infra* and accompanying text, as resting upon either one of two undesirable approaches: an instrumentalist use of law to obtain the conviction of the defendants or a desire to assist the social policy favoring prohibition); Forrest R. Black, *A Critique of the* Carroll *Case*, 29 Colum. L. Rev. 1068, 1070-71 (1929) (criticizing the *Carroll* opinion's use of instrumentalist justifications); *see also* Atkinson, *supra* note 160, at 748; John D. Carroll, *The Search and Seizure Provisions of the Federal and State Constitutions*, 10 Va. L. Rev. 124, 143 (1924).

219. *Carroll*, 267 U.S. at 134, 162.

220. *Id.* at 149.

221. *Id.* at 143.

222. *See* texts accompanying notes 162-163, 168, 171-173 *supra*.

223. *Carroll*, 267 U.S. at 143-44.

224. *Id.* at 144.

The Court concluded that these prohibition statutes authorized warrantless searches of automobiles,[225] and used both formal and substantive reasoning to justify its conclusion that such searches did not violate the Fourth Amendment.[226] The opinion both relied upon and distinguished the *Boyd* line of cases. Those cases, as well as numerous statutes, affirmed the right of government to search for and seize certain classes of property, particularly contraband, which a private citizen had no right to possess.[227] None of the Court's precedents requiring a warrant had involved the seizure of contraband in transit. Analogical reasoning from precedent combined with the well-established linkage of the Fourth Amendment to property law classifications provided the Court with formal reasons for upholding the government's interpretation of the statutes.

But the opinion ultimately rested upon a practical concern for the public welfare and the difficulties facing law enforcers, rather than upon a formalist construction of the scope of individual property rights. The Court concluded that officers must obtain search warrants where *reasonably practicable*, or act at the risk of personal liability.[228] But no search warrant was needed to justify the search of a vehicle—probable cause alone was sufficient—because the warrant requirement was not "practicable." By the time the officers had obtained a warrant the vehicle could "be quickly moved out of the locality or jurisdiction,"[229] allowing the criminals to escape with the contraband.

Forty years earlier the *Boyd* Court had rejected government arguments justifying searches and seizures because of society's interest in effective law enforcement. By 1925, the Court was more receptive to these pragmatic arguments, and its use of social needs rather than individual liberty interests to justify its decision seemed to represent a turn away from formalism and toward pragmatist reasoning.[230] *Carroll* reads like a "modern" opinion, anticipating

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225. The conference committee that drafted the final language of the supplemental statute had rejected a Senate amendment making it a misdemeanor for officers enforcing the prohibition laws to search *any property* without a warrant. The committee report cited statutes and the common law as authority for the legality of warrantless searches, *id.* at 145-46, and warned that the Senate language would seriously interfere with law enforcement in general, and would "cripple" efforts to enforce the Prohibition Act. *Id.* at 145. The Supreme Court quoted a lengthy passage from the report expressing concern about the practical consequences of prohibiting warrantless searches of automobiles:

> But what is perhaps more serious, it will make it impossible to stop the rum running automobiles engaged in like illegal traffic. It would take from the officers the power that they absolutely must have to be of any service, for if they can not search for liquor without a warrant they might as well be discharged. It is impossible to get a warrant to stop an automobile. Before a warrant could be secured the automobile would be beyond the reach of the officer with its load of illegal liquor disposed of.

Id. at 146.

226. *Id.* at 149 ("The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.").

227. *Id.* at 147-153.

228. *Id.* at 156. The Court thereby negated the requirement of a warrant announced in *Gouled.* *See* notes 171-183 *supra* and accompanying text.

229. *Carroll*, 267 U.S. at 153.

230. The Court's treatment of the relationship between societal interests and individual rights had a "modern feel," suggesting the recent turn to interest balancing in Fourth Amendment jurisprudence. The Court asserted that it would define unreasonable searches and seizures "in a manner which will

the Court's recent explicit use of pragmatist methods to construe the Fourth Amendment. The Court's focus upon the negative practical consequences of a rule requiring warrants for vehicle searches survives today as a primary justification for the automobile exception.[231]

The pragmatist treatment of the warrant requirement also anticipated the warrant model used by the Court to interpret the Fourth Amendment in the decades following World War II.[232] Although the majority in *Carroll* held that a statute could authorize a warrantless search of a vehicle because it was impractical to require a warrant, the opinion still relied upon the Warrant Clause to define the scope of this exception to the general rule. A warrantless search of a vehicle was justified only where the officers possessed probable cause, the quantum of information required to obtain a warrant. The Court thus crafted an escape route from the rigid warrant rule announced in *Gouled*,[233] but nonetheless limited the scope of the exception by reference to the specific requirements of the Warrant Clause. Forty years later the Court would use this approach as the primary method for interpreting the Fourth Amendment.[234]

The dissenting justices took a different view of the means used by the government, focusing upon the limits the common law had placed upon the power to arrest. Carroll was arrested for a misdemeanor, and the common law only permitted warrantless arrests for misdemeanors committed in the officers' presence. The majority finessed this rule in a circuitous analysis resting in part on the conclusion that the arrest followed discovery of the contraband, for which the officers had probable cause to search the automobile.[235]

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conserve public interests as well as the interests and rights of individual citizens." *Id.* at 149. This language seems to propose an accommodation of dichotomous interests. Yet, as is typical in the Court's recent balancing decisions, the interests claimed by the government outweighed the rights asserted by the individual.

231. *See* United States v. Johns, 469 U.S. 478, 483-88 (1985) (relying in part on *Carroll* in finding that a warrantless search of containers conducted three days after the seizure of the vehicle in which they were found did not violate the Fourth Amendment); United States v. Ross, 456 U.S. 798, 820 (1982) ("[T]he practical consequences of the *Carroll* decision would be largely nullified if the permissible scope of a warrantless search of an automobile did not include containers . . . found inside the vehicle."); Chambers v. Maroney, 399 U.S. 42, 51-52 (1970) (stating that, in light of *Carroll* and given probable cause, "we see no difference between" seizing a car and holding it until a magistrate issues a search warrant and carrying out an immediate search without a warrant).

232. *See* Cloud, *Pragmatism, supra* note 1, at 224 ("[I]n 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.").

233. *See* text accompanying note 172 *supra.*

234. *See* Katz v. United States, 389 U.S. 347, 354-55 (1967) (holding that the warrantless electronic surveillance conducted by FBI agents violated the Fourth Amendment even though it "was so narrowly circumscribed that a duly authorized magistrate . . . could constitutionally have authorized . . . the very limited search and seizure that . . . took place"). "The emergence of this model as central to fourth amendment theory is often traced to a series of dissents by Justice Frankfurter." Cloud, *Pragmatism, supra* note 1, at 224 n.103. *See* Davis v. United States, 328 U.S. 582, 605 (1946) (Frankfurter, J., dissenting) ("It is significant that . . . the Fourth Amendment [contains] a qualifying permission for search and seizure by the judicial process of the search warrant. . . . [t]he principle was that all seizures without judicial authority were deemed 'unreasonable.' "); *see also* Harris v. United States, 331 U.S. 145, 157-64 (1947) (Frankfurter, J., dissenting); United States v. Rabinowitz, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting). Examination of the Court's *Lochner* era cases demonstrates that the warrant model actually emerged early in the century.

235. Carroll v. United States, 267 U.S. 132, 156-62 (1925).

The dissenters disputed the conclusion that the facts provided the necessary probable cause, and objected to the use of utilitarian goals to justify the diminution of fundamental rights. The laudable goal of catching bootleggers could not justify the greater evil resulting from the warrantless searches of vehicles.[236] The dissenters argued that to allow an officer possessing mere suspicion of a misdemeanor to stop someone on the public highway, take articles away from him, and use them as evidence to convict him of a crime, would gut both the Fourth and Fifth Amendments.[237] Not surprisingly, they cited *Weeks, Gouled,* and other cases as sources of the exclusionary rule that should control this decision.[238] Ultimately the dissenters rejected the majority's pragmatist reasoning and advocated the kind of rigid rules protecting fundamental rights that were emblematic of *Lochner* era formalism.

Both Holmes and Brandeis joined the majority opinion in *Carroll,* and from one perspective this is not surprising. The Court's use of pragmatist ideas—the contextual emphasis upon social needs and policies, the instrumental focus upon achieving those policy goals, and the consequential concern with the practical impact of the decision—represent the kind of pragmatist analysis for which both frequently argued. But from another perspective, it would not have been surprising for Holmes and Brandeis to have dissented from the result in *Carroll.* One of the outstanding characteristics of the Holmes and Brandeis opinions—including dissents—interpreting the Fourth Amendment was that both frequently deployed pragmatist arguments in support of a broad vision of liberty and privacy, a vision ultimately as expansive as that announced in *Boyd, Weeks,* and *Gouled.*

An early example was Justice Holmes' terse opinion in *Silverthorne Lumber Co. v. United States,*[239] in which he focused not upon property rights, but upon the means the government used to obtain evidence and the practical consequences of approving those methods. The Silverthornes, father and son, had been indicted and arrested. Government agents then conducted warrantless searches of the offices of their lumber company and seized books and papers, which they later photographed. The trial court ordered the government to return the originals, but impounded the photographic copies over the defendants' objection. Relying upon knowledge gained from these events, the government obtained subpoenas for the original documents that had been returned to the defendants.

Justice Holmes focused almost entirely upon the government's methods and exhibited a pragmatist's emphasis upon consequences. He rejected the argument that a subpoena could be based upon illegally obtained evidence, because that would permit the government to achieve a result in two steps that it could not lawfully obtain in one.[240] He concluded that the government's conduct was

236. *Id.* at 163-70 (McReynolds, J., dissenting).

237. *Id.* at 169.

238. *Id.* at 169-70.

239. 251 U.S. 385 (1920).

240. The Fifth Amendment did not prohibit the subpoena, because the lumber company was a corporation. But *Hale v. Henkel* had also established the rule that corporations, like individuals, were

an "outrage," and that allowing warrantless searches and seizures to serve as the basis for a subpoena would reduce "the Fourth Amendment to a form of words."[241]

Holmes cast the Court's broadest holding in similarly functional terms: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."[242] Only six years after enunciating a broad exclusionary rule resting on formalist reasoning in *Weeks*, the Court used a pragmatist's consequential reasoning to reach a comparable result.[243]

One fundamental difference between the Court's reasoning in *Boyd* and *Silverthorne* warrants discussion. Formalist theory dictated that the property's legal status or classification determined whether it could be subpoenaed for use as evidence against the owner in a criminal or forfeiture proceeding. An otherwise legitimate subpoena was unconstitutional if the government could not establish a cognizable legal interest in the property, and some papers were immune from compelled production. This application of substantive rights erected a sometimes insurmountable barrier against searches and seizures. Holmes' opinion in *Silverthorne* ignored this conceptual approach, perhaps because the papers were corporate records, and focused solely on the legitimacy of the government's conduct. The outcome did not turn on whether the disputed documents were contraband, instrumentalities or evidence of criminal activity, or required records. The outcome depended upon the legitimacy of the means used by the government.[244] Under *Boyd*, a subpoena for papers was

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protected from unreasonable searches and seizures. *See* text accompanying notes 205-210 *supra*. Justice Holmes noted this rule, without citing the case. *Silverthorne*, 251 U.S. at 392.

241. *Id.* at 391-92.

242. *Id.* at 392.

243. Only a year after the decision in *Silverthorne*, however, the Supreme Court reemphasized the centrality of property concepts in search and seizure theory in *Gouled*. *See* notes 171-174 *supra* and accompanying text.

244. The Court had exhibited a similar focus upon means instead of property rights two years earlier in Perlman v. United States, 247 U.S. 7 (1918). The Supreme Court rejected Perlman's argument that the Fourth and Fifth Amendments were violated by court orders allowing the use of his papers and tangible personal property as evidence in a grand jury investigation. The grand jury was investigating charges that Perlman had committed perjury in earlier civil trials at which the papers and property had been introduced as evidence. *Id.* at 11. Perlman's argument, based upon *Boyd* and other cases, functionally equated property rights and Fourth and Fifth Amendment rights. He claimed that as owner of the property he was entitled to its return, and argued that the court orders granting custody to the grand jury and the United States Attorney were unconstitutional. *Id.* at 13. The Supreme Court parsed the rules of *Boyd*, *Weeks*, and other cases, and concluded that they restricted government use of force or compulsion to obtain evidence, but permitted the exercise of government power—in this case by the court—over private property voluntarily offered as evidence in another judicial matter. The Court concluded that precedent made "the criterion of immunity not the ownership of property but the 'physical or moral compulsion' exerted." *Id.* at 15. The Court phrased its justification for the opinion as analogical reasoning from precedent, rather than as the product of any particular jurisprudential theory, but it treated Perlman's constitutional arguments resting on *Boyd* as baseless.

Perlman's reliance upon *Boyd* was more credible than the Supreme Court's opinion suggested. In *Boyd* the court-issued subpoena commanding the production of papers violated the Fourth Amendment in large part because it intruded upon the Boyds' rights as property owners of the papers in question. Although the subpoena compelled the Boyds' to bring their papers to court, they never lost possession of their property. The court orders in *Perlman* did not compel him to turn evidence over to the court, but they were coercive in a prohibitory sense, because they prevented Perlman from recovering his property,

inherently unconstitutional. But according to Holmes' analysis, the subpoena for these papers would not have violated the Fourth Amendment had it been based upon information obtained lawfully.[245] Justice Holmes did not explicitly reject the notion of property-based substantive limits on government power, but he did not embrace it.

Despite the differences between formalist and pragmatist reasoning, Justice Holmes' opinion shared a fundamental attribute with the Court's justifications for its decisions in *Boyd, Weeks,* and *Gouled.* Holmes' "outrage" was driven by a concern for individual liberty. His pragmatist concern for the consequences of the government conduct paralleled the formalist rejection of warrantless searches and seizures. Both Holmes and the formalists emphasized individual liberty as a fundamental value in Fourth Amendment jurisprudence, and this distinguishes Holmes' Fourth Amendment pragmatism from the version practiced by contemporary justices. Holmes tempered the pragmatist focus upon the contemporary social context of legal disputes and the instrumental use of law to achieve social policy goals with a pragmatic concern for the consequences that government actions had upon individual liberty interests and the values underlying the Fourth Amendment. During the 1920s Holmes and Brandeis frequently deployed pragmatist ideas to argue in favor of liberty and privacy in Fourth Amendment cases. Usually they raised these arguments in dissent.[246] The most important of these dissents appeared in the case that

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and amounted to a much greater interference with his possessory interests than did the subpoena in *Boyd.* Here was a literal seizure of property by the government, and a formal application of the *Boyd* and *Weeks* decisions linking property and Fourth Amendment rights could have produced a different result. The Supreme Court instead focused on the means used by the government to obtain possession of the evidence, and not on the relationship between property rights and liberty. *See also* Melvin Gutterman, *A Formulation of the Value and Means Models of the Fourth Amendment in the Age of Technologically Enhanced Surveillance,* 39 SYRACUSE L. REV. 647, 651-56 (1988) (examining the emergence of Fourth Amendment theory emphasizing the means employed by government agents).

245. In language anticipating the contemporary rule, Holmes concluded that government misconduct did not act as a total bar to discovery of this evidence. Had the government possessed an independent source of knowledge of the documents' existence, one untainted by the illegal search and seizure, it could have compelled production of these private papers. *Silverthorne,* 251 U.S. at 392. For a modern discussion of the independent source rule, see Nix v. Williams, 467 U.S. 431, 438, 442 n.3, 443-44 (1984).

246. Only weeks after the Court issued its opinion in *Gouled,* Justice Brandeis employed pragmatist reasoning in a dissent urging the Court to use the Fourth Amendment to protect individual liberty. The case was Burdeau v. McDowell, 256 U.S. 465 (1921). McDowell sought a court order directing the Justice Department to return private papers stolen from his office and precluding the government from using the documents as evidence before the grand jury or at trial. The government did not dispute that the papers had been stolen from McDowell, but argued that the thieves were private parties acting independently of the government, and therefore acting outside the scope of the Fourth Amendment. The Court agreed, and based its decision in part upon a categorical view of rights, duties, and powers. The majority held that the Fourth Amendment only regulates government conduct, and not actions by private citizens. *Id.* at 475. The majority assumed that McDowell was the victim of an illegal trespass and was entitled to relief against the individuals who had invaded his rights, but these private wrongs did not prevent the government from retaining the incriminating papers for use as evidence against him. *Id.* at 475-76. This is a reasonable interpretation of the scope of the Amendment, and it remains the modern rule. *See* United States v. Jacobsen, 466 U.S. 109, 114-15 (1984) (finding no Fourth Amendment violation in a search conducted by a private party). The *McDowell* opinion is consistent with both the conceptual approach that allocates discrete spheres of rights and powers to different actors in the legal system and the formalist proclivity for basing decisions upon formal rules found within the legal system.

stands as the theoretical endpoint for the *Lochner* era's liberty-oriented version of Fourth Amendment formalism.

IV. *Olmstead* and the Demise of Fourth Amendment Formalism

The appearance of explicitly pragmatist reasoning in the Supreme Court's Fourth Amendment jurisprudence did not signal the immediate demise of Fourth Amendment formalism. Formalist property law concepts continued to influence the Court's search and seizure opinions throughout the *Lochner* era, sometimes leading to exclusion of evidence,[247] in other cases justifying intrusive government conduct.[248] But the deathknell for a critical part of the formalist construct—the integration of property law with an expansive interpretation of constitutional provisions designed to protect individual liberty—was the Court's decision in *Olmstead v. United States.*[249]

The majority justified its decision by deductive reasoning from this "right" rule, not by relying on substantive issues extraneous to the rule of decision.

Nonetheless, deductive application of the rules announced in *Gouled* could have produced a very different outcome. The District Court had ordered the return of McDowell's papers because they had been seized unlawfully before the government had obtained possession. *Burdeau,* 256 U.S. at 471-72. The papers were "mere evidence," not contraband, criminal instrumentalities or other property in which the government could assert an interest. Even a valid search warrant could not authorize a search of a citizen's office for these papers. As Justice Brandeis noted in dissent, if the stolen papers had been held by a private citizen, the Court would have been required to order their return to McDowell. *Id.* at 477 (Brandeis, J., dissenting). When coupled with the interpretive approach commanding that the Fourth Amendment should be construed broadly to protect liberty and privacy interests, the Court's precedents permitted the conclusion that the Justice Department had functionally seized the papers by refusing to return stolen property to its owner. Rather than rely on its recent decision in *Gouled,* the Court simply concluded that the Fourth Amendment's "origin and history" established that it only regulated searches and seizures conducted by the government. *Id.* at 475. The Court in fact did not discuss the Amendment's history, but merely noted that the *Boyd-Gouled* line of cases had already reviewed it extensively. *Id.* at 474-75.

Justice Brandeis, joined by Holmes in dissent, expressed a pragmatic concern for the consequences of the decision and did not focus upon constitutional rules. Brandeis did not complain that the Court had failed to follow controlling rules. He did not cite precedent. In fact, the presence or absence of a constitutional violation was insignificant. What mattered to Brandeis was that the government was taking advantage of criminal conduct. After acknowledging that the government could have subpoenaed the papers from the thieves without violating the Constitution, he argued that action by a public official is not necessarily legal just because it does not violate a constitutional provision. He worried instead about the effects upon civil liberties, "[r]espect for law," and the "common man's sense of decency and fair play" that would follow from a decision allowing government to knowingly benefit from illegal acts. *Id.* at 477 (Brandeis, J., dissenting).

247. In Agnello v. United States, 269 U.S. 20 (1925), the Court followed *Weeks, Silverthorne,* and *Gouled* and reversed the defendant's conviction, which was based in part upon cocaine discovered during a warrantless search of his home. The opinion distinguished between searches of homes and vehicles, and the government's use of policy-based arguments that had prevailed less than a year earlier in *Carroll* failed here. Warrantless searches of homes were unlawful "notwithstanding facts unquestionably showing probable cause." *Id.* at 33. The Court held that the other defendants lacked standing to challenge the search of Agnello's home, however, and affirmed their convictions. *Id.* at 35-36.

248. *See, e.g., Marron v. United States,* 275 U.S. 192, 199 (1927) (holding that items not described in the warrant can be lawfully seized "as an incident of . . . arrest"). The Court's substantive due process decisions were similarly inconsistent during the *Lochner* era. Despite the *Lochner* era's reputation, during this period the Supreme Court upheld more statutes regulating economic activity than it struck down. Gunther, *supra* note 6, at 445; Tribe, *supra* note 5, at 567 n.2.

249. 277 U.S. 438 (1928). Subsequent cases followed the *Olmstead* majority's narrow, literalist definition of the property basis for Fourth Amendment rights. *Compare, e.g.,* Goldman v. United States, 316 U.S. 129, 134-35 (1942) (holding that government eavesdropping without a physical trespass did

Olmstead and his co-defendants were convicted of conspiring to violate the federal prohibition laws. The government's evidence revealed that Olmstead was the general manager of a criminal enterprise with annual revenues exceeding two million dollars,[250] a substantial figure in the 1920s. Wiretaps of the conspirators' telephone conversations were a critical source of the evidence establishing the conspiracy, and the sole issue before the Court was whether the use of wiretaps to intercept private conversations violated the Fourth and Fifth Amendments.[251]

A bare majority held it did not. The Court held that no independent Fifth Amendment violation existed. Because the defendants were under no compulsion to talk on the telephone, their conversations were voluntary.[252] The majority concluded that in this situation a violation of the privilege against self-incrimination depended upon the existence of a prior violation of the Fourth Amendment.[253] The analysis of Fourth Amendment issues was dispositive of the claims under both Amendments.

After surveying its earlier decisions, the majority opinion both rejected and adopted essential elements of Fourth Amendment formalism.[254] The majority abandoned the rights-driven interpretive spirit of *Boyd, Weeks,* and *Gouled.*[255] It acknowledged that those opinions held that the Fourth and Fifth Amendments were to be "liberally construed to effect the purpose of the framers . . . in the interest of liberty,"[256] then gutted that approach by adopting a narrow interpretation of the nature of property-related interests protected by the Fourth Amendment. The Court held that the Fourth Amendment only regulated physical trespasses into constitutionally protected places, like homes and offices, and searches and seizures of people and tangible physical property. "The Amend-

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not violate the Fourth Amendment) *with* Silverman v. United States, 365 U.S. 505, 511-12 (1961) (holding that government surveillance of a conversation in which agents physically trespassed upon private property violated the Fourth Amendment). *But see Katz,* 389 U.S. at 353 (overruling trespass doctrine of *Olmstead*). The Supreme Court decided several Fourth Amendment cases during the remaining years of the *Lochner* era, but even the decisions with the most practical impact were not as theoretically important as were the seminal opinions discussed in this article. The later opinions typically applied doctrines established in earlier decisions. *See, e.g.,* Nathanson v. United States, 290 U.S. 41, 47 (1933); United States v. Lefkowitz, 285 U.S. 452, 464-66 (1932); Go-Bart Importing Co. v. United States, 282 U.S. 344, 357-58 (1931).

250. *Olmstead,* 277 U.S. at 455-56.

251. *Id.* at 455.

252. *Id.* at 462. The Supreme Court's decisions have established that government coercion is an essential element of a violation of the Fifth Amendment privilege against self-incrimination. *See, e.g.,* Colorado v. Connelly, 479 U.S. 157, 167 (1986); Miranda v. Arizona, 384 U.S. 436, 460 (1966); Bram v. United States, 168 U.S. 532, 549 (1897); Counselman v. Hitchcock, 142 U.S. 547, 562 (1892). From another perspective, however, the *Olmstead* defendants' Fifth Amendment claims were at least as compelling as those raised in earlier cases. The government's surveillance had produced 775 typed pages of notes reporting the defendants' telephone conversations. The defendants raised the plausible claim that use of the conversations as evidence against them at trial made them unwilling witnesses against themselves. *Olmstead,* 277 U.S. at 471 (Brandeis, J., dissenting).

253. *Olmstead,* 277 U.S. at 462.

254. *Id.* at 457-64.

255. The majority's discomfort with these decisions is exemplified by the complaint that "*Gouled v. United States* carried the inhibition against unreasonable searches and seizures to the extreme limit." *Id.* at 463.

256. *Id.* at 465.

ment itself shows that the search is to be of material things—the person, the house, his papers or his effects . . . . [A warrant] must specify the place to be searched and the person or *things* to be seized."[257]

This property-based literalism permitted the Court to conclude that the installation and use of wiretaps did not constitute a search because the taps had been placed on telephone lines outside the walls of the suspects' homes and offices. There was no search because there was no physical trespass into constitutionally protected areas.[258] Chief Justice Taft reasoned that telephone lines connecting telephones "are not part of his house or office any more than are the highways along which they are stretched,"[259] and thus intrusion upon them did not implicate any property-based privacy interests.

Similarly literal reasoning dictated that only tangible property was protected by the Amendment. Intercepting telephone conversations was neither a search nor a seizure, because spoken words were not the kind of tangible property specified in the text of the Amendment.[260] Earlier formalist opinions had rejected textual literalism in interpreting the scope of the Fourth and Fifth Amendments, but the *Olmstead* majority refused to enlarge the language of the text "beyond the possible practical meaning."[261]

Olmstead permanently altered the nature and impact of formalist theory in Fourth Amendment jurisprudence in two ways. First, by abandoning the liberal interpretive approach of earlier cases while preserving the link between property and privacy rights, the Court did more than adopt a literal interpretive theory. It guaranteed that the Fourth Amendment would be irrelevant as a device for regulating the use of new technologies that allowed the government to invade formerly private places without committing a common law trespass. As new technologies permitted investigators to intrude directly into the lives of people, and as their use became more common, it was almost inevitable that the Court would eventually abandon this restrictive property-based theory of the Fourth Amendment.[262]

Second, the opinion reversed the Court's use of history in interpreting the Framers' purposes—and therefore restricted the scope of the Fourth Amendment. *Boyd* and the other early formalist opinions had examined the historical materials and had concluded that the Framers had crafted the Amendment to protect broadly conceived rights to private property, privacy, and liberty. The events involved in the eighteenth century Anglo-American cases supplied examples but not an exhaustive definition of the Amendment's reach.[263] Chief Justice Taft, in contrast, espoused a crabbed originalism, limiting the Amendment's protections to the specific problems—the use of general warrants and

257. *Id.* at 464.

258. *Id.* ("There was no search. . . . There was no entry of the houses or offices of the defendants.")

259. *Id.* at 465.

260. *Id.* at 464-65.

261. *Id.* at 465.

262. *See* Katz v. United States, 389 U.S. 347, 353 (1967).

263. *See* notes 189-195 *supra* and accompanying text.

writs of assistance to seize papers and goods—that arose in the prominent pre-Revolutionary cases.[264]

At points, Chief Justice Taft's opinion for the majority relied upon pragmatist as well as formalist arguments to support his interpretation of the Fourth Amendment. The best example is his analysis of the conflict between the common law rule prohibiting collateral inquiry into the means by which evidence was obtained[265] and the exclusionary rule explicitly adopted in *Weeks*. Relying upon formal rule interpretation, he concluded that the common law inclusionary rule was the general rule and the Fourth Amendment exclusionary rule was merely an exception to the general rule. Only acts violating the Constitution triggered the exclusionary rule; acts that were simply unethical or illegal did not.[266] Finding that the use of wiretaps was not a constitutional violation, Taft opted for the "general" rule, which mandated admission of the evidence.[267]

Instrumental reasoning led to the same result. Admitting evidence probative of a defendant's guilt advanced social policy goals, particularly the need for efficient law enforcement. Chief Justice Taft argued that a rule excluding evidence obtained unethically but not unconstitutionally "would make society suffer and give criminals greater immunity than has been known heretofore."[268] It was for Congress, not the Court, to adopt a rule affecting the already difficult task of "bringing offenders to justice."[269]

The majority opinion demonstrates how, in the Fourth Amendment context, *Lochner* era formalist reasoning could favor government power, as well as restrict it. The opinion also demonstrates how pragmatist instrumentalism and formalist deductive application of legal rules could be employed to reach the same conclusion. The dissenting opinions, which also employed pragmatist and formalist reasoning, demonstrate that the result in the case was dictated less by the interpretive techniques employed by the justices than by the values the interpreters brought to the task.

The four dissenters each wrote opinions. Three are of particular interest here.[270] Justice Butler's opinion reiterated the interpretive approach employed in *Boyd* and its progeny. He emphasized that the "Court has always construed the Constitution in the light of the principles upon which it was founded,"[271] and argued that these principles include "the rule of liberal construction that always has been applied to provisions of the Constitution safeguarding personal rights."[272] The majority's restrictive textual literalism violated both these fun-

264. *Olmstead*, 277 U.S. at 465.

265. *See* notes 130-132 *supra* and accompanying text.

266. Wiretapping violated the state law of Washington, where the relevant events transpired. *Olmstead*, 277 U.S. at 468-69. This analysis apparently was offered to rebut arguments Brandeis and Holmes made in dissent.

267. *Id.* at 467-68.

268. *Id.* at 468.

269. *Id.*

270. Although Justice Stone's brief opinion expressed agreement with the other dissenting opinions, it focused on the Court's power to consider issues appearing in the trial record but not included in the "order granting certiorari." *Id.* at 487-88 (Stone, J., dissenting).

271. *Id.* at 487 (Butler, J., dissenting).

272. *Id.*

damental principles and "sound reason."[273] Justice Butler also demonstrated how the formalist linkage of an expansive vision of constitutionally protected liberties and property law could reverse the majority's analysis.

Justice Butler argued that telephones are used for the transmission of various types of messages, including some that are privileged, and these communications "belong to the parties between whom they pass."[274] Private conversations are analogous to private property; they *belong* to the speakers. Justice Butler strengthened this analogy by treating telephone lines as physical property in which the users possess property and privacy interests based upon *contract* rights, rights that are violated when the government listens.

> The contracts between telephone companies and users contemplate the private use of the facilities employed in the service. . . . During their transmission the exclusive use of the wire belongs to the persons served by it. Wire tapping involves interference with the wire while being used. Tapping the wires and listening in by the officers literally constituted a search for evidence. As the communications passed, they were heard and taken down.[275]

Justice Butler's dissent is conceptually true to the Fourth Amendment formalism of *Boyd* and its *Lochner* era progeny. The dissents by Holmes and Brandeis, on the other hand, enunciated pragmatist reasons for reaching the same result. What links their pragmatist arguments with Butler's formalism is not a shared technique, but rather shared values about the nature of individual liberty protected by the Fourth Amendment.

Holmes' dissent was typically terse, and notable both for his candid arguments for a substantive value choice favoring liberty and for his casual disregard for the significance of precedent. From Holmes' pragmatist perspective, precedents were to be followed only if they produced the results that were best for society. If they did not, they were to be cast aside. The formalist belief that obeying legal rules was an independent virtue carried little weight in this analysis. Holmes began by arguing that no relevant precedents existed, but concluded by choosing the line of cases producing the best outcome for society.

Holmes initially justified his ends-driven analysis by simply asserting that the Court was faced with a straightforward policy choice, not formal rule application. "There is no body of precedents by which we are bound, and which confines us to logical deduction from established rules."[276] He made a passing

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273. *Id.* at 487-88.

274. *Id.* at 487.

275. *Id.* *Olmstead* was overruled almost forty years later in Katz v. United States, 389 U.S. 347 (1967). I have argued elsewhere that *Katz* is one of the theoretical bulwarks of the Court's contemporary Fourth Amendment pragmatism. *See* Cloud, *Pragmatism, supra* note 1, at 249. With this in mind, it is interesting to note that the *Katz* opinion, which explicitly rejected the formalist linkage of property and privacy rights, included reasoning that echoes Justice Butler's formalist argument that while telephone lines are in use, the speakers are entitled to their exclusive use. *See Katz,* 389 U.S. at 352 (stating that one who enters a telephone booth, "shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world").

276. *Olmstead,* 277 U.S. at 470 (Holmes, J. dissenting).

reference to the problem of interpreting the Constitution,[277] but focused on the policy issues raised by the federal officers' violations of Washington state laws prohibiting wiretaps. The Court had to choose between two conflicting policies, the desire for efficient law enforcement and the belief that government should not promote illegal behavior. He concluded: "We have to choose, and for my part I think it a less evil that some criminals should escape than that the Government should play an ignoble part."[278] Value choices, not deductive application of rules, should control the outcome.

If the Court's decision ultimately turned on the interpretation of competing rules announced in earlier cases, however, Holmes was willing to employ rules to achieve the best result. His argument demonstrates how decisionmakers can select from among competing rules to achieve their instrumental goals. After reasserting that the Court was "free to choose between two principles of policy," Holmes concluded that if the Court were to confine itself to "precedent and logic," then the constitutional rule of *Weeks*, and not the common law "no collateral inquiry" rule, was controlling, and the evidence should be excluded.[279] In other words, the Court should choose the rule that advanced the better policy.

But it was Brandeis, not Holmes, who leveled the most powerful pragmatist arguments against the revised formalism of the majority opinion. Brandeis' arguments captured both the instrumental and contextual sides of pragmatist theory. Central to his dissent was the idea of a living Constitution that adapted to a changing world and whose meaning was not frozen at the moment of drafting: "Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth."[280]

The facts of *Olmstead* presented Brandeis with the proof of his assertion. Requiring a trespass or a seizure of tangible things ignored the capacity of technologies unimagined in the eighteenth century to destroy the rights protected by the Fourth and Fifth Amendments.[281] "Discovery and invention have

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277. Holmes finessed the issue of constitutional interpretation by complimenting Brandeis' dissent, then writing:

> While I do not deny it, I am not prepared to say that the penumbra of the Fourth and Fifth Amendments covers the defendant, although I fully agree that Courts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them.

Id. at 469.

This brief passage is interesting for two reasons. First, Holmes accurately points out that *Boyd* adopted a penumbral theory of the relationship between different parts of the Bill of Rights. This theory is akin to the one proposed in Justice Douglas' controversial opinion in Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965). Second, Holmes expresses agreement with the rule of liberal construction of the Fourth and Fifth Amendments.

278. *Olmstead*, 277 U.S. at 470 (Holmes, J., dissenting).

279. *Id.* at 471.

280. *Olmstead*, 277 U.S. at 472-73 (Brandeis, J., dissenting) (quoting Weems v. United States, 217 U.S. 349, 373 (1910)). Brandeis cited several Supreme Court decisions in which the Court had interpreted various parts of the Constitution in cases involving "objects of which the Fathers could not have dreamed." *Id.* at 472.

281. Almost 40 years earlier Brandeis had expressed similar ideas about the effects of social change and new technologies employed by private actors. *See* Warren & Brandeis, *supra* note 164, at 193 ("Political, social, and economic changes entail the recognition of new rights, and the common law,

made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet."[282] The Court should construe the Fourth and Fifth Amendments liberally to protect against those invasions upon personal privacy, and to preserve "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."[283]

In contrast to the nontrespassory intrusions permitted by modern technologies:

> When the Fourth and Fifth Amendments were adopted, "the form that evil had theretofore taken," had been necessarily simple. Force and violence were then the only means known to man by which a Government could directly effect self-incrimination. It could compel the individual to testify—a compulsion effected, if need be, by torture. It could secure possession of his papers and other articles incident to his private life—a seizure effected, if need be, by breaking and entry.[284]

Brandeis obviously embraced the emphasis upon context and the instrumentalism that are hallmarks of pragmatist theory. But his interpretive theory also displayed two attributes consistent with, and perhaps derived from, the constitutional formalism of opinions like *Boyd*.[285] The first is his belief that certain parts of the Constitution implement a broad notion of individual liberty and impose corresponding limitations upon the power of government.[286] The second is his contention that the Constitution in general, and these liberty-protecting provisions in particular, should be construed liberally to achieve the broad purposes underlying the text.[287]

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in its eternal youth, grows to meet the demands of society."); *id.* at 195 (calling for new legal protection against invasions of privacy caused by the invention of instantaneous photographs and increasingly invasive newspaper practices). Anticipating the problem of electronic monitoring of private conversations, the authors noted that "numerous mechanical devices threaten to make good the prediction that 'what is whispered in the closet shall be proclaimed from the house-tops.' " *Id.* They concluded that the right to privacy "for thoughts, emotions, and sensations" should not depend on the manner in which they are expressed. *Id.* at 206.

282. *Olmstead*, 277 U.S. at 473 (Brandeis, J., dissenting).

283. *Id.* at 478. Brandeis made another instrumental argument. In Washington state, wiretapping was illegal. To condone illegal behavior by the government would imperil decency, security, liberty, and the existence of the government itself. It would also promote anarchy. *Id.* at 484-85. Brandeis earlier had made these arguments in his dissent in *Burdeau v. McDowell*. *See* note 246 *supra* and accompanying text.

284. *Olmstead*, 277 U.S. at 473 (Brandeis, J., dissenting).

285. For an interesting discussion of the natural law origins of Brandeis' views about privacy, see RICHARD C. TURKINGTON, GEORGE B. TRUBOW & ANITA L. ALLEN, PRIVACY: CASES AND MATERIALS 31-34 (1992). For a *Lochner* era article examining the links between Brandeis' theory of privacy in tort law and his *Olmstead* dissent, see George Ragland, Jr., Note and Comment, *The Criminal's Right of Privacy*, 27 MICH. L. REV. 927, 929-30 (1929).

286. Brandeis quoted a passage from the *Boyd* opinion in which the Court stressed that the Fourth and Fifth Amendments embody principles defining the essence of individual freedom, principles that "reach farther than the concrete form of the case there before the Court." *Olmstead*, 277 U.S. at 474 (Brandeis, J., dissenting) (quoting Boyd v. United States, 116 U.S. 616, 630 (1886).

287. Brandeis reviewed the facts and holdings of *Boyd* and other *Lochner* era cases construing the Fourth and Fifth Amendments to confirm that the Court had repeatedly refused to adopt a literalist interpretive theory, and instead had sought to implement the Amendments' underlying purposes. *Id.* at 472-79.

The attributes shared by Brandeis' Fourth Amendment pragmatism and the formalism of opinions like *Boyd* highlight the theoretical complexity of Fourth Amendment jurisprudence during the *Lochner* era. The juncture of *Boyd*'s formalism and Brandeis' pragmatism also suggests the contours of an integrative theory of the Fourth Amendment that could resolve many of the shortcomings evident in the sterile pragmatism that permeates Fourth Amendment theory at the end of the twentieth century.

V. An Integrative Theory of the Fourth Amendment

Each of the three interpretive theories—Fourth Amendment formalism and pragmatism, together with the warrant model—employed by the Supreme Court during the *Lochner* era contributes to this integrative theory.[288] One goal of this integration is to reclaim the virtues of formalist opinions like *Boyd* and *Weeks* while avoiding the rigidity of *Gouled* and *Olmstead.* Another is to avoid the extreme pragmatism of recent theory. Contemporary discourse about the Fourth Amendment—in the courts as well as in the law journals—is unsatisfactory in part because it has become dominated by an extreme version of pragmatism.[289]

In recent decades the Supreme Court has explicitly rejected essential elements of the Fourth Amendment formalism common during the *Lochner* era. It has attempted to sever the rights protected by the Amendment from those defined in property law,[290] and it was the "liberal" Warren Court that cleaved Fourth Amendment theory from its property-based foundations. A pair of opinions issued in 1967 asserted that the "premise that property interests control the right of the Government to search and seize has been discredited."[291] *Katz v. United States*, the better-known opinion, explicitly overruled *Olmstead*'s restrictive use of property concepts, and relied upon privacy concepts to expand the Amendment's coverage to encompass electronic surveillance of conversations. Despite this purpose, over the past thirty years the *Katz* approach has

288. I have adopted the label "integrative" from Professor Berman, who has argued persuasively for the development of a jurisprudence combining the three classical schools of legal philosophy: legal positivism, natural law theory, and the historical school. Harold J. Berman, *Toward an Integrative Jurisprudence: Politics, Morality, History,* 76 CAL. L. REV. 779 (1988). His argument is relevant here, in part because it proposes that these traditional classifications have each "isolated a single important dimension of law," and that it is "important to bring the several dimensions together in to a common focus." *Id.*

289. For a detailed analysis of contemporary Fourth Amendment pragmatism, see generally Cloud, *Pragmatism, supra* note 1.

290. The attempt has been only a partial success, in part because of the text's explicit references to property. Occasionally, the Supreme Court returns to common law property analysis to justify its decisions. *See, e.g.,* Oliver v. United States, 466 U.S. 170 (1984) (basing decision in part on property law distinctions between houses, curtilage, and open fields). Sometimes the government conduct is simply a clear intrusion upon private property rights. *See, e.g.,* Soldal v. Cook County, 113 S. Ct. 538, 544 (1992) (observing that "our cases unmistakably hold that the Amendment protects property as well as privacy").

291. Warden v. Hayden, 387 U.S. 294, 304 (1967), *quoted in* Katz v. United States, 389 U.S. 347, 353 (1967).

degenerated into a standardless "expectations" analysis that has failed to protect either privacy or property interests.[292]

This failure results not only from the intrinsic defects in the *Katz* formulation, but also from the effects of the decision in *Warden v. Hayden*, in which the Court overruled the mere evidence rule. Justice Brennan's majority opinion justified this result in part by rejecting the principle that the Fourth Amendment imposes both substantive and procedural limits upon government power. Justice Brennan argued that these substantive limits, grounded in property rights,[293] were unnecessary because the exclusionary rule and the Warrant Clause provided adequate procedural protections of Fourth Amendment rights.[294]

In a post-*Carolene Products* constitutional world, it makes analytical sense to uncouple liberty rights from property—particularly if one wants to treat liberty as a fundamental right. By the 1960s, Fourth Amendment doctrine may well have seemed like a jurisprudential dinosaur left over from our constitutional Jurassic period—the *Lochner* era. The Court's subsequent opinions demonstrate that if its goal in *Hayden* was to secure liberty rights, it was wrong in concluding that procedural limits and remedies alone are sufficient. It made a comparable error in *Katz* by deciding that the malleable contours of privacy doctrine alone were an adequate substitute for the more rigid limits derived from property law, limits that can be deployed to protect privacy.

The Supreme Court's recent case law differs from Fourth Amendment formalism in other ways as well. It has abandoned any notion that the Fourth and Fifth Amendments should be construed together.[295] It has rejected the idea that the Fourth Amendment should be interpreted broadly to protect the principles upon which it rests. Recent opinions eschew the Fourth Amendment's foundational principles, instead using social needs, wants, and goals as reasons for decision.[296] The Court does not treat privacy, liberty, and property as indefeasible rights, but rather as interests to be considered along with an expansive array of factors potentially relevant to deciding each case.[297] Formal reasoning

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292. *See* Cloud, *Pragmatism*, *supra* note 1, at 247-65.

293. *Boyd* traced the doctrine to the Framers and to the common law opinions that influenced them: " 'The great end for which men entered into society was to secure their property.' " Boyd v. United States, 116 U.S. 616, 627 (1886) (quoting Entick v. Carrington, 19 Howell's State Trials 1029, 1066 (1765)).

294. *Hayden*, 387 U.S. at 307-10.

295. *See* United States v. Doe, 465 U.S. 605, 610-12 (1984) (evaluating the constitutionality of a subpoena for business records only under the Fifth Amendment); Schmerber v. California, 384 U.S. 757, 760-65, 766-772 (1966) (separating Fourth and Fifth Amendment analyses into separate, unrelated sections of the opinion).

296. *See, e.g.*, United States v. Leon, 468 U.S. 897, 909 (1984) (establishing a good faith exception to the exclusionary rule and emphasizing social "costs" of excluding evidence); United States v. Calandra, 414 U.S. 338, 350 (1974) (declining to extend the exclusionary rule to a grand jury witness because it "would unduly interfere with the effective and expeditious discharge of the grand jury's duties").

297. Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 453 (1990) (balancing the citizen's liberty interest against the social interest in eliminating the problem of drunk drivers). *See, e.g.*, Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 621-24 (1989) (balancing government interests in detecting and deterring drug and alcohol use by railroad employees against the employees' interest in

from antecedent rules is no longer the central method of decisionmaking.[298] The justices do not purport to act as neutral interpreters of preexisting legal principles and rules, but instead act as social engineers utilizing various tools, including the social sciences, to help them shape search and seizure law to fit what they perceive to be society's needs. The archetypal method employed to decide these cases is "balancing," in which the justices purport to weigh the interests of society in public safety and order—with the government acting as surrogate for all of society—against the rights of the individual citizen involved in each case.[299] It should come as no surprise that the collective social "interests" almost always outweigh the liberty or privacy "interests" asserted by the individual, who is often some malefactor protesting not his innocence, but only that government agents violated the rules when they discovered proof of his guilt. The Court's recent opinions often measure government conduct against a mere rationality standard, rather than the heightened scrutiny employed in *Boyd* and its progeny.[300]

This contemporary version of Fourth Amendment pragmatism is unsatisfactory for many reasons, particularly because it undermines the very purposes for which the Amendment was adopted. The text and history[301] of the Fourth Amendment demonstrate that it exists to enhance individual liberty by con-

privacy); United States v. Mendenhall, 446 U.S. 544, 561 (1980) (Powell, J., concurring) (comparing the public interest in halting the flow of illegal drugs with the individual defendant's liberty interest).

298. A dispute resolution system operating according to the rule of law requires the existence of rules possessing some degree of "authoritative" and "mandatory" formality. *See* ATIYAH & SUMMERS, *supra* note 16, at 11-17. Even thinkers espousing strong antiformalist theses often recognize the necessary role played by formal rules. Karl Llewellyn, for example, eventually 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). 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." K.N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 9 (2d ed. 1951).

Primary rules are essential if the legal system is to decide disputes according to the rule of law. 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." HART, *supra* note 31, at 132. Even the idea that decisions should be based upon the purpose behind the language of the rule still assumes some degree of decisionmaking according to rule. *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE 16-17 (1986); LON L. FULLER, THE MORALITY OF LAW 81-91 (1964); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 662-63 (1958).

299. *See* note 297 *supra* and accompanying text.

300. *See* note 112 *supra* and notes 319-320 *infra* and accompanying text. *See, e.g.*, Illinois v. Rodriguez, 497 U.S. 177, 183-89 (1990) (upholding a search of an apartment based on consent by a third party lacking actual authority if police were "reasonable" in believing third party); Maryland v. Garrison, 480 U.S. 79, 88 (1987) (upholding the mistaken search of an apartment not described in a search warrant because offiers' mistake was "reasonable").

301. For general histories of the Fourth Amendment, *see* NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE CONSTITUTION (da Capo Press 1970) (1937) (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 of the 1930s); JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION (1966) (tracing the Amendment from English law in the 15th century to the Supreme Court's decisions of the early 1960s).

straining government power.[302] The Amendment operates in a concrete dimension, regulating the power of government to intrude physically upon people and their property. But it also operates in a more abstract dimension: "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."[303]

It should be readily apparent that this sweeping vision of the Amendment is consistent with the value-based formalism of *Boyd*. But this vision is inconsistent with the Court's recent pragmatist decisions upholding the constitutionality of significant transgressions upon personal privacy, liberty, and property interests because: (1) the government interests "outweighed" those asserted by the individual;[304] (2) the intrusions were deemed not to be searches or seizures;[305] or (3) government violations of rules, including those found in the constitutional text, were "reasonable."[306]

This contemporary version of pragmatism has cut Fourth Amendment theory loose from the historical justifications for the Amendment. These include the Framers' belief in the relationship between property and liberty,[307] and their intent to abolish two evils attendant to the use of general warrants, writs of assistance, and warrantless general searches. One evil was the power to conduct searches and seizures despite the absence of particularized suspicion. The other was the exercise of arbitrary discretion, usually by members of the execu-

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302. Cloud, *Pragmatism*, *supra* note 1, at 295.

303. *Id.*

304. *See, e.g.*, Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990) (upholding a system of highway sobriety checkpoints); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 621-24 (1989) (upholding the drug testing of railroad employees); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 664-65 (1989) (upholding suspicionless drug testing of U.S. Customs Service employees).

305. *See, e.g.*, Florida v. Bostick, 501 U.S. 429, 437-38 (1991) (rejecting a per se rule that a seizure occurs when drug agents confront a traveler sitting on a bus, ask him questions, and ask to inspect his luggage; no seizure if a reasonable innocent person would feel free to refuse to cooperate); California v. Hodari D., 499 U.S. 621, 626 (1991) (finding that no seizure occurs when police command a suspect to halt unless the suspect acquiesces); Florida v. Riley, 488 U.S. 445, 450-51 (1989) (holding that a warrantless aerial surveillance of a greenhouse within the curtilage of a home, from an altitude of 400 feet, is not a Fourth Amendment search); United States v. Dunn, 480 U.S. 294, 303-05 (1987) (holding that no Fourth Amendment search occurs when federal agents trespass on private property and climb over several fences to look into a barn located outside the home's curtilage); California v. Ciraolo, 476 U.S. 207, 212-13 (1986) (holding that a warrantless aerial surveillance of the fenced curtilage of a home, from an altitude of 1000 feet, is not a search regulated by the Fourth Amendment); Oliver v. United States, 466 U.S. 170, 183-84 (1984) (holding that no Fourth Amendment search occurs when police officers commit criminal trespass on private property classified as open fields).

306. *See, e.g.*, Massachusetts v. Sheppard, 468 U.S. 981, 990 (1984) (good faith exception to the exclusionary rule permits search where officers reasonably rely on a warrant that fails to satisfy the particularity requirements of the Fourth Amendment because of an error by the judge who issues the warrant); United States v. Leon, 468 U.S. 897, 919-20 (1984) (creating good faith exception to exclusionary rule and upholding search where officers reasonably rely on a search warrant issued despite the absence of probable cause).

307. *See* Warden v. Hayden, 387 U.S. 294, 312-25 (1967) (Douglas, J., dissenting) (discussing the influence of property concepts on the framing of the Fourth Amendment); NEDELSKY, *supra* note 45, at 1-5, 86-93 (discussing the relationship between property, liberty, and the Constitution); Corwin, *supra* note 45, at 292.

tive branch, to decide where to search and what to seize.[308] The Court's *Lochner* era Fourth Amendment cases are useful, and not only because, for all their defects, they generally were more successful at achieving those purposes than is recent case law. Of greater importance for the present discussion, the early cases supply the elements of an interpretive theory of the Amendment that achieves the Framers' fundamental goals while accommodating the legitimate needs of law enforcers. This theory incorporates portions of the *Lochner* era formalist and pragmatist theories, elements fused by the warrant model that both theories employed.

Fourth Amendment formalism teaches that liberty and privacy rights are linked to private property rights. This idea is consistent with the text of the Amendment, as well as with *Lochner*-style substantive due process jurisprudence. The fundamental relationship between private property and the broader rights protected by the Amendment is rarely enforced in contemporary case law,[309] and this is one aspect of formalist theory that needs to be reclaimed in Fourth Amendment jurisprudence.[310] This need not mean that large categories of private property are immune from searches and seizures, as *Gouled* posited. It must mean, however, that searches and seizures intruding upon houses and effects (not to mention persons) need to satisfy more than the mere rationality standard of scrutiny that is increasingly common in contemporary case law. The Amendment requires some higher level of scrutiny. As the *Lochner* era opinions reveal, this heightened scrutiny embodies procedural and substantive limits. During the *Lochner* era the Supreme Court repeatedly defined the procedural requirements: searches and seizures must satisfy the requirements of the Warrant Clause. That is, the government must possess probable cause and a warrant—or be facing a true exigency that makes it impossible to obtain a warrant—before it can conduct searches and seizures.

The substantive limit precludes searches and seizures of some property, even if the Amendment's procedural requirements are satisfied. Private papers are the archetype of tangible property deserving greater protection than other kinds of property. Papers are special because they contain the physical manifestations of the author's thoughts. To the extent that the government obtains papers by compulsion or force (whether by search or subpoena) for use against the author in a criminal case, it is forcibly using the author's own thoughts against him. This is a central insight in the *Boyd*[311] and *Weeks* opinions. The Court has abandoned this insight in recent decades, and it deserves to be resurrected. *Boyd* and *Weeks* rested in large part on the conclusion that because of the inherent testimonial attributes of papers, the Fourth and Fifth Amendments run together to create a zone of privacy into which the government cannot

308. *See, e.g.*, Amsterdam, *supra* note 232, at 382.

309. *See* notes 289-308 *supra* and accompanying text.

310. *See* note 344 *infra*.

311. *Boyd* stressed that "any forcible and compulsory extortion of *a man's own testimony or of his private papers* to be used as evidence to convict him of crime or to forfeit his goods" violates the rights protected at the confluence of the Fourth and Fifth Amendments. Boyd v. United States, 116 U.S. 616, 630 (1886) (emphasis added).

intrude unless the papers are stolen property, contraband, criminal instrumentalities, or required records—papers in which the government can assert an independent interest, or over which it can assert independent authority. When the papers do not fall into one of these unprotected categories, the Fourth Amendment's substantive and procedural limits on searches and seizures are amplified by the privilege against self-incrimination, and the papers protected by both Amendments cannot be the objects of searches and seizures. In other words, the mere evidence rule is sensible if it is limited to papers.

One response to this approach might be that it is unrealistic in the context of the twentieth century regulatory state, in which we assume that government agencies—including but not limited to police departments—have broad powers to obtain information. In fact, this approach would not insulate all papers from searches and seizures and would create less of a burden on law enforcers than one might initially expect. If the crime is money laundering or fraud, for example, key documents will be instrumentalities of the crime. Many documents sought by administrative agencies are corporate documents unprotected by the Fifth Amendment since *Hale v. Henkel*.[312] Many records will be unprotected under the required records doctrine announced in *Boyd*. Indeed, the most significant difficulty arising from this proposal may not be that it impedes law enforcers. The greatest problem may be to define the proper limits imposed on the required records doctrine.[313]

But the government could not obtain some papers—private diaries, journals, manuscripts, and unsent letters are obvious examples—for use as evidence against the author. In the larger scheme of things, these may actually comprise only a small portion of the documents that government agencies pursue. Nonetheless, imposing substantive restrictions on paper searches would be of practical importance for at least three reasons. First, it would matter to the individuals who authored protected documents, and the Court has repeatedly held that Fourth and Fifth Amendment rights are possessed by individuals.[314] Second, the principles underlying this approach logically apply to information prepared, stored, and transmitted by electronic devices unimagined by the *Boyd* Court. For example, private thoughts stored on a computer hard drive deserve the protection afforded private papers. Thus more information may be protected than this short list of private papers suggests.

Finally, even if substantive limits protect communicative property in only a relatively small number of cases, the incremental increase in privacy is substan-

312. *See* notes 204-216 *supra* and accompanying text. In recent years the Court has made it easier for law enforcers to obtain corporate documents. *See* note 187 *supra*.

313. *See, e.g.*, Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 869-70 (1995) (describing how, in the Fifth Amendment context, the Supreme Court has been unable to develop a consistent rule "for applying the required records doctrine," and has used "an open-ended test . . . without any principled basis").

314. *See* Rawlings v. Kentucky, 448 U.S. 98, 104 (1980) (defendant lacks standing to challenge a search unless his personal rights were violated); Rakas v. Illinois, 439 U.S. 128, 132-48 (1978) (noting that "the rights secured by [the Fourth] Amendment are personal"); Hale v. Henkel, 201 U.S. 43, 74 (1906) ("The individual may stand upon his constitutional rights as a citizen."); WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 459-67 (2d ed. 1992) (discussing personal rights approach to Fourth and Fifth Amendment standing).

tial in each of those cases. By its very nature, a paper search is likely to be extremely intrusive. Not only does it permit government agents to examine a person's thoughts, it also permits a search of every document (or computer file) which might contain those thoughts. A search in which government agents are free to peruse all of a person's papers in pursuit of incriminating information is likely to be intrusive in ways reminiscent of general searches.[315] Substantive barriers prohibiting searches for private papers, therefore, significantly enhance privacy in every case in which such a search might occur, even if we assume that the number of these cases constitutes only a small percentage of cases in which the government seeks information from citizens.

The Fourth Amendment also protects houses and effects—tangible property without the testimonial attributes inherent in papers. It is precisely because these kinds of property do not implicate the values that arise at the intersection of the Fourth and Fifth Amendments that they do not deserve the level of protection given to papers. This property, like private papers that are not mere evidence, can be searched for and seized as long as the government complies with the procedural requirements announced in the Warrant Clause.

A *Lochner* era decision that employed the approach I have outlined was *Marron v. United States*.[316] Federal agents obtained a warrant authorizing a search of business premises for "intoxicating liquors and articles for their manufacture."[317] During the search they discovered items named in the warrant, as well as utility bills and "a ledger showing inventories of liquors, receipts, expenses, including gifts to police officers, and other things relating to the business."[318] As this characterization suggests, the Court treated the ledger and bills as instrumentalities used in the operation of this illegal speakeasy, and concluded that officers could seize criminal instrumentalities discovered while executing a lawful search warrant.

The two-step analysis announced in *Gouled* was implicit in this opinion. The officers satisfied the Amendment's procedural requirements by obtaining a valid search warrant. While lawfully executing the warrant they discovered instrumentalities of the crime not listed in the warrant. Formalist doctrine permitted the officers to seize this property because the government had a right to possess it, and the officers had adhered to the procedural requirements prescribed by the Amendment. In effect, this model applies a higher level of scrutiny to searches and seizures of certain papers, while measuring intrusions

315. *See* James A. McKenna, *The Constitutional Protection of Private Papers: The Role of a Hierarchical Fourth Amendment*, 53 IND. L.J. 56, 69, 83 (1977-1978) (arguing that all seizures of private papers are "uniquely intrusive"). Similarly, government searches for electronically stored information can implicate privacy rights, including those protected by statute. *See* Steve Jackson Games, Inc. v. United States Secret Service, 36 F.3d 457, 459 (5th Cir. 1994); Nicole Giallonardo, Note, Steve Jackson Games v. United States Secret Service: *The Government's Unauthorized Seizure of Private E-Mail Warrants More Than the Fifth Circuit's Slap on the Wrist*, 14 JOHN MARSHALL J. COMPUTER & INFO. L. 179, 198-203 (1995) (discussing the Electronic Communications Privacy Act).

316. 275 U.S. 192 (1927).

317. *Id.* at 193.

318. *Id.* at 194.

upon other kinds of property against a less rigorous procedural standard.[319] And even this weaker procedural standard subjects government conduct to scrutiny that is more demanding than is a mere rationality level of scrutiny. For example, a search and seizure may be "reasonable" yet violate the Constitution because officers failed to get a warrant.[320]

It should be obvious that the warrant model played a significant role in Fourth Amendment theory long before its emergence in the 1960s as one of the Court's central interpretive devices. In formalist opinions like *Weeks* and *Gouled* and a pragmatist opinion like *Silverthorne*, the Court found that searches were unconstitutional in part because the government had not obtained warrants. In *Adams* and *Marron* the searches were valid in part because they were authorized by warrants. And in *Carroll*, the exigency facing the government agents justified a warrantless search for contraband only because the agents possessed information satisfying the evidentiary requirement for a warrant: they had probable cause to believe the suspects were transporting contraband.

From a historical perspective, the interpretive model based upon the Warrant Clause supplies the means for addressing some of the evils that concerned the Framers. The probable cause standard eliminates the evil of suspicionless searches and seizures. The particularity requirement precludes general searches.[321] The Warrant Clause establishes a system of rules to control excessive executive branch discretion by imposing external standards that are enforceable by the judicial branch.[322] The core rule requires a warrant 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 it 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

319. This analysis suggests another conceptual link between the Supreme Court's *Lochner* era substantive due process and search and seizure opinions. One criticism of *Lochner* is that it effectively treated property rights as fundamental rights and subjected laws regulating economic and property rights to a level of scrutiny stricter than the rational basis or rational relationship approach employed since 1937. *See* United States v. Lopez, 115 S. Ct. 1624, 1628-29 (1995); *id.* at 1652-3 (Souter, J., dissenting) (criticizing *Lochner* era due process and Commerce Clause cases for adopting an "exacting judicial scrutiny of a legislature's choice of economic ends and of the legislative means selected to reach them"); Gunther, *supra* note 6, at 448-49 (asserting that one of the evils of *Lochner* was that it paid lip service to a mere reasonableness standard of scrutiny, while in fact imposing a stricter standard in reviewing the means and ends of the legislation). *Boyd* obviously treated property and liberty rights as fundamental, and applied a high level of scrutiny to laws infringing upon those rights. This analysis highlights what may be the primary difference between the Fourth Amendment pragmatism espoused by Justice Brandeis and the version practiced by contemporary justices. Brandeis treated Fourth Amendment rights as fundamental rights, and subjected government intrusions to a higher level of scrutiny, while today justices apply a watered-down rationality standard to judge intrusions upon what they perceive to be weak interests, not strong rights.

320. *E.g.*, Katz v. United States, 389 U.S. 347, 356-57 (1967).

321. *See, e.g.*, Maryland v. Garrison, 480 U.S. 79, 84 (1987) ("The manifest purpose of this particularity requirement was to prevent general searches.").

322. Formal decisionmaking allocates power within legal institutions to rulemakers and rule enforcers. Within the criminal justice system, the warrant model tends to allocate power to judges, while informal decisionmaking has tended to transfer power to police officers acting as rule appliers. Cloud, *Pragmatism*, *supra* note 1, at 275-93; *see also* Atiyah & Summers, *supra* note 16, at 26 ("[F]ormal reasons may be justified by value judgments about the appropriate persons to make decisions . . . ").

principle favoring liberty and allow the government to proceed with a search or seizure. The requirements of specificity and judicial review also restrict the exercise of arbitrary government power.

But this system of rules has its limits. In many circumstances law enforcers cannot obtain warrants before they must act. In those situations the pragmatist reasoning employed in opinions like *Carroll* (creating the automobile exception) provides the necessary play in the joints. The creation of rule exceptions (like the automobile exception) was an essential part of the rule-based warrant model that the Court relied upon prior to the recent emergence of full-blown pragmatism in Fourth Amendment jurisprudence. And this interpretive model employing formal rules and rule exceptions appears in opinions written by Fourth Amendment formalists and pragmatists alike at the turn of the century.

The *Lochner* era cases demonstrate that the formalist view of the relationship between property rights and privacy rights could have been coupled with a pragmatic reliance upon the Warrant Clause to produce a generally workable theory of the Fourth Amendment. The theory unraveled in part because the Court erred in *Gouled* by according all kinds of property equal status under the mere evidence rule. It also unraveled because the *Olmstead* opinion rendered the property-based theory of the Amendment incapable of coping with the invasions of privacy made possible by new technologies. Here Brandeis' Fourth Amendment pragmatism provides the final piece of the integrative theory.

Brandeis was no *Lochner*-style formalist. But when the right of privacy was at stake, he advocated an interpretive theory consistent with the values that animated *Boyd,* values that Brandeis traced to the same pre-Revolutionary disputes cited in the *Boyd* opinion.[323] Indeed, in his *Olmstead* dissent Brandeis repeatedly cited the earlier formalist decision, and quoted at length from it.[324] He then concluded his constitutional analysis with the following passage:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.[325]

This was Justice Brandeis writing, although the reader could easily mistake this for a passage taken from Justice Bradley's opinion for the Court in *Boyd.*

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323. Olmstead v. United States, 277 U.S. 438, 474-75 (1928) (Brandeis, J., dissenting) (citing Lord Camden's opinion in *Entick v. Carrington* and the famous courtroom argument made by James Otis in the Massachusetts writs of assistance case).

324. *Olmstead,* 277 U.S. at 473-77.

325. *Id.* at 478-79.

Brandeis' language would not be out of place in Bradley's formalist opinion because both the formalist and pragmatist arguments were based upon the same constellation of values, values derived from natural law concepts inherited from the eighteenth century. And Brandeis' focus upon "beliefs, thoughts, and emotions" comported with the formalist recognition that papers deserved added protection because they embody ideas.

However, Brandeis did not base his argument upon property rights. As he had nearly forty years earlier, Brandeis argued for the protection of privacy.[326] Indeed, in 1890 he had argued that in some cases involving the publication of private letters, common law judges had erred by asserting that property law defined the sender's rights when, in fact, it was privacy that was at stake. In those opinions, he contended, property law served as an awkward and inadequate surrogate for privacy.[327]

But property and privacy are not mutually exclusive concepts in the Fourth Amendment context. The two often overlap—particularly when the property is a home or private document. Of course, property and privacy do not always overlap. If police officers seize a gun found in a public place, the act may implicate possessory interests but not privacy rights. Electronic monitoring of telephone conversations in a public telephone booth can implicate privacy interests but not property rights. But often the two overlap; often they amplify one another.

The *Boyd* and *Weeks* opinions identified this relationship. But in retrospect it appears they erred by failing to distinguish categorically property that implicates privacy interests from property that does not. Conversely, Brandeis (and later the Warren Court) erred by disconnecting property from privacy, by relying upon privacy and procedure to define the permissible scope of searches and seizures.

Although he did not rely upon formalist notions of property rights, Brandeis the pragmatist employed foundational values to interpret fundamental legal rules. One of the lessons of his dissent in *Olmstead* is that pragmatism need not reject all foundational values in legal interpretation. When the background purposes and underlying values for a portion of the Constitution can be discerned, these purposes and values should drive the interpretation of the text. Such values are not the product of whimsy or idiosyncracy, they are the reasons the text exists. This kind of pragmatism fits comfortably with the Fourth Amendment formalism of the *Lochner* era.[328]

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326. Brandeis influenced modern legal conceptions about the nature of privacy, beginning with the famous article published only four years after *Boyd*, and more than a decade before *Lochner*. *See* Warren & Brandeis, *supra* note 164.

327. Warren & Brandeis, *supra* note 164, at 200-05.

328. The pragmatist component of the integrative theory I have outlined can be explained from another dimension as well. One of the defects in contemporary Fourth Amendment pragmatism is that it is excessively nonformal; it undervalues both the text of the Amendment and the need for rules to regulate government activities. Cloud, *Pragmatism*, *supra* note 1, at 233-47, 268-92. The integration of turn-of-the-century formalism and pragmatism rests in part upon the recognition that judicial decisionmaking in our legal system almost inevitably utilizes a combination of formal and substantive reasoning. Hart, *supra* note 32, at 610-15.

But the pragmatist contribution to the integration of Fourth Amendment theories does not stop here. Part of Brandeis' analysis rested on the nature of constitutional interpretation, and his arguments supply an essential piece of the integrated theory I propose. To pragmatists, law must change to meet changing conditions. To Brandeis, this was especially true for a Constitution designed to survive for generations: "We must never forget," Brandeis quoted, "that it is a Constitution we are expounding."[329]

Brandeis pointed out that prior to *Olmstead* the Supreme Court "ha[d] repeatedly sustained the exercise of power by Congress, under various clauses of that instrument, over objects of which the Fathers could not have dreamed."[330] The cases he cited generally involved economic behavior, but parts of the Constitution protecting individual liberties "must have a similar capacity of adaptation to a changing world."[331] He acknowledged that statutes and constitutions alike arise out of particular "evils," but refused to treat law as a historical artifact that buries fundamental rules under the detritus of ancient disputes. The pragmatist sources of his well-known dissent are readily apparent, but the similarity of the rhetoric to the formalist opinions in *Boyd* and *Weeks* is also obvious. A law's "general language should not, therefore, be necessarily confined to the form that evil had theretofore taken."[332] Because time does work changes that create new conditions:

At the turn of the century, pragmatists called for a conscious and overt substitution of substantive reasoning for formal reasoning, a substitution assertedly necessary to compensate for the formalists' alleged excessive reliance upon formal reasoning. The pragmatist critique of formalism did not, however, require that either rules or formal reasoning be abandoned. At its best, legal pragmatism stands not for the abolition of legal rules or deductive reasoning from rules, but instead for a balanced jurisprudence avoiding *excessive* rule formality. Late in his career Pound asserted that one of the achievements of "sociological" jurisprudence was the "[o]verthrow of the jurisprudence of conceptions." 1 POUND, *supra* note 51, at 132. He cautioned, however, that "this does not mean wholesale abandonment of conceptions as with some extreme realists, today." *Id.*

Holmes' description of the common law, for example, attacked excessively formal reasoning without rejecting formal reasoning entirely: "[O]ther tools are needed besides logic. It is something to show that the consistency of a system requires a particular result, but it is not all." HOLMES, *supra* note 56, at 1. As this passage suggests, he attempted to blend formal and substantive reasoning in his critique of the common law. Although he criticized those who defined law as "a system of reason . . . a deduction from principles of ethics or admitted axioms or what not," *id.* at 172, he also recognized the essential role played by formal reasoning from legal rules and the instrumental functions it served. *See id.* at 169-174; *see also* WHITE, *supra* note 16, at 62-63 (recognizing Holmes' adoption of the "essence of the law" as paradigmatic to his reasoning); Grey, *supra* note 33, at 824 (asserting that Holmes "found great value in a system of general legal principles which could call to mind just those rules, cases, and considerations of policy . . . useful in deciding the matter at hand"). Of course, common law lawyers and judges inevitably focused upon the facts of each dispute, history, custom, and the consequences of conflicting outcomes, and used both abstract values and precedents as instrumental tools. Leading pragmatists understood this. *See, e.g.*, HOLMES, *supra* note 56, at 1. Substantive reasoning looms large in Holmes' account, which seems to reject formalist extremism, and not the "appropriate" use of rules or deductive logic. Once again we find that from the perspective of legal theory, and not politics, turn-of-the-century pragmatism and formalism were not total antinomies.

329. *Olmstead*, 277 U.S. at 472 (Brandeis, J., dissenting) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 159, 200 (1819)) (alteration in original).

330. *Id.*

331. *Id.*

332. *Id.* (quoting Weems v. United States, 217 U.S. 349, 373 (1910))

> [A] principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are . . . "designed to approach immortality as nearly as human institutions can approach it." The future is their care . . . . In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be.[333]

Constitutional interpretation must adapt to changing conditions, and the purposes underlying the relevant rules must guide those changes. The Framers lived in a world in which transgressions upon privacy and liberty were effected by physical force and violence. Two centuries later, however, scientific invention had made it possible for government agents to violate protected privacy rights without employing physical power. Brandeis' pragmatist antidote to the narrow literalism adopted by the *Olmstead* majority echoed the formalist reasoning in *Boyd.* Neither a physical trespass into a constitutionally protected area nor a literal search or seizure of tangible property was a prerequisite for a Fourth Amendment claim. That claim arose whenever the government intruded upon the values embodied in the Amendment.[334] The goal of constitutional interpretation was to achieve the purposes underlying the text, not to achieve a rigid literalist construction of the words.[335] Brandeis and *Boyd* again concur.

Brandeis also concurred that the Fourth and Fifth Amendments run together when the government attempts to search for and seize a person's communications. Brandeis expressed agreement with the Supreme Court's pre-*Boyd* decision that the Fourth Amendment protects private letters sent through the public mails, and concluded that for these purposes there is "no difference between the sealed letter and the private telephone message."[336] But he argued that the *harm* caused by tapping telephone conversations is far greater than that caused by a search of private letters because the electronic intrusion invades the privacy of anyone on the line, about any topic of conversation, including those that are "proper, confidential and privileged."[337] The evil here is twofold. First, although a wiretap is akin to a general search, indiscriminately intruding upon anyone who happens to use the telephone line, "writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire-tapping."[338]

Second, wiretapping is dangerous because it allows the government to "capture" private communications (oral, not written) for the purpose of using them as evidence against the parties to the conversation. This part of his cri-

333. *Id.* at 373 (quoting Chief Justice John Marshall).

334. Nearly forty years later the Supreme Court unsuccessfully attempted to adopt a similar approach. *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (adopting what has become a reasonable expectation of privacy standard).

335. "No court which looked at the words of the [Fourth] Amendment *rather than at its underlying purpose* would hold, as this Court did," that it protects "letters in the mails." *Olmstead,* 277 U.S. at 476 (Brandeis, J., dissenting) (emphasis added).

336. *Id.* at 475 (citing *Ex parte* Jackson, 96 U.S. 727 (1877)).

337. *Id.* at 476.

338. *Id.*

tique is consistent with the special protection offered communicative papers in *Boyd*, and actually extends the concept to ideas not memorialized in a writing.[339] Surely Brandeis would have concluded that the protections Fourth Amendment formalism offered to papers should be extended to ideas prepared, stored, and transmitted electronically.[340] Undoubtedly government regulators could require corporate entities to maintain and disclose certain kinds of information. But private thoughts—whether preserved in a notebook or in a notebook computer—would still be protected from government trespassers.

Brandeis was no formalist, and his famous *Olmstead* dissent is a classic statement of a pragmatist theory of constitutional interpretation. Yet its essential elements are consistent with the rights-oriented Fourth Amendment formalism of the era. At the core, Brandeis and *Boyd* expressed the same understanding of, and commitment to, the values upon which the Fourth Amendment rests.

VI. Conclusion

Turn-of-the-century legal pragmatism is often described as a response to—and attack upon—the formalist ideas that dominated legal theory during much of the *Lochner* era. But when these supposedly dichotomous legal theories are analyzed apart from the political battles waged under the banner of Fourteenth Amendment due process, it becomes apparent that some critical attributes of *Lochner* era formalism and pragmatism can be merged into a provocative interpretive theory of the Fourth Amendment.[341] Each theory makes a contribution. Formalist analysis identifies the purposes underlying the Amendment and the evils against which the Amendment was arrayed. The ultimate purposes, rooted in the history of the Amendment, were to protect individual liberty, privacy, and property, and to preserve the capacity to enjoy all three in the quiet of one's home or place of business, undisturbed by unreasonable government intrusions. These were strong rights, to be protected by a nonliteralist, value-based jurisprudence. The particular evils which produced the Amendment included unjustified government intrusions upon liberty, privacy, and property, and the arbitrary and excessive exercise of legislative and executive power. Pragmatism supplies the insight (consistent with much of the common law tra-

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339. Brandeis' attempt to protect these private communications echoed arguments he had made nearly forty years earlier. Warren and Brandeis argued that careful analysis of the common law cases involving the publication of private letters demonstrated that conventional property law analysis could not explain the results. The courts claimed that their decisions protected property rights, but in fact they were protecting a broader right of privacy. Warren & Brandeis, *supra* note 164, at 200-06. They asserted that the principle protecting personal writings against publication "is merely an instance of the enforcement of the more general right of the individual to be let alone," and rests not on "the principle of private property, but [on] that of an inviolate personality." *Id.* at 205.

340. *See id.* at 206 ("If, then, the decisions indicate a general right to privacy for thoughts, emotions, and sensations, these should receive the same protection, whether expressed in writing, or in conduct, in conversation, in attitudes, or in facial expression.")

341. Attempting to integrate rules and values is not a novel idea. *See* Harold J. Berman, Law and Revolution: The Formation of the Western Legal Tradition 590-91 n.88 (1983) (rejecting as a false dualism the "antinomy of rules and values" (quoting Roberto Mangabeira Unger, Knowledge & Politics 88 (1975)).

dition) that history is not fixed—time does not stop. Law as a social institution must adapt. But those adapting to change need not abandon the values upon which the text is grounded.

The integration of the two theories helps avoid the pitfalls that facilitated the demise of formalism and that have produced the inadequate contemporary version of Fourth Amendment pragmatism. By identifying the values linking *Boyd* and Brandeis, it is easy to avoid the failings of two key formalist opinions. First, the integrated theory eliminates the literalist treatment of property concepts found in *Olmstead.* Second, both *Boyd* and Brandeis support the conclusion that the Fourth Amendment (together with the Fifth) offers the greatest protection to property that possesses testimonial attributes. This insight permits escape from the unbearable limits that *Gouled*'s mere evidence rule equating all types of property imposed upon law enforcers.

Conversely, the formalist emphasis upon privacy, property, and values counteracts the tendency evident in contemporary Fourth Amendment pragmatism to produce theories that abandon the Amendment's background purposes in favor of decisionmaking designed to advance social policy goals—even those conflicting with the Amendment, its history, and underlying purposes. Turn-of-the-century formalist theory recognized that even procedurally correct government intrusions are unreasonable if they transgress upon protected substantive rights. Fourth Amendment pragmatism has failed because it has evolved into a jurisprudence resting on the assumption that social policy can serve as the source of meaning for a constitutional provision that establishes fundamental rights. This has produced judicial opinions that abandon the values that justify the Amendment, and that debase the rights protected by it, precisely because those rights often conflict with other social policies of value—particularly efficient law enforcement and the promotion of social order.[342] Government agents can defeat these weakened privacy and liberty interests with relative ease—they must only employ reasonable means in pursuit of rational policy goals. This distorts the meaning of the Amendment, and the rights it protects.

> [T]he Fourth Amendment establishes a right and not merely a social policy. The main point of a right is precisely that it insulates the protected value from ordinary considerations of the general good. The notion of a right has been so

342. Pragmatism's own instrumentalism suggests the problem. If law exists to serve proper ends, then some theory of value seems necessary to identify and organize those ends. At times pragmatist writers have hinted that a utilitarian theory of value supported pragmatist theory. 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 56, at 41. James asserted that law should operate to "maximize the satisfaction of existing wants and interests." WILLIAM JAMES, *supra* note 51, at 48. 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." WILLIAM JAMES, PRAGMATISM AND OTHER ESSAYS, *supra* note 51, at 1. At other 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 16, at 14-15.

abused lately that that point is easily lost; but in that case, there is little reason to use the term at all, except for its rhetorical value.[343]

Finally, the warrant model supplies the procedural mechanism—found in the constitutional text—for implementing the Amendment's underlying purposes. Turn-of-the-century formalists and pragmatists alike recognized the important role the Warrant Clause plays in constructing a coherent theory of the Amendment. The warrant rule uses the more specific language of the Amendment's second (warrant) clause as a primary but not exclusive source of meaning for the more general first (reasonableness) clause.

Of course, this integration of formalist and pragmatist ideas in the Fourth Amendment context does not address directly all of the criticisms leveled at the *Lochner* era substantive due process jurisprudence. But the turn-of-the-century search and seizure decisions do undercut two of the standard attacks on *Lochner*. First, they support the argument that *Lochner* and its ilk were less the product of politicized decisionmaking than of a widespread and legitimate set of ideas about the nature of liberty. Second, they demonstrate that the formalist approach to defining and protecting fundamental rights need not be seen as some archaic and dysfunctional theory about law. Formalist conceptions of liberty were consistent with the values underlying the Fourth Amendment theories of Justice Brandeis, perhaps the most effective pragmatist critic of *Lochner*, and they provide ideas useful for contemporary theory as well.[344] Analyzed in a context not carrying the baggage of long-running political debates, it becomes apparent that some attributes of the formalist approach to constitutional interpretation that flourished during the *Lochner* era are worth reclaiming.

These ideas may have surprising vitality as we near the end of the twentieth century. Only months ago, Justice Souter complained that the Supreme Court's decision invalidating a federal statute may "portend a return to the untenable

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343. Letter from Professor Lloyd L. Weinreb to Morgan Cloud (June 13, 1994) (on file with author).

344. Some important areas of the Supreme Court's current Fourth Amendment doctrine would be altered by a recognition that property rights play an integral role in defining the interests protected by the Fourth Amendment. Most obviously, recent decisions discarding the traditional rule that property owners have standing to challenge government conduct would fall. *See, e.g.*, Rawlings v. Kentucky, 448 U.S. 98, 104-06 (1980) (holding that defendant's ownership of drugs discovered in another's purse did not entitle him to challenge the legality of the search). Cases in which the Court has approved warrantless searches of homes because the mistakes made by police officers were "reasonable" would likely be reconsidered. *See* Illinois v. Rodriguez, 497 U.S. 177, 183-89 (1990) (search based upon consent by person lacking actual authority); Maryland v. Garrison, 480 U.S. 79, 88 (1987) (police with warrant searched another apartment not named in the warrant). A Brandeisian view of the relationship between property and privacy would require a reevaluation of certain uses of technology to intrude upon protected places like the home and its curtilage. *See, e.g.*, Florida v. Riley, 488 U.S. 445 (1989) (finding no Fourth Amendment violation in the warrantless observation of a home and its curtilage from a low-flying helicopter). It would also require reevaluation of the government's authority to gather certain kinds of information about a person's communicative activities. *See, e.g.*, Smith v. Maryland, 442 U.S. 735, 741-46 (1979) (holding that a person possesses no protectable privacy expectation in the telephone numbers dialed from his telephone). Other decisions would be bolstered by an analysis protective of property rights. *See* Soldal v. Cook County, 113 S. Ct. 538, 544 (1992) (confirming the right to possession of property against a noncriminal seizure); Arizona v. Hicks, 480 U.S. 321, 326-28 (1987) (suppressing the fruits of a warrantless search of personal property).

jurisprudence from which the Court extricated itself almost 60 years ago."[345] Although the opinion in *United States v. Lopez* rested upon the Commerce Clause, Justice Souter stressed the conceptual links between the Court's *Lochner* era substantive due process and Commerce Clause opinions, and repeatedly invoked the specter of *Lochner*.[346] Justice Stevens agreed with Justice Souter's "exposition of the radical character of the Court's holding and its kinship with the *discredited, pre-Depression version of substantive due process*."[347]

The Court's decision in *Lopez* may be an anomaly, a judicial reaction to legislation in which Congress disregarded even the simplest requirements for justifying the exercise of its commerce power. But some judicial and academic critics worry that *Lopez* may prove to be much more: an "epochal case,"[348] "one of the opening cannonades in the coming constitutional revolution"[349] that will "turn the clock back"[350] to the *Lochner* era. If these more dramatic predictions are correct,[351] then understanding and reclaiming the virtues of *Lochner* era jurisprudence will become a fundamental task in constitutional law. If *Lopez* in fact signals a revival of substantive due process theory linking property rights to other fundamental rights, contemporary Fourth Amendment theory could be one of the surprising casualties of that "constitutional revolution."

345. United States v. Lopez, 115 S. Ct. 1624, 1654 (1995) (Souter, J., dissenting). Some commentators quickly concurred. *See, e.g.*, Bennett L. Gershman, *Judicial Conservatism*, N.Y. L.J., June 21, 1995, at 2; Vicki C. Jackson, *Cautioning Congress to Pull Back*, Legal Times, July 31, 1995, at S31; Nina Totenberg, *Supreme Court Rules Ban on Guns Near Schools Invalid*, National Public Radio Morning Edition, Apr. 27, 1995, *available in* LEXIS, News Library, NPR File.

346. *See Lopez*, 115 S. Ct. at 1652-54 (Souter, J., dissenting).

347. *Id.* at 1651 (Stevens, J., dissenting) (emphasis added).

348. *Id.* at 1657 (Souter, J., dissenting).

349. Totenberg, *supra* note 345 (quoting Professor Bruce Ackerman).

350. *Id.*

351. The results of judicial decisions in the months following *Lopez* are inconclusive. Some decisions have invalidated statutes for exceeding the scope of the Commerce Clause, *see, e.g.*, United States v. Parker, No. CRIM. 95-352, 1995 WL 683215, at *4-*5 (E.D. Pa. Oct. 30, 1995) (invalidating Child Support Recovery Act); United States v. Mussari, 894 F. Supp. 1360, 1362-67 (D. Ariz. 1995) (invalidating Child Support Recovery Act). Other decisions have upheld statutes as proper exercises of the Commerce power, *see, e.g.*, United States v. Bishop, 66 F.3d 569, 576 (3d Cir. 1995) (upholding federal carjacking statute); United States v. Sage, 906 F. Supp. 84, 89-91 (D. Conn. 1995) (upholding Child Support Recovery Act).