SOVEREIGNTY AND SUSPICION

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ABSTRACT

Most academics agree that search and seizure jurisprudence is a "mess." Professor Luna proposes a new approach to the Fourth Amendment founded on a sovereignty-based theory of the Constitution. Under this individual rights model, a government search or seizure of an individual's home or body receives the strongest presumption of invalidity. This presumption, he argues, could only be rebutted in three discrete circumstances: (1) consent by the individual to search his home or body; (2) individualized suspicion of wrongdoing; or (3) real, direct, and substantial threats to the sovereignty of other persons. Apart from these exceptions, governmental intrusions into the body and home are beyond the boundaries of official authority. Professor Luna contrasts the individual rights model with what he calls an antidiscrimination approach to the Fourth Amendment, which focuses on group participation in the political process rather than coercive effects on the individual. He identifies an important flaw in the antidiscrimination model: the lack of a constitutional floor protecting individuals and constraining government. Professor Luna's individual rights model provides content to that constitutional floor—tangible zones of individual sovereignty.

INTRODUCTION

Fourth Amendment jurisprudence needs to be overhauled. A mere tune-up will not do. Vacillating interpretations have left scraps of search and seizure law randomly strewn across the legal landscape. The Supreme Court has valiantly attempted to keep the machinery up and running, tinkering with new approaches and bending the rules. But each doctrine is more duct tape on the Amendment's

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frame and a step closer to the junkyard. Sometimes the most difficult thing for the mechanic to do is concede that repair is not possible and begin the reconstruction process.

Academics of all stripes agree that search and seizure law is a "mess"[1] and have offered their own fix-it guides for the Fourth Amendment. Peering over the Justices' shoulders, some scholars point to various parts of the law that should be tightened up or replaced. Others argue that the Court just needs to change its perspective to spot the structural cracks and the jurisprudential leaks. This scholarship fills countless articles, books, and treatises, providing blueprints for impassioned debate in legal circles.[2] But these works fail to realize that the Fourth Amendment is not a self-contained unit but part of a much larger machine—the Constitution. Few critics have attempted to link search and seizure law with modern constitutional theory;[3] most present schemes that are descriptive of the Court's jurisprudence or prescriptive within a doctrinal niche known as criminal procedure. They fail to unite Fourth Amendment law with any larger theoretical justification.

What is needed is a new jurisprudential engine connected to contemporary constitutional thought. But rather than monolithic formalisms, potential theories should be viewed as distinct interpretive frameworks founded on unified principles. In other words, scholarship should focus on constructing theoretical "models" of the Fourth Amendment. One possible model is grounded in a political process

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1. *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 759 (1994); Roger B. Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329, 334 (1973) (describing search and seizure law as so uncertain and incomprehensible "that it deprives any sanction of a meaningful chance to control conduct"); Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 20 (1988) (noting "virtual unanimity" among observers that the Court has bungled search and seizure law).

2. Seminal works on the Fourth Amendment include WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (3d ed. 1996); JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION (1966); NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (1937); TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION (1969); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974).

3. *See* Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 763 (1991) ("Anyone pondering the constitutional justification for the modern criminal procedure revolution cannot help but be struck by the utter poverty of the scholarly literature."); Wasserstrom & Seidman, *supra* note 1, at 21 ("[V]irtually no work has been done on the implications that modern constitutional theory holds for fourth amendment questions.").

theory of the Constitution.[4] This interpretation holds that the constitutional framework in general and criminal procedure guarantees in particular are concerned with fair process rather than individual substantive rights. Majority rule is the fundamental feature of American democracy and should be deferred to unless equal representation is denied or law enforcement costs are concentrated on a discrete minority. This approach generates what I call an antidiscrimination model of the Fourth Amendment, focusing on group participation in the political process. A citizen cannot complain if his voice can be heard and the relevant community internalizes the costs of a search and seizure policy.

The primary vice of the antidiscrimination model is its failure to provide a constitutional floor protecting individuals and constraining government. If the political majority wants to reside in a police state marked by absolute power to search and seize, the model poses no barrier so long as the burden is shared by the entire community. A surveillance society seems unthinkable to most at this particular moment in history, but bad government is not built in a day. It comes through slight shifts in power and gentle encroachments on individual rights—a form of creeping oppression that would go unnoticed and unstopped by the antidiscrimination model.

A second model of the Fourth Amendment can be constructed from a theory of individual sovereignty, protecting personal zones of autonomy that may not be invaded by government. The sovereign individual is an independent moral agent, unaccountable to political majorities. He is the ultimate and final source of authority within his domain, making choices and enacting personal policies at will. The citizen is subject to the laws of society outside his boundaries, but within the borders of personal sovereignty the state must accede. This individual rights model fits the constitutional text, context, and precedents while providing a theoretical justification that unifies post-Enlightenment philosophy and American constitutionalism. And unlike the political process approach, the individual rights model sustains a constitutional baseline of rights that are beyond the reach of government.

The question of which model is more consistent with the Constitution and the philosophical underpinnings of our nation echoes the perennial debate between individual liberty and societal order: Does society need to be protected from the selfish citizen? Or does the in-

4. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

dividual need a safe harbor from the tyranny of the majority? The abstract answer involves a little bit of both. But if history is any indicator, society in fact possesses more than adequate means to ensure the public good. It is the individual, unique in style and substance, who must be secure from forced conformity. Although the antidiscrimination model generally serves both the singular citizen and collective society, there are times when the political process functions "properly" but driven by sheer emotion rather than calm deliberation. Only an individual rights model of the Fourth Amendment provides inviolable protection against intemperate decisionmaking.

Open discussion and compromise leading to an ultimate vote are, of course, the hallmarks of a prosperous society. And in most situations, the political majority can be expected to do the right thing. But the Constitution was not designed for times when the general public can be trusted. A written charter in such circumstances is largely superfluous; express and implicit majoritarian devices are often equally successful at smoking out the best resolution. The true mettle of government is tested when the exigencies of the day raise public passions to a boil and individual rights seem too expensive to retain.

The purpose of this Article is to develop these two competing models from the ground up and then take them out for a constitutional test drive. In Part I, I describe the theoretical battle over the Fourth Amendment and the resulting chaos in search and seizure jurisprudence. Part II provides a brief overview of constitutional theory and considers the promise of modeling. Part III derives an antidiscrimination model of the Fourth Amendment from political process scholarship. In Part IV, I construct an individual rights model of the Fourth Amendment based on a sovereignty theory of the Constitution. And in Part V, I run the models through the gauntlet of suspicionless searches and seizures to confirm their relative merits and limitations.

I. A TALE OF TWO CLAUSES

The current state of search and seizure law reflects an ongoing war of linguistic interpretation. The first clause of the Fourth Amendment (the Reasonableness Clause) generally prohibits

"unreasonable searches and seizures."[5] The second clause (the Warrant Clause) outlines the requirements for a valid warrant, expressly noting the necessary level of suspicion and the specific information that must be provided. The comma between the two Clauses, however, has become a virtual Mason-Dixon line. How the Clauses are to interact, if at all, is the central question that divides judges and scholars.[6]

The "conjunctive" interpretation of the Fourth Amendment holds that the two Clauses should be read together, shedding light on one another.[7] Searches and seizures, according to this view, are presumptively unreasonable without a warrant based on probable cause.[8] Except for a few "jealously and carefully drawn" exceptions,[9] warrantless searches and seizures violate the Fourth Amendment, and their fruits must be suppressed in subsequent court proceedings. Judicial analysis under this interpretation is relatively straightforward: courts should look only at whether the search was conducted pursuant to a warrant based on probable cause or a recognized exception to the warrant requirement.[10]

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5. The full text states:

> 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.

6. *See generally* Silas J. Wasserstrom, *The Fourth Amendment's Two Clauses*, 26 AM. CRIM. L. REV. 1389, 1389-90 (1989) (discussing literal and historical approaches to the relationship between the Clauses).

7. *See* Almeida-Sanchez v. United States, 413 U.S. 266, 277 (1973) (Powell, J., concurring) ("[I]t is by now axiomatic that the Fourth Amendment's proscription of 'unreasonable searches and seizures' is to be read in conjunction with its command that 'no Warrants shall issue, but upon probable cause.'"); United States v. United States Dist. Court, 407 U.S. 297, 315 (1972) (holding that the definition of "reasonableness" turns in part on the specific commands of the Warrant Clause); 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, 1178-79 (1988) (noting that the conjunctive interpretation has been the conventional view among scholars and judges); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 417-18 (1988) [hereinafter Sundby, *A Return to Fourth Amendment Basics*] (proposing a "composite model" under which the two Clauses work in tandem to achieve the Fourth Amendment's broader purposes).

8. *See, e.g.*, Katz v. United States, 389 U.S. 347, 357 (1967) ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment.").

9. Jones v. United States, 357 U.S. 493, 499 (1958).

10. Exceptions to the warrant requirement include, *inter alia*, searches incident to valid arrests, *see, e.g.*, United States v. Robinson, 414 U.S. 218, 220-22 (1973) (upholding pat-down search of defendant arrested for driving after revocation of permit); searches and seizures of items in plain view, *see, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443, 472 (1971) (outlining

In contrast, the "disjunctive" interpretation of the Fourth Amendment maintains that the two Clauses are distinct.[11] Under this view, the specific requirements of the Warrant Clause—in particular, the prerequisite of probable cause—apply only to warrant-based activity.[12] Warrantless searches and seizures are not necessarily invalid but need only be reasonable.[13] Pursuant to the disjunctive interpretation, courts must conduct a context-sensitive inquiry into "the total atmosphere" of a particular case.[14] This analysis requires judicial balancing of the individual's interest in constitutional protection against the government's interest in conducting the search.[15]

Currently, neither interpretation of the Fourth Amendment is the clear jurisprudential victor.[16] One might argue that the conjunctive view remains the law of the land, pointing to the unequivocal

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the plain view exception but refusing to apply it in the case of a car outside defendant's house, since police had ample opportunity to obtain a warrant); searches and seizures in exigent circumstances, *see, e.g.*, Cupp v. Murphy, 412 U.S. 291, 296 (1973) (approving of seizure of fingernail samples without a warrant, given the destructibility of the evidence); and searches based on voluntary consent, *see, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218, 248 (1973) (affirming conviction where the state demonstrated that defendant voluntarily consented to search of car). *See generally* California v. Acevedo, 500 U.S. 565, 581-82 (1991) (Scalia, J., concurring) (listing exceptions to the warrant requirement).

11. *See, e.g.*, AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 3-20 (1997); TAYLOR, *supra* note 2, at 43 (arguing that the Framers did not intend "reasonableness" to include the requirements of the Warrant Clause in all cases).

12. *See, e.g.*, Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 653 (1995) ("[A] warrant is not required to establish the reasonableness of all government searches; and when a warrant is not required (and the Warrant Clause therefore not applicable), probable cause is not invariably required either.").

13. *See, e.g.*, *Acevedo*, 500 U.S. at 581 (Scalia, J., concurring) (stating that the Fourth Amendment "merely prohibits searches and seizures that are 'unreasonable'"). Chief Justice Rehnquist has been a primary champion of the disjunctive interpretation. *See* Robbins v. California, 453 U.S. 420, 438 (1981) (Rehnquist, J., dissenting) ("The terms of the Amendment simply mandate that the people be secure from unreasonable searches and seizures, and that any warrants which *may* issue shall only issue upon probable cause."); Steagald v. United States, 451 U.S. 204, 224 (1981) (Rehnquist, J., dissenting) (arguing that reasonableness, not the existence of a warrant, is the ultimate standard).

14. United States v. Rabinowitz, 339 U.S. 56, 66 (1950).

15. *See Vernonia*, 515 U.S. at 652-53 ("[W]hether a particular search meets the reasonableness standard 'is judged by balancing its intrusion on the individual's interests against its promotion of legitimate governmental interests.'" (quoting Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 619 (1989))).

16. *See Acevedo*, 500 U.S. at 582 (Scalia, J., concurring) (contending that the Court has "lurched back and forth" between the two interpretations); James J. Tomkovicz, California v. Acevedo*: The Walls Close in on the Warrant Requirement*, 29 AM. CRIM. L. REV. 1103, 1104 (1992) (arguing that the Court seems unable to decide whether the warrant requirement "is or is not a constitutional command").

language of recent search and seizure decisions.[17] But on close examination, it becomes obvious that the Court's allegiance is more lip service than reality.[18] The disjunctive theory has made substantial inroads into search and seizure law, creating the aforementioned doctrinal mess. In particular, two systemic changes have enshrined "reasonableness" as the defining attribute of a vast body of Fourth Amendment law.

A. Katz *and "Reasonable Expectations of Privacy"*

Beginning with the 1967 decision in *Katz v. United States*,[19] the Supreme Court moved from a property-based conception[20] of the Fourth Amendment to a privacy-based interpretation, holding that "the Fourth Amendment protects people, not places."[21] The new

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17. *See* Minnesota v. Dickerson, 508 U.S. 366, 372 (1993) ("Time and again, this Court has observed that 'searches . . . conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment.'" (quoting Thompson v. Louisiana, 469 U.S. 17, 19-20 (1984) (per curiam))).

18. *See* Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1475 (1985) ("By its continued adherence to the warrant requirement in theory, though not in fact, the Court has sown massive confusion among the police and lower courts."); William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 882 (1991) (observing that the Court "regularly narrows the range of cases to which the warrant requirement applies, so that in practice warrants are the exception rather than the rule").

19. 389 U.S. 347 (1967). Katz had been convicted of gambling charges based on his phone call from a public telephone booth. Federal agents had recorded the conversation by attaching a listening device to the outside of the booth. *See id.* at 348.

20. Until the late 1960s, search and seizure analysis focused solely on concepts of property. A physical intrusion into a "constitutionally protected area" was required before government activity would be deemed a search for Fourth Amendment purposes. *See* Silverman v. United States, 365 U.S. 505, 510 (1961). This so-called "trespass doctrine" was more than adequate to protect individuals in a pre-technological agrarian society; searches prior to the turn of the century uniformly required some form of physical intrusion. *See, e.g.*, Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-first Century*, 65 IND. L.J. 549, 557 (1990). But the advent of electronic surveillance demonstrated the limitations of a Fourth Amendment strictly grounded in the law of property. Wiretapping phone lines, for example, was constitutional because no physical intrusion was made into a protected area. *See* Olmstead v. United States, 277 U.S. 438, 465 (1928). But inserting a microphone into a wall was considered a search within the meaning of the Fourth Amendment because of the physical trespass into the structure. *See Silverman*, 365 U.S. at 512. A constitutional right that turned on antiquated notions of property was highly manipulable and could provide sporadic protection at best.

21. *Katz*, 389 U.S. at 351. Professor Albert Alschuler has made a powerful argument that *Katz* added privacy as a measure of constitutionality without displacing the prevailing property-based conception: "Much of the trepidation that scholars have voiced concerning *Katz* may stem from a failure to recognize that *Katz* supplemented earlier visions of fourth amendment protections but did not supplant them." Albert W. Alschuler, *Interpersonal Privacy and the Fourth Amendment*, 1983 N. ILL. U. L. REV. 1, 7 n.12.

touchstone of search and seizure analysis safeguards conversations whispered in the public cafe but not words screamed out the bedroom window.[22] In particular, the Fourth Amendment protects "an expectation of privacy that society is prepared to consider reasonable."[23] According to this interpretation, like the disjunctive interpretation, warrantless surveillance should be judged under the mantra of reasonableness.

The *Katz* formula was clearly intended to provide individuals with a high level of protection against governmental surveillance.[24] But in an ironic twist, *Katz* has been used to constrict Fourth Amendment rights rather than expand them. "Reasonableness" might be the law's greatest waffle word, allowing courts to hedge their bets or duck principled analysis. In the criminal procedure context, a reasonableness standard is flexible and simple, but also manipulable, terribly ambiguous, and subject to inconsistency.[25] The Fourth Amendment reasonableness test contains the vice of degenerative self-definition, with each unimpeded intrusion providing a new baseline against which all subsequent modes of government sur-

22. *Katz*, 389 U.S. at 351-52 ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.") (citations omitted).

23. United States v. Jacobsen, 466 U.S. 109, 113 (1984). This is actually the second part of the two-prong test originally articulated by Justice Harlan in his *Katz* concurrence. Individuals are afforded constitutional protection when: (1) they demonstrate a subjective expectation of privacy, and (2) society recognizes that expectation as reasonable. *See Katz*, 389 U.S. at 361 (Harlan, J., concurring). Although scholars have demonstrated that the first prong is legal nonsense, *see* Amsterdam, *supra* note 2, at 384 (noting that adherence to the first prong would allow the government to "diminish each person's subjective expectation of privacy merely by announcing half-hourly on television that . . . we were all forthwith being placed under electronic surveillance"); Wayne R. LaFave, *The Fourth Amendment: "Second to None in the Bill of Rights,"* 75 ILL. B.J. 424, 427 (1987) ("The first of these two requirements certainly deserves no place in a theory of what the Fourth Amendment protects."), the second prong has flourished as the threshold test of Fourth Amendment coverage.

24. *See* Amsterdam, *supra* note 2, at 385 ("*Katz* is important for its rejection of several limitations upon the operation of the amendment."); Lewis R. Katz, *supra* note 20, at 560-63 (1990) (observing that *Katz* "provided a framework for ensuring freedom by protecting personal security"); Scott E. Sundby, *"Everyman"'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizens?*, 94 COLUM. L. REV. 1751, 1756 (1994) [hereinafter Sundby, *"Everyman"'s Fourth Amendment*] (arguing that *Katz* extends the Fourth Amendment's scope to protect against an array of intrusions that would not fall within its literal meaning).

25. *See* Amsterdam, *supra* note 2, at 414-15 (arguing that "unreasonableness . . . is obviously much too amorphous either to guide or to regulate the police").

veillance will be measured. As a test, it provides a near-perfect bootstrap for incrementally more intrusive police actions.[26]

B. Administrative Searches, Brief Detentions, and Special Needs

A second systemic change in Fourth Amendment jurisprudence began within a year of the *Katz* decision. The Supreme Court crafted two doctrines that rejected a strict conjunctive reading of the Fourth Amendment and set the stage for a partial adoption of the disjunctive interpretation.[27] Both attempted to toe the line of past precedents, but their adherence to the dictates of the Warrant Clause was largely superficial, and their progeny demonstrated that initial allusions to the conjunctive interpretation of the Fourth Amendment were window dressing. In the end, a new hybrid doctrine unequivocally rejected the conjunctive interpretation.

1. *Administrative Searches.* Beginning with *Camara v. Superior Court*,[28] the Supreme Court constructed a special doctrine for "administrative searches."[29] Although the *Camara* Court clung to the warrant requirement, it expressly rejected the need for any predicate of individualized suspicion in administrative searches based on a litany of factors.[30] Administrative inspection schemes were judged under a reasonableness test, balancing the individual's privacy interests against the government's interests in conducting the search.[31] Five years later, the Court completely dispensed with the warrant requirement in the administrative search context, confirming

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26. *See infra* notes 190-219 and accompanying text.

27. *See* Terry v. Ohio, 391 U.S. 1, 30-31 (1968) (articulating the "brief detention" doctrine); Camara v. Municipal Court, 387 U.S. 523, 534-35 (1967) (articulating the "administrative search" doctrine).

28. 387 U.S. 523 (1967).

29. *Id.* at 534. In *Camara*, the Court examined routine, areawide building inspections by city health and safety officials. The defendant's conviction for refusing to allow the inspection was overturned because the officials had failed to seek a warrant after consent was withheld. *See id.* at 534. Nonetheless, *Camara* overruled *Frank v. Maryland*, 359 U.S. 360 (1959), which had held that Fourth Amendment interests were not implicated by administrative inspections. *See Camara*, 387 U.S. at 528 (overruling *Frank*).

30. *See Camara*, 387 U.S. at 538. The factors were: the presence of a neutral administrative scheme; the long history of judicial and public acceptance of such schemes; the compelling interest in preventing urban catastrophes; the absence of less-restrictive alternatives; the nonpersonal, non-criminal nature of the inspection; and the limited invasion of individual privacy. *See id.* at 535-37.

31. *See id.* ("[T]here can be no ready test for reasonableness other than by balancing the need to search again the invasion which the search entails.").

its retreat from the conjunctive reading of the Fourth Amendment.[32] Subsequent cases disregarded each of the elements found to be essential to the *Camara* decision.[33] By invoking an arguably administrative or regulatory purpose, the government can now avoid warrant and probable cause requirements even when the search results in a criminal prosecution.[34] The label placed on the search, therefore, will often determine whether the conjunctive or disjunctive interpretation controls the case.[35]

2. *Brief Detentions.* One year after *Camara*, the Court confronted the issue of warrantless investigatory detentions in *Terry v. Ohio*.[36] In upholding the police technique commonly known as a "stop and frisk," the *Terry* Court refused to apply the strictures of the Warrant Clause and instead adopted the reasonableness balancing test as the appropriate mode of inquiry.[37] Because the governmental interests in safety and crime prevention outweighed the individual's privacy interests,[38] the scale tipped against the warrant and probable cause requirements. Government officials could conduct warrantless investigative detentions based on a "reasonable suspicion" of wrongdoing, a less demanding standard than probable cause.[39]

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32. *See* United States v. Biswell, 406 U.S. 311, 317 (1972).

33. This has not gone unremarked. *See* Stephen J. Schulhofer, *On the Fourth Amendment Rights of the Law-Abiding Public*, 1989 SUP. CT. REV. 87, 93-107 (1989) (detailing the case-by-case dilution of *Camara*). The Court has approved warrantless search schemes in a variety of regulated businesses. *See Biswell*, 406 U.S. at 317 (licensed firearms); Donovan v. Dewey, 452 U.S. 594 (1981) (underground and surface mines); New York v. Burger, 482 U.S. 691, 708 (1987) (automobile junkyards).

34. *See Burger*, 482 U.S. at 725 (Brennan, J., dissenting) (arguing that the state had used an administrative scheme as a pretext to search a junkyard for evidence of criminal violations without probable cause).

35. *Cf. Sundby, A Return to Fourth Amendment Basics*, *supra* note 7, at 408 (arguing that "the government retains inordinate power to dictate which fourth amendment standard applies").

36. 392 U.S. 1 (1968). The facts in *Terry* were as follows: after a police officer noticed that three men appeared to be "casing" a store for a robbery, he approached the individuals, asked for their identification, and patted them down. *See id.* at 6-7.

37. *Id.* at 20-21 ("[W]e deal here with an entire rubric of police conduct . . . which historically has not been, and as a practical matter could not be, subject to the warrant procedure.").

38. *See id.* at 22-26. According to the Court, an investigative detention "constitutes a brief, though far from inconsiderable, intrusion upon the sanctity of the person." *Id.* at 26.

39. *See id.* at 27 (concluding that police authority to search for weapons can be based on a reasonable belief that felonious conduct is afoot, not whether probable cause exists to arrest the individual for a crime).

Terry maintained at least a minimal connection to the conjunctive interpretation of the Fourth Amendment. Although the reasonable suspicion standard departs from the literal requirements of the Warrant Clause and demands a lesser quantum of evidence than probable cause, it nonetheless demands some form of individualized suspicion. But a subsequent line of "minor seizures"[40] cases rejected even this tangential association with the conjunctive reading.[41] In applying the reasonableness balancing test, the Court has generally found weighty government interests served by brief detentions.[42] The intrusion on the countervailing privacy interests is often deemed relatively minimal,[43] allowing minor seizures to pass constitutional muster without warrants or probable cause.

3. *Special Needs. Camara* and *Terry* represented initial breaks from the conjunctive interpretation of the Fourth Amendment. Their direct and indirect progeny dismissed the prevailing view that searches and seizures could only be conducted pursuant to a warrant based on probable cause. Instead, the dictates of the Warrant Clause presented but one option open to the government. In a variety of contexts, officials could turn to the Reasonableness Clause to justify their actions.

A new line of cases—collectively establishing the so-called special needs doctrine—has been built on the foundation laid by *Camara* and *Terry*.[44] This doctrine shares with its predecessors a distaste for

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40. Wayne R. LaFave, *Computers, Urinals, and the Fourth Amendment: Confessions of a Patron Saint*, 94 MICH. L. REV. 2553, 2576 (1996).

41. For example, law enforcement may conduct warrantless, suspicionless checkpoint stops of all vehicular traffic to check for illegal aliens. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 561-67 (1976) (illegal aliens); *cf.* Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990) (drunk drivers); Delaware v. Prouse, 440 U.S. 648, 663 (1979) (explaining that roadblock stops would be permissible alternatives to random checks for documentation, which the Court deemed unreasonable).

42. *See Sitz*, 496 U.S. at 451 (noting the magnitude of the nation's drunk driving problem); *Martinez-Fuerte*, 428 U.S. at 556-57 (reasoning that highway checkpoints are the most effective means of apprehending illegal aliens).

43. *See Sitz*, 496 U.S. at 451-53 (reasoning that checkpoints generate less fear and surprise than random stops); *Martinez-Fuerte*, 428 U.S. at 557-60 (noting that random stops only involve answering a few questions and possibly producing documentation).

44. The initial articulation of the special needs doctrine can be traced back to 1985. In *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), Justice Blackmun stated that "special needs, beyond the normal need for law enforcement, [can] make the warrant and probable-cause requirement impracticable." *Id.* at 351 (Blackmun, J., concurring). The most remarkable aspect of the *T.L.O.* decision, however, was not Blackmun's legal rubric but the majority's point of departure for its Fourth Amendment inquiry. The then-prevailing legal norm was to offer at least a

the warrant and probable cause requirements of the conjunctive interpretation. Yet unlike its precursors, the special needs doctrine shares few of the bells and whistles that provide ostensible limitations. An administrative or regulatory purpose is not the *sine qua non* of constitutionality. The searches and seizures are often personal. And the intrusions need not be brief. But the special needs cases have adopted one defining characteristic of previous doctrines—the reasonableness balancing test.

Special needs cases are defined by a few general characteristics. As the title suggests, government must articulate a special need for the search that goes beyond, and is arguably greater than, law enforcement prerogatives.[45] Second, the warrant requirement must provide little constitutional protection and be excessively burdensome and impractical in the context of the search.[46] And finally, the officials conducting the search must be unable to articulate probable cause or comprehend the legal standard, or the probable cause requirement must defeat the underlying purpose of the search itself.[47] When the

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passing reference to the conjunctive interpretation before moving on to a reasonableness balancing test. But the *T.L.O.* Court began its analysis with a disjunctive reading of the Fourth Amendment, arguing that reasonableness was the primary issue rather than an alternate reading of second choice. *See id.* at 337 ("[T]he underlying command of the Fourth Amendment is always that searches and seizures be reasonable . . . [which] requires 'balancing the need to search against the invasion which the search entails.'" (quoting Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967))). Ironically, the oft-quoted language in Justice Blackmun's concurrence was intended to admonish the Court for "omit[ting] a crucial step," that is, consideration of the warrant and probable cause requirements. *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring).

45. *See* Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 653 (1995) (finding a special need in protecting students and deterring drug use); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 666-67 (1989) (same as to preventing drug users from becoming customs agents); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 620-21 (1989) (same as to preventing railroad accidents); Griffin v. Wisconsin, 483 U.S. 868, 878 (1987) (same as to rehabilitating probationers); O'Connor v. Ortega, 480 U.S. 709, 725 (1987) (same as to ensuring supervision, control, and efficient operation of the workplace); *T.L.O.*, 469 U.S. at 341 (same as to maintaining school discipline and security). Ensuring safety in the railroad industry, for example, satisfies this criterion, even thought the government is trying to prevent locomotive catastrophes, not crime. *See Skinner*, 489 U.S. at 620.

46. *See Von Raab*, 489 U.S. at 666-67 (reasoning that requiring a warrant for drug tests of customs service employees would do little to protect privacy and would divert valuable agency resources); *Skinner*, 489 U.S. at 622 (reasoning that requiring a warrant before drug testing of railroad employees would provide little additional protection); *O'Connor*, 480 U.S. at 722 (reasoning that requiring an employer to obtain a warrant before searching an employee's office "would seriously disrupt the routine conduct of business"); *T.L.O.*, 469 U.S. at 340 (reasoning that requiring teachers to obtain warrants before searches "would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in schools").

47. *See Von Raab*, 489 U.S. at 668 (stating that the probable cause standard is unhelpful in analyzing activities that seek to prevent hazardous conditions, since these "rarely generate ar-

Court finds some semblance of these factors, it then moves on to the reasonableness balancing test.[48] But this final step is largely a formality; once a special need is found, the government almost always prevails.[49]

II. CONSTITUTIONAL THEORY AND THE FOURTH AMENDMENT

The preceding was but a brief overview of the unwieldy, confusing, and uncouth state of search and seizure doctrine. Trying to uncover the rhyme or reason of Fourth Amendment jurisprudence seems fanciful to many. "Warrants are not required—unless they are," Professor Akhil Amar quips.[50] "All searches and seizures must be grounded in probable cause—but not on Tuesdays."[51] Sometimes the disjunctive approach holds sway, other times the conjunctive in-

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ticulable grounds for searching any particular place or person"); *Skinner*, 489 U.S. at 628 (stressing that the railroad employees subject to testing could cause great human loss before showing the signs of impairment necessary to give rise to probable cause); *O'Connor*, 480 U.S. at 724-25 ("It is simply unrealistic to expect supervisors in most government agencies to learn the subtleties of the probable cause standard.").

48. The Court has suggested that the non-prosecutorial nature of a search may play a part in the existence of special needs. *See, e.g.*, *Von Raab*, 489 U.S. at 666. But this factor has been ignored or flatly contradicted in other cases. *See, e.g.*, *Griffin*, 483 U.S. at 868 (allowing a search where the evidence was used to convict a probationer for possession of a firearm); *T.L.O.*, 469 U.S. at 347-48 (upholding a search at school where the evidence was used for a delinquency proceeding against a juvenile).

49. *See Skinner*, 489 U.S. at 639 (Marshall, J., dissenting) ("Tellingly, each time the Court has found that 'special needs' counseled ignoring the literal requirements of the Fourth Amendment for such full-scale searches in favor of a formless and unguided 'reasonableness' balancing inquiry, it has concluded that the search in question satisfies that test."). *But see* Chandler v. Miller, 117 S. Ct. 1295, 1303-05 (1997) (finding a special need but striking down a law that required candidates to pass a drug test to qualify for state office). The special needs doctrine has been soundly criticized. Justice Brennan described it as "Rohrschach-like," portending "a dangerous weakening of the purpose of the Fourth Amendment to protect the privacy and security of our citizens." *T.L.O.*, 469 U.S. at 358 (Brennan, J., dissenting). The doctrine, argued Justice Marshall, turns search and seizure law into a "patchwork quilt." *Skinner*, 489 U.S. at 639 (Marshall, J., dissenting). Even Justice Scalia, a noted advocate of law-and-order policies, described a particular special needs case as "destructive of privacy and offensive to personal dignity." *Von Raab*, 489 U.S. at 680 (Scalia, J., dissenting). The harshest criticism, as one might suspect, has come from legal commentators. *See, e.g.*, Gerald S. Reamey, *When "Special Needs" Meet Probable Cause: Denying the Devil Benefit of the Law*, 19 HASTINGS CONST. L.Q. 295, 299-300 (1992) (arguing that the "special needs" doctrine is flawed because it requires the Court to interpret the Fourth Amendment in an ad hoc and unprincipled manner). Each step of the doctrine—identification of a special need, determination of the interests involved, application of the reasonableness balancing test—has been dissected and condemned. Few seem to like the doctrine, other than some of those who occupy the highest court in the land.

50. AMAR, *supra* note 11, at 1.

51. *Id.*

terpretation reigns. But any regression analysis of Fourth Amendment decisions is likely to uncover what criminal procedure scholars have known for some time: the choice between the two interpretations will be founded on five votes rather than on principle.

The Court sometimes plays a game of semantics with the two Clauses of the Fourth Amendment as though there were some deep meaning yet to be discovered. In reality, the battle between the conjunctive and the disjunctive interpretations is a red herring. The text of the Constitution, of course, should be the origin for any interpretation. But that's all it is—a starting point. Many constitutional provisions, including the Fourth Amendment, are vaguely phrased and require content from some external source. The Constitution is clearly concerned with official searches and seizures in particular and abusive government conduct in general. But the text is light on the specifics. History often provides little help, with documentary evidence being too fragmented or corrupted to provide insight into the original meaning.[52] And even if the Framers' intent could be unearthed, the question remains whether we should be guided by the dead hands of men who lived in a universe vastly different from our own. This is a particularly dubious proposition for the Fourth Amendment. "It is bizarre," Professors Silas Wasserstrom and L. Michael Seidman argue, "to focus on the precise language of the amendment in light of the fact that the Framers themselves did not focus on it."[53] The precise wording and construction of the two Clauses were not purposeful but seem to have resulted from an unnoticed drafting error by the Framers.[54]

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52. *See* James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 2 (1986) ("To recover original intent from these records may be an impossible hermeneutic assignment.").

53. Wasserstrom & Seidman, *supra* note 1, at 79.

54. Professors Wasserstrom and Seidman explain:

> Congressman Benson, the chairman of the committee that arranged the amendments, thought the amendment was too limited, and proposed that the phrase "by warrants issued" be altered to read "and no warrant shall issue." This proposal was quickly voted down by the House of Representatives, but the persistent Benson apparently smuggled his version back into the draft of the Bill of Rights that was sent to the Senate, which accepted his language without any discussion or debate. And while the state legislatures ratified the fourth amendment as currently written, it is doubtful that many of those who voted paid close attention to the precise wording of the fourth amendment, for it was, of course, ratified as part of a package consisting of the first ten amendments. Thus, the language of the fourth amendment as we know it, with its two clauses and the enduring uncertainty about the relationship between them, did not receive from the Congress that proposed it anything like the attention that has been lavished on it since. That language, it seems, is not a reliable guide to the original intentions of the framers.

The text and context of the Fourth Amendment cannot resolve the dispute between conjunctive and disjunctive interpretations,[55] and the Supreme Court's vacillation between the two views only confirms the futility of such efforts. Yet that critical observation only begs the question of what is to be done with the Fourth Amendment mess. Once the doctrines are knocked down, something must be erected in their place.

Legal scholars have submitted a variety of proposals to fill the potential void.[56] Many present simple yet powerful rubrics that could be adopted without constitutional revolution.[57] Some scholars advance elegant search and seizure theories grounded in legal philosophy.[58] Still others have offered fresh visions of the Fourth Amendment by shifting the prevailing paradigm.[59] All of these works

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Id. at 80 (footnotes omitted); *see also* LANDYNSKI, *supra* note 2, at 41-42; LASSON, *supra* note 2, at 101-03.

55. *See* Wasserstrom & Seidman, *supra* note 1, at 80-81 (concluding that the history of the Amendment leaves the dispute between the conjunctive and disjunctive interpretations unresolved).

56. *See* Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 203 (1993) (advocating a rule-based interpretation of the Fourth Amendment as a replacement for the "malleable standard of reasonableness"); Katz, *supra* note 20, at 555 (arguing for recognition of a new class of intrusions against which there would be some constitutional protection); Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1230 (1983) (arguing that the Court's Fourth Amendment focus should be on the effect of its pronouncements on the innocent, not on the guilty); Schulhofer, *supra* note 33, at 89 (proposing a revamping of the Court's administrative search doctrine); Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 3 (1991) (setting aside the Fourth Amendment and constructing an approach to search and seizure regulation from a blank slate); Strossen, *supra* note 7, at 1177 (arguing for reforms of the Court's Fourth Amendment balancing test); William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 555 (1992) (advocating a Fourth Amendment model based on contract principles); Sundby, *"Everyman"'s Fourth Amendment*, *supra* note 24, at 1754-55 (arguing that Fourth Amendment jurisprudence should seek to foster reciprocal trust between the government and its citizens); *Sundby, A Return to Fourth Amendment Basics*, *supra* note 7, at 385-86 (proposing a reinterpretation of the roles of the two clauses and replacement of the reasonableness balancing test with a standard more protective of privacy).

57. Nadine Strossen, president of the ACLU, for example, has argued for the inclusion of a "least intrusive alternative" component to Fourth Amendment analysis, a component which is both consistent with other areas of constitutional law and suited for the judicial craft. *See* Strossen, *supra* note 7, at 1208-09; *see also* Holly, *supra* note 56, at 540 (advocating the adoption of a strict scrutiny standard in warrantless searches, including the imposition of a "least intrusive alternative" requirement).

58. *See, e.g.*, Cloud, *supra* note 56, at 203 (presenting a Fourth Amendment theory based on "principled positivism").

59. *See, e.g.*, Slobogin, *supra* note 56 (envisioning an approach to search and seizure law in the absence of the Fourth Amendment); Stuntz, *supra* note 56 (shifting the Fourth Amendment model from tort law to contract law).

undertake a clean-up job of massive proportions. But this genre of legal scholarship has one fault—its isolation from contemporary constitutional theory. Few authors have attempted to connect Fourth Amendment jurisprudence with overarching theoretical justifications.[60] Instead, search and seizure scholarship has, by and large, either described the Court's precedents or prescribed change within the narrow confines of criminal procedure law.[61] What is needed is a framework that unites the Fourth Amendment with constitutional substance and structure. In other words, a theory must delineate the primary purpose of the Fourth Amendment within the Constitution and a concomitant method of enforcement.

The use of constitutional theory is not without its perils. In past decades, scholars have constructed "grand theories" or "formalisms" that advocate a single overarching vision of the Constitution based on an external standard of political morality. These metatheories attempted to connect constitutional doctrine, modern philosophy, and political theory while satisfying the inherent desire to find a common thread running through the Constitution.[62] But critics correctly noted that there was no *a priori* rationale for selecting one grand theory over another, and the unavoidable subjectivity was corroborated by the fact that no theory achieved widespread support among legal scholars.[63] Moreover, the grand theorists themselves engaged in a process of mutually assured annihilation, launching the academic equivalent of neutron bombs at each other's proposals.[64] Although scholarly criticism is a mandatory element of legal discourse, the underlying premise of the debate was mutual exclusivity: grand theories cannot peacefully coexist in the competitive world of constitutional interpretation.

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60. *See supra* note 3 and accompanying text. The works of Professor Akhil Amar are an exception. *See generally* AMAR, *supra* note 11.

61. *See* Amar, *supra* note 1, at 759 ("Fourth Amendment case law is a sinking ocean liner—rudderless and badly off course—yet most scholarship contents itself with rearranging the deck chairs.").

62. *See* Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 358-60 (1981) (enumerating several such theories).

63. *See, e.g.*, Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1376-77 (1988) ("[M]any extremely able people have attempted to discover the true foundation of constitutional law, and none has succeeded.").

64. As Professor Tushnet has observed: "A student of grand theory notices rather quickly that the presentations have a common structure. In 'Part I' the theorist offers a critique of all other grand theories, and in 'Part II' he presents an assertedly defensible and therefore different grand theory." MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 2 (1984).

This academic skirmish is both unwarranted and counterproductive. Instead, constitutional theories should be used as unique interpretive frameworks built upon first principles; they serve as "models" of interpretation for constitutional disputes. Modeling encourages debate on constitutional aspirations and notions of fundamental law, while channeling an otherwise unwieldy discussion into a contrastive approach. Real-world controversies can be reviewed under each theoretical model, and the potential outcomes can then be mapped for comparative analysis. And while grand theories must be perfect by definition, models need not be. Under a modeling approach, the issue is not whether a particular theory has defects. Instead, one should examine the size and number of flaws both in concrete disputes and over the entire body of constitutional questions. The goal is not to find the perfect or perpetual model, but rather the "best" model for the here and now.[65] It is a model that fulfills the aspirations for contemporary society, respects the American tradition without repeating the mistakes of the past, and makes the Constitution the very best it can be.

The following sections detail two search and seizure models that bridge the gap between the Fourth Amendment and constitutional theory. The antidiscrimination model takes a "participational orientation"[66] to search and seizure law. This political process theory focuses on the internal workings of government, that is, how the decisionmaking machinery selects policies and distributes goods to its citizenry.[67] The precise political ends are much less important than the means to these ends. Fair and just procedure is the linchpin; equality in representation is the goal. The Fourth Amendment serves as an antidiscrimination device within this model, a criminal proce-

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65. If one accepts the postmodern critique of modernism and the inherent challenge of individual perspective, as I do, the idea of an objectively and eternally perfect Constitution becomes quixotic. *Cf.* Monaghan, *supra* note 62, at 360 (arguing that the text of the Constitution does not lend itself to the perfection some commentators try to achieve by marrying the document with external concepts of political morality). But human fallibility and the impossibility of personal omnipotence should not foreclose a search for the best constitutional interpretation for "ourselves and our Posterity." U.S. CONST. preamble. A post-postmodern solution only requires that any theory be acutely self-conscious and open to change (or even repudiation) through meritorious critiques or superior argumentation. For a discussion of the postmodern critique, *see infra* Part IV.C.

66. ELY, *supra* note 4, at 75 n.*.

67. *See id.* ("[A] participational orientation denotes a form of review that concerns itself with how decisions effecting value choices and distributing the resultant costs and benefits are made.").

dure analog to the Equal Protection Clause of the Fourteenth Amendment.

The second model, in contrast, is drawn from a moral theory of the Constitution. The Fourth Amendment secures individual liberties that can be claimed in spite of fair procedures and adequate representation in government decisionmaking. Each moral agent is guaranteed a baseline of constitutional protection even if a heterogeneous super-majority would agree to relinquish its rights in whole or in part. A well-oiled political system is not enough. Substance rather than procedure, this model argues, is the lodestar of the Fourth Amendment.

The two models do share some common ground. Both agree that government must afford "equal concern and respect" for each of its citizens.[68] The models also reach the same conclusions in a variety of scenarios. One can protect substantive liberties "fairly well" by ensuring procedural equality. Likewise, one can guarantee procedural rights "fairly well" by embracing substantive values.[69] But the range of overlapping results is not the proving ground of these models. Where they diverge is the true test of their utility and fidelity to the Constitution.

III. THE ANTIDISCRIMINATION MODEL

Although its title is of recent vintage, a rudimentary form of political process theory can be traced back to seminal cases of the Marshall Court.[70] In more recent times, a federalism version of the theory has occasionally found its way into Commerce Clause jurisprudence[71]

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68. *Id.* at 82 (quoting RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 180 (1977)).

69. Professor John Hart Ely explains:

> One can guarantee substantive rights directly (by pointing to them) or, fairly well, by an equality provision commanding that everyone generally get what the best-off are getting. Similarly, one can guarantee equality either by thus commanding it, or, fairly well, by pointing to things one considers important and saying everyone is to get them.

ELY, *supra* note 4, at 24.

70. *See* Gibbons v. Ogden, 22 U.S. 1, 197 (1824) (concluding that states' rights concerns are sufficiently protected by the political process); McCulloch v. Maryland, 17 U.S. 316, 435-36 (1819) (holding that a state may not tax an arm of the federal government because the national citizenry is not politically represented in the state legislature).

71. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550-51 (1985) ("It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress."); South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 184 n.2 (1938) (noting that state regulations affecting interstate

and legal scholarship.[72] Nonetheless, most scholars point to a celebrated annotation in the 1938 case *United States v. Carolene Products*[73] as the origin of modern political process theory. In the fourth footnote of that decision, Justice Harlan Fiske Stone delineated situations when the usual judicial presumption of constitutionality might be inappropriate, including: (1) "legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation";[74] and (2) laws involving "prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[75]

Decades later, John Hart Ely would draw upon this footnote as the basis for a "representation reinforcing" version of political process theory.[76] Professor Ely's 1980 book, *Democracy and Distrust*, is arguably "the most important contribution to constitutional theory of the past generation."[77] In the nearly two decades since its publication, Ely's theory of judicial review has provided both a framework for further scholarship and a foil for competing theories.

A. Ely and Representation-Reinforcement Theory

According to Ely, the Constitution indicates fundamental principles that must be interpreted and applied in a contemporary con-

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commerce are unconstitutional if their purpose is "to gain for those within the state an advantage at the expense of those without").

72. *See* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 170-259 (1980) (arguing that the Court should not decide questions about the power of the federal government vis-à-vis the states, since states are well-represented in the national political process); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 559 (1954) (observing that Congress's interpretations of the Constitution with respect to issues of federalism carry great weight, since it is the states' representatives who control the political process).

73. 304 U.S. 144 (1938).

74. *Id*. at 152-53 n.4.

75. *Id*. In the first paragraph of the footnote, Stone argued that the presumption of constitutionality might also be improper "when legislation appears on its face to be within a specific prohibition of the Constitution." *Id.*

76. ELY, *supra* note 4, at 77 (arguing that the fourth footnote of *Carolene Products* suggests a focus on constriction of opportunities to participate in the political process rather than on the importance of substantive values).

77. Klarman, *supra* note 3, at 747; *see also* Mark V. Tushnet, *Foreword*, 77 VA. L. REV. 631, 631 (1991) (noting that Ely's representation-reinforcement theory played a key role in shaping constitutional discourse in the 1980s).

text.[78] The hard question—and, in fact, the ultimate downfall of modern constitutional theory—is determining which principles are so fundamental that they must be rigidly enforced against government.[79] Some provisions seem fairly straightforward and require little in the way of interpretation. The President, for example, must be at least thirty-five years old.[80] Other provisions are "open-ended," providing little textual guidance as to their meaning. The Eighth Amendment's prohibition against "cruel and unusual punishments," for instance, fails to delimit what types of penalties should be deemed "cruel and unusual."[81] Open-ended provisions require comprehensive interpretation by some individual or body in order to have any effect.

Since the time of John Marshall, this duty to interpret the Constitution has been vested in the judiciary.[82] The Court's definitive authority to construe ambiguous language, however, creates the notorious "counter-majoritarian difficulty."[83] The American system of government is premised on majoritarianism: popular will, as expressed through democratically elected representatives, must generally prevail. But the Constitution is not a document solely concerned with majority rule. Various provisions, particularly those found in the Bill of Rights, were intended to thwart the desires of political majorities. Yet when a judge invokes the Constitution to protect the rights of a minority, that action exemplifies the twin evils of the countermajoritarian difficulty. First, a majority of the citizenry is prevented from getting its way. And second, the judges themselves are neither elected nor subject to political restraints.[84]

The difficult task, then, is to construct a method of judicial review which protects minorities without undermining a government based on majority rule.[85] Ely overcomes the countermajoritarian dilemma by rejecting substantive principles as the core of the Constitution. Although such principles may look value neutral on their face,

78. *See* ELY, *supra* note 4, at 1 (arguing that "the Constitution proceeds by briefly indicating certain fundamental principles whose specific implications for each age must be determined in contemporary context").

79. *See* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 55 (1962), *quoted in* ELY, *supra* note 4, at 43.

80. *See* ELY, *supra* note 4, at 13 (discussing U.S. CONST. art. II, § 1, cl. 5).

81. *Id.* at 13-14 (discussing U.S. CONST. amend. VIII).

82. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

83. BICKEL, *supra* note 79, at 16.

84. *See* ELY, *supra* note 4, at 4-8.

85. *See id.* at 7-8 (contending that the consent of the majority is the core of American government but "cannot be the whole story").

they inevitably incorporate the subjective opinions of an insulated cadre of judges.[86] By protecting procedure rather than substance, judges can avoid imposing value-laden judgments on society.

Ely finds support for this hypothesis in the constitutional text and context, as well as in the Supreme Court's contemporary jurisprudence. The Constitution itself is largely concerned with procedural fairness and popular participation in government,[87] with various provisions demonstrating an orientation towards process over results.[88] According to Ely, the Constitution was almost exclusively concerned with the structure of government rather than selecting and preserving particular substantive rights.[89] The Framers understood that perpetual justice and equality could not be guaranteed by enshrining static substantive principles, but rather by constructing a governmental framework that assured fair procedures and full participation.[90]

The procedure-over-substance thesis is also justified by the workings of the Warren Court. Ely, a former clerk for Chief Justice Earl Warren, argues that the Court's jurisprudence of the 1950s and 1960s was inspired by procedure writ large—the lawmaking process. Many of its decisions were driven by the desire to ensure that all voices would be heard and respected when policy decisions were made.[91] Likewise, the Court demanded that all citizens—particularly the downtrodden and despised members of society—be treated equally in the distribution of rights, goods, and services. If a legislature bestowed something of value upon a particular group, it would have to provide that largesse to all similarly situated individuals.[92]

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86. *See id.* at 44 (discussing how judges inject their own values into issues of constitutional interpretation).

87. *See id.* at 87 (observing that the Constitution leaves the accommodation of substantive values "almost entirely to the political process").

88. *See id.* at 90-92 (discussing the Ex Post Facto, Bill of Attainder, Privileges and Immunities, and Contract Clauses).

89. *See id.* at 92.

90. *See id.* at 89 (discussing the American colonists' discontent with the political process under British rule).

91. *See id.* at 74:

> [Decisions were] fueled not by a desire on the part of the Court to vindicate particular substantive values it had determined were important or fundamental, but rather by a desire to ensure that the political process—which is where such values are properly identified, weighed, and accommodated—was open to those of all viewpoints on something approaching an equal basis.

92. *See id.*

Drawing upon the language of footnote four in *Carolene Products*, Ely's theory of judicial review implies that the Court should only intervene when the political process has malfunctioned. This occurs in two situations. First, the "channels of political change" may be obstructed by the politically powerful.[93] This primarily results from limitations on speech, association, and voting.[94] In other words, some group is denied formal participation in the political system or access to the instruments that can change government policy.[95] Laws that systematically disadvantage "discrete and insular minorities" represent the second form of malfunction.[96] Although the minority group may have the formal right to participate in the political process, its interests are disregarded or diminished as a result of prejudice.[97] Under Ely's "representation-reinforcement" theory, legislation that implicates either form of malfunction should be subjected to strict scrutiny.[98] Laws that do not involve a defect in the political process—even those restricting constitutional rights—should be subject to almost complete judicial deference.[99] In such circumstances, the Court must heed majority rule.[100]

The power of the political process theory can be demonstrated in a number of ways. On a superficial level, Supreme Court Justices have cited Ely's work more than a dozen times since its publication.[101]

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93. *Id.* at 103.

94. *See id.* at 105-34 (discussing enforcement of rights that are critical to an effective democratic process).

95. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938) (raising the possibility that such activity may be subject to "more searching judicial inquiry").

96. *Id.*; *see also* ELY, *supra* note 4, at 103.

97. *See* ELY, *supra* note 4, at 103.

98. *See id.* at 105, 135-36.

99. *See id.* at 181.

100. *See id.*

101. *See* Washington v. Glucksberg, 117 S. Ct. 2258, 2278 n.6 (1997) (Souter, J., concurring); Seminole Tribe v. Florida, 517 U.S. 44, 168 (1996) (Souter, J., dissenting); Weiss v. United States, 510 U.S. 163, 189 n.5 (1994) (Souter, J., concurring); New York v. United States, 505 U.S. 144, 185 (1992); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495 (1989) (O'Connor, J., plurality opinion); McMillan v. Pennsyvania, 477 U.S. 79, 102 n.5 (1986) (Stevens, J., dissenting); Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 796 n.5 (1986) (White, J., dissenting); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 317 n.10 (1986) (Stevens, J., dissenting); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442 n.10 (1985); United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208, 231 (1984) (Blackmun, J., dissenting); Anderson v. Celebrezze, 460 U.S. 780, 793 n.16 (1983); Industrial Union Dep't v. American Petroleum Inst. 448 U.S. 607, 687 n.6 (1980) (Rehnquist, J., concurring); Richmond Newspapers v. Virginia, 448 U.S. 555, 587 (1980)

More importantly, representation-reinforcement theory provides an explanation for decisions in a variety of contexts. Cases striking down limitations on free speech and impediments to voting rights clearly fit within Ely's theory.[102] But the Court has interpreted other constitutional provisions under the semblance of a political process theory.[103] For example, the Free Exercise Clause prohibits government from policing religiously motivated conduct that burdens specific religious sects but not the general public.[104] But when the government imposes a burden on the entire citizenry through neutral and generally applicable legislation, any resulting limitations on religious practice are of no constitutional import.[105] Such laws do not represent a breakdown in the political process, but instead a properly functioning democratic system: a political majority spreading costs and benefits across the entire population.

B. The Neo-Political Process Theory of Criminal Procedure

Professors Dan Kahan and Tracey Meares have utilized Ely's constitutional framework to construct a new political process theory of criminal procedure.[106] The constitutional limitations on the crimi-

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(Brennan, J., concurring); Carlson v. Green, 446 U.S. 14, 31 n.2 (1980) (Burger, C.J., dissenting).

102. *See* Cohen v. California, 403 U.S. 15, 26 (1971) (prohibiting states from outlawing the public display of expletives); Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (per curiam) (invalidating a statute that prohibited "mere advocacy not distinguished from incitement to imminent lawless action"); Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 670 (1966) (striking down a Virginia poll tax as inconsistent with the Equal Protection Clause); Reynolds v. Simms, 377 U.S. 533, 586-87 (1964) (affirming the district court's order that Alabama legislative districts be reapportioned consistent with a "one person, one vote" standard); *see also* ELY, *supra* note 4, at 105-34 (discussing such cases).

103. *See* Shapiro v. Thompson, 394 U.S. 618, 642 (1969) (outlawing, as inconsistent with the Equal Protection Clause, states' denial of welfare benefits to residents of less than one year); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 543 (1942) (invalidating a statute that provided for the sterilization of some but not all similarly situated recidivists as a violation of the Equal Protection Clause); South Carolina State Highway Dep't v. Barnwell Bros., 303 U.S. 177, 196 (1938) (affirming a state regulation of trucks traveling on state highways as imposing the same burdens on both instate and out-of-state citizens and therefore consistent with the dormant Commerce Clause).

104. *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 545 (1993).

105. *See* Employment Div. v. Smith, 494 U.S. 872, 879 (1990).

106. *See* Dan M. Kahan & Tracey L. Meares, *The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153 (1998) [hereinafter Kahan & Meares, *The Coming Crisis*]. Kahan and Meares have employed this theory to argue for the constitutionality of community policing programs, particularly a Chicago gang-loitering ordinance. *See* Brief Amicus Curiae of the Chicago Neighborhood Orgs. in Support of Petitioner, City of Chicago v. Morales, No. 97-1121 (cert. granted Apr. 20, 1998), *available in* 1998 WL 328366 (U.S. June 19, 1998) [hereinafter Brief

nal justice system, they argue, are intended to prevent oppression of disempowered groups. As such, the judiciary must be particularly wary of police practices that focus on a despised caste.[107]

A breakdown in the political process should be presumed when the costs of a particular criminal law or practice are borne by a discrete and insular minority. In such circumstances, elected officials are unlikely to give adequate consideration to the burden placed upon the powerless minority and may overestimate the benefits to society in general.[108] But when the whole community pays the price by internalizing the burden of a particular policy, Kahan and Meares argue that there is little concern that the machinery of democratic government has malfunctioned.[109] One can assume that a political majority prepared to accept a law's coercive elements has adequately considered the advantages and disadvantages of the law enforcement policy in question.[110]

Kahan and Meares claim that modern criminal procedure doctrine arose in the context of organized racism. Law enforcement in the Jim Crow era utilized police power to suppress African-Americans and exclude them from political participation.[111] Confessions were beaten out of black defendants. Minorities were systematically excluded from jury service. Police used dragnet-type roundups based solely on skin color, and law enforcement exercised virtually unfettered discretion to arrest civil rights advocates. These and other racially motivated practices were vilified by the Court, Kahan and Meares argue, and serve as the backbone of modern criminal

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Amicus Curiae]; Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of* Chicago v. Morales, 1998 U. CHI. LEGAL F. 197; Tracey L. Meares & Dan M. Kahan, *Black, White and Gray: A Reply to Alschuler and Schulhofer*, 1998 U. CHI. LEGAL F. 245 [hereinafter Meares & Kahan, *Black, White and Gray*].

107. *See* Kahan & Meares, *The Coming Crisis*, *supra* note 106, at 1173.

108. Brief Amicus Curiae, *supra* note 106, at *6 ("Where the coercive incidence of a particular policy is being visited on a powerless minority, popularly elected representatives lack adequate incentives to determine whether the . . . benefits of the law for the community at large truly outweigh the liberty costs to the few.").

109. *See* Kahan & Meares, *The Coming Crisis*, *supra* note 106, at 1172-73 ("[I]nsofar as . . . policies do burden average members of the community, there is much less reason for courts to doubt the determination . . . that these policies strike a fair balance between liberty and order.").

110. *See id.*

111. *See id* at 1153; *see also* Chambers v. Florida, 309 U.S. 227, 236 (1940) (observing that oppressive governments often use "dictatorial criminal procedure . . . to make scapegoats of . . . helpless political, religious, or racial minorities").

procedure jurisprudence.[112] Political process theory is wholly consistent with these opinions: racial minorities were prevented from participating in government while suffering the entire burden of unjust police practices.

But their theory has implications beyond the context of race. Heightened scrutiny will be appropriate whenever the median voter, who does not bear the law enforcement burden, harbors ill will toward those who are subject to the policy's provisions.[113] Courts should not defer to laws, for instance, that require convicted sex offenders to register with government officials. The median voter is not a sex offender, will not be subject to the law's strictures, and would generally prefer that such criminals never see the light of day.[114] Likewise, investigative detentions[115] and custodial interrogations[116] require substantial judicial oversight—the voting public is unlikely to come into contact with government agents in an adverse inquisitorial setting.[117]

Kahan and Meares's neo-political process theory of criminal procedure also prompts the courts to reduce the standard of review in some circumstances. "New community policing" strategies are the archetypes of when judicial deference is appropriate.[118] In the crime- and drug-ridden inner cities, community members are banding together to find novel solutions to urban blight. Many communities have enacted antiloitering laws, strict curfews, and other discretionary policing techniques to attack criminal behavior that continues

112. *See* Kahan & Meares, *The Coming Crisis*, *supra* note 106, at 1153 ("Modern criminal procedure reflects the Supreme Court's admirable contribution to eradicating this incidence of American apartheid."); *see also* Davis v. Mississippi, 394 U.S. 721, 728 (1969) (overturning rape conviction of African-American youth who was jailed and fingerprinted without a warrant or probable cause for arrest); Cox v. Louisiana, 379 U.S. 536, 558 (1965) (voiding statute that gave police broad discretion to arrest civil rights demonstrators for breach of peace); Brown v. Mississippi, 297 U.S. 278, 287 (1936) (overturning murder convictions of two African-American men where police obtained confessions by torture); Norris v. Alabama, 294 U.S. 587, 599 (1935) (finding rape defendant was not afforded equal protection of the laws where African-Americans were systematically excluded from jury service).

113. *See* Kahan & Meares, *The Coming Crisis*, *supra* note 106, at 1173 (discussing sex-offender registration laws).

114. *See id.*

115. *See* Terry v. Ohio, 392 U.S. 1, 10, 27 (1968) (upholding "stop and frisk" police searches).

116. *See* Miranda v. Arizona, 384 U.S. 436, 467-68 (1966) (requiring that a suspect be advised of his right to remain silent and right to counsel prior to custodial interrogation).

117. *See* Kahan & Meares, *The Coming Crisis*, *supra* note 106, at 1175 ("[T]here's no guarantee that the average citizen will be affected in a way that gives her sufficient incentive to police the police for abuse.").

118. *See id.* at 1160-61 (describing "the new community policing").

unabated under current penal regimes.[119] Although antiloitering statutes were once a tool of political majorities to suppress discrete and insular minorities,[120] such laws are now being used by minority communities to protect and better themselves. Judges should reduce the level of scrutiny when the relevant community can be seen as internalizing the costs of a policing policy, forcing all members to share the burden on freedom and autonomy.[121] If an individual has been afforded an opportunity to be heard, his interests are actually or virtually[122] represented by government decisionmakers, and the entire community bears the law enforcement costs. In such cases, community policing strategies should be presumed valid even in the face of reduced constitutional rights for all members of the particular community.[123]

C. Scholarly Criticism

As with any constitutional proposal, the political process theory in general and the criminal procedure version in particular are subject to a variety of attacks.[124] As argued before,[125] Ely is simply wrong

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119. *See id.* at 1175-76 (contending that public housing searches, curfews, and gang-loitering provisions all pass the political process test).

120. *See id.* at 1156-57; William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE L.J. 1 (1960) (noting oppressive use of vagrancy statutes); Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603 (1956) (reporting on the lack of due process afforded "vagrants" in the Magistrates' courts of Philadelphia).

121. *See* Kahan & Meares, *The Coming Crisis*, *supra* note 106, at 1173 (arguing that new community policing strategies are now being chosen by inner-city African-American communities, rather than being imposed upon them as tools of oppression).

122. Juveniles, for example, are "virtually" represented by government officials. Although they may not vote, their parents may. The political process theory of criminal procedure assumes that parents and other concerned citizens, therefore, will act as surrogates for the community's children in the lawmaking process. *See id.*

123. *See id.*

124. For criticism of Ely's representation-reinforcement theory, see ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 194-99 (1990); DAVID A.J. RICHARDS, TOLERATION AND THE CONSTITUTION 14-19 (1986); TUSHNET, *supra* note 64, at 70-107; CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW 343-52 (1994); Daniel R. Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*, 77 VA. L. REV. 721 *passim* (1991); Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669 *passim* (1991); Richard A. Posner, *Democracy and Distrust Revisited*, 77 VA. L. REV. 641 *passim* (1991); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 *passim* (1980); Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 *passim* (1980); Tushnet, *supra* note 77, *passim*; Symposium, *Judicial Review Versus Democracy*, 42 OHIO ST. L.J. 1 (1981). For criticism of the political process theory of criminal procedure, see Albert W. Alschuler & Stephen J. Schulhofer, *Antiquated Pro-*

when he claims that the Constitution is "overwhelmingly"[126] concerned with process rather than substance. Textual guarantees like religious freedom and implicit rights such as reproductive autonomy are wholly concerned with substance. Even clearly procedural rights have substantive foundations; the right to vote, for example, carries a substantive determination of who deserves the electoral franchise and how much each vote will count. And the selection of a procedural rather than substantive theory, or the choice between various procedural theories, must be based on some underlying substantive value. Moreover, courts will have to determine the appropriate process and set procedural limitations under Ely's approach. The judge's personal value system, therefore, will inevitably sneak into the political process theory and pose the same danger of judicial activism condemned in value-laden interpretations.[127]

Representation-reinforcement theory can also be attacked on practical grounds. Deciding which groups will be deemed "discrete and insular minorities" is not as easy as it sounds. Racial minorities appear to be obvious candidates. But race-based categories ignore the various communities of interest that transcend skin color, such as gender, age, and socioeconomic status. And what about homosexuals, the physically disabled, Muslims, or the illiterate—are any of these groups sufficiently discrete and insular to merit heightened protection? Representation-reinforcement theory offers no answer, nor does it provide a natural limit to the potential categories. Ely's theory

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cedures or Bedrock Rights?: A Response to Professors Meares and Kahan, 1998 U. CHI. LEGAL F. 215, 240-43 (arguing that the political process theory fails to account for dissenters within the group, and that the theory is incapable of accurately depicting the preferences of all relevant groups within the community).

125. *See* Erik G. Luna, *The Models of Criminal Procedure*, 2 BUFF. CRIM. L. REV. (forthcoming 1999) (manuscript at 45, on file with author) ("The Constitution is not exclusively or even primarily concerned with process.").

126. *See* ELY, *supra* note 4, at 87 ("[T]he selection and accommodation of substantive values is left almost entirely to the political process and instead the [Constitution] is overwhelmingly concerned . . . with procedural fairness in the resolution of individual disputes . . . [and] with ensuring broad participation in the processes and distributions of government.").

127. Scholars also reject the countermajoritarian difficulty which drives Ely's theory. *See, e.g.*, RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 15-17 (1996) (arguing that the "defining aim" of democracy is not that the majority rules, but that decisions are made by institutions that treat all individuals equally). *But see* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 339 (1998) (describing the countermajoritarian difficulty as a "dominant paradigm" and stating that "[t]he need to reconcile judicial review with democracy framed almost all constitutional scholarship about the role of the Supreme Court in the 1970s and 1980s").

also fails to define the level of generality for the relevant community. African-Americans, for example, may constitute a discrete and insular minority at the national level but a powerful majority in a given county or city. And even if it were possible to ascertain the pertinent minority group and community, the theory offers little guidance on how to determine whether the political process has malfunctioned. Minority groups may lose on the merits rather than as a result of prejudice.[128]

Similar criticisms can be lodged against the political process theory of criminal procedure. Constitutional rights were not designed to end institutionalized racism but rather to prevent governmental tyranny.[129] Moreover, the idea that a political majority can define the fundamental rights of the citizen is inimical to the Framers' design. Constitutional guarantees were intended precisely to thwart the will of the majority and its political representatives, and to reserve an indelible compass of freedom for the individual.[130] The fact that a com-

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128. Political process theory also ignores the phenomenon of interest-group politics and the various sources of political power. *See* Posner, *supra* note 124, at 646-48.

129. *See* Alschuler & Schulhofer, *supra* note 124, at 244 & n.138 ("The reason for the Framers' endorsement of an old conception of rights was not their fear of institutionalized racism. (Many of them in fact were slaveowners.) It was their dread of tyranny.") (footnote text added in parenthetical). Pragmatically, the inevitable points of discretion in the criminal justice system make it unlikely that constitutional guarantees could prevent some forms of racial discrimination. *See* McCleskey v. Kemp, 481 U.S. 279, 291 n.7, 294, 313 (1987) (accepting the results of the Baldus study—that persons convicted of killing white victims were more than four times as likely to be sentenced to death in Georgia than persons convicted of killing black victims—but holding it insufficient to prove racial discrimination in individual trial and sentencing decisions); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 5 (1997):

> [T]he criminal justice system is characterized by extraordinary discretion—over the definition of crimes (legislatures can criminalize as much as they wish), over enforcement (police and prosecutors can arrest and charge whom they wish), and over funding (legislatures can allocate resources as they wish). In a system so dominated by discretionary decisions, discrimination is easy, and constitutional law has surprisingly little to say about it.

And even if criminal procedure rights were aimed specifically at organized racism, scholars reject the idea that the constitutional guard may now be let down. "Despite increases in black voter registration in the South and despite dramatic increases in the number of black elected officials," Professors Albert Alschuler and Stephen Schulhofer respond, "there is no basis for assuming that the days of institutional racism are behind us." Alschuler & Schulhofer, *supra* note 124, at 222.

130. In the venerated words of Justice Robert Jackson:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

munity stands ready to share the burden on liberty does not change the inviolate nature of these rights.[131] The Constitution also rejects racially calibrated or geographic approaches to fundamental rights; constitutional guarantees do not depend on your skin color or the neighborhood you call home.[132]

Many of these criticisms can be rebutted by affirmative evidence or by pointing to the flaws in alternate theories.[133] But one deficiency cannot be so easily dismissed. Political process theory provides no baseline of rights, no constitutional floor below which government is not allowed to operate. In particular, it would not prevent gradually increasing intrusions into private lives. If a political majority wanted to reside in a totalitarian state where government officials had absolute power to search and seize, the antidiscrimination model would have no objection so long as the entire community shared the burden.[134] Ely, Kahan and Meares would argue, I presume, that the possibility of an Orwellian surveillance society is minute; a properly functioning majoritarian process can be trusted to protect the substantive interests of the citizenry.[135] But safeguards subject to political vicissitudes provide only theoretical protection. And as will be argued later, the slide down the slippery slope may have already begun.

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

131. *See* Alschuler & Schulhofer, *supra* note 124, at 240 (contending that even when a group's majority stands ready to forego certain liberties, not all members of the group are necessarily ready to do so).

132. The political process theory of criminal procedure would also countenance a dangerous level of police discretion as a quick-fix solution to urban blight. *See* Luna, *supra* note 125 (manuscript at 52-53). Moreover, Professors Alschuler and Schulhofer take the Kahan/Meares approach to task for its specific application to Chicago's gang-loitering ordinance. "On virtually every essential point, the picture [Kahan and Meares] paint is incorrect or seriously misleading." Alschuler & Schulhofer, *supra* note 124, at 216. *But see generally* Meares & Kahan, *Black, White and Gray*, supra note 106 (responding to such criticism).

133. *See* Klarman, *supra* note 3, at 772-88 (criticizing those who contend that Ely's model mischaracterizes the nature of democracy and the proper conception of judicial review, but conceding that substantive value judgments are inherent in the model).

134. *See* Wasserstrom & Seidman, *supra* note 1, at 94 ("Unlike various normative theories of the fourth amendment, [Ely's] theory does not rest on any assertion about the ultimate worth of privacy. [With the exception of first amendment values], the majority would be free to choose whatever level of privacy it wished.").

135. In his concluding chapter, Professor Ely considers Harry Wellington's example of "a statute making it a crime for any person to remove another person's gall bladder, except to save that person's life." ELY, *supra* note 4, at 182. After an interesting internal dialogue, Ely concludes that "[i]t is an entirely legitimate response to the gall bladder law to note that it couldn't pass and refuse to play any further." *Id.* at 183.

D. A Model of the Fourth Amendment

As noted earlier scholarly criticism does not prevent a constitutional theory from serving as an interpretive model. A flawed approach may nonetheless offer the "best" possible model for modern constitutional interpretation. And although its critique is severe, political process theory is not so inherently defective as to prevent its use in a model of the Fourth Amendment.

In *Democracy and Distrust*, Ely briefly argued that the Fourth Amendment could be viewed as both a procedural and substantive guarantee.[136] In fact, Ely suggested, it could be considered a forerunner of the Equal Protection Clause and the limitations on disparate government treatment.[137] By injecting a neutral and detached magistrate into the picture, requiring the contemporaneous documentation of the facts, and specifying a minimum quantum of evidence for a warrant to issue, the Fourth Amendment provides indirect protection against invidious discrimination.[138]

This antidiscrimination model of the Fourth Amendment is also explored by Kahan and Meares within their discussion of criminal procedure doctrine. The Court has frequently held that constitutional rights in the criminal justice system require a reasonable balance between liberty and order.[139] In the search and seizure context, the liberty interest is an individual's right to privacy—or, in the words of Justice Brandeis, "the right to be let alone."[140] When a search is pursuant to a warrant based on probable cause, the procedural mandates of the Fourth Amendment have been met and we can presume that the relevant interests have been appropriately considered. But when law enforcement conducts a warrantless, suspicionless search, the modern Court has often struck the balance in an ad hoc manner, using the reasonableness balancing test.

An antidiscrimination model of the Fourth Amendment hopes to avoid many of the value judgments required from an ad hoc balancing test in the suspicionless search context. As with the political process theory in general, the ultimate question is whether the rele-

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136. *See id*. at 96-97, 172-73.

137. *See id*. at 97.

138. *See id*. at 172-73.

139. *See* Medina v. California, 505 U.S. 437, 443 (1992) (noting "the careful balance that the Constitution strikes between liberty and order"); Kahan & Meares, *The Coming Crisis*, *supra* note 106, at 1172-73).

140. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

vant community could be seen as internalizing the costs of a police practice. If a particular individual or disempowered minority is subjected to suspicionless searches and seizures while the political majority is free from such action, government officials are likely to undervalue the privacy interests at stake while overestimating the law enforcement gains. Judicial intervention and a presumption of unconstitutionality are appropriate in such circumstances: the individual or minority group has not been provided the constitutionally mandated procedure, yet is required to bear the entire burden of the police practice.[141]

In contrast, a suspicionless search regime which spreads the law enforcement costs across the entire community will likely pass muster under the antidiscrimination model. Government officials are less likely to ignore the tolls on privacy that accrue to both political majorities and minorities. If all members of a community had an opportunity to air their views and their interests were factored into the decisionmaking process, a diffusely felt suspicionless search practice would be presumed constitutional.[142] Obligatory searches of every person entering government buildings do not violate the Fourth Amendment,[143] because discrete groups or individuals are not singled out for disparate treatment. Rather, society as a whole suffers the intrusions as an incident of modern life. If such searches were truly unreasonable, political process theory would expect the equally afflicted political majority to vindicate the interests of the entire citizenry.

An antidiscrimination model of the Fourth Amendment is consistent with much of the Supreme Court's suspicionless search jurisprudence.[144] It explains, for instance, why police can conduct suspicionless stops of all cars on a given road as part of a regulatory scheme,[145] but not individual vehicles at the officer's own discretion.[146] The model also provides a prescriptive tool for analyzing new search

141. *See* Kahan & Meares, *The Coming Crisis*, *supra* note 106, at 1173 (presenting sex offender registration statutes as an example).

142. *See id.* at 1174 (listing searches of regulated commercial enterprises and random drug testing of student-athletes, who are virtually represented by their parents, as examples).

143. *See* National Treasury Employees Union v. Von Raab, 489 U.S. 656, 675 n.3 (1989) (dictum) (discussing, with approval: *United States v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974) (upholding generalized searches before boarding commercial airplanes); *United States v. Skipwith*, 482 F.2d 1272, 1275-76 (5th Cir. 1973) (same); *United States v. Davis*, 482 F.2d 893, 908-10 (9th Cir. 1973) (same)).

144. *See infra* Part V.

145. *See* Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990).

146. *See* Delaware v. Prouse, 440 U.S. 648, 663 (1978).

and seizure issues. In Chicago, an inner-city housing authority enacted a policy allowing suspicionless searches of government-subsidized apartments following random gunfire in the buildings. Under traditional Fourth Amendment analysis, such searches are unconstitutional without a warrant based on probable cause.[147] But Kahan and Meares argue that political process theory would justify a different conclusion: all members of the housing projects are subject to the same search procedure, ensuring that the coercive burden is spread across the entire population. Each individual had an opportunity to express his opinion in an open forum and the voices were heard by political representatives accountable only to the community and not to unaffected parties.[148] In such circumstances, Kahan and Meares believe that judicial deference to the political branches is appropriate. Even if the search fails to give sufficient weight to the privacy interests at stake, a majority-driven legislature can be expected to correct any imbalance in due course.[149]

IV. THE INDIVIDUAL RIGHTS MODEL

In contrast to political process approaches, moral theories are primarily concerned with substance and the content of fundamental law. They attempt to identify a universal good and universal moral rights, and are generally founded on a common first principle—the rationality of all human beings. Virtually all moral theories share an affinity with liberalism or individualism, a belief that each person possesses a set of inviolate rights, rights that preexist any government and provide normative standards for society. The individual, therefore, is the ultimate concern and must be protected from oppression by the state. It is up to each person to decide for herself what the "good life" entails, consistent with the existence of that same right in all individuals. Although moral theory descends from natural law philosophy, moral rights are not divinely conferred but are a consequence of fundamental human dignity.

Many of the leading contemporary moral theorists have been philosophers rather than legal scholars, including Isaiah Berlin, John

147. *See* Pratt v. Chicago Hous. Auth., 848 F. Supp. 792, 794-95 (N.D. Ill. 1994).

148. *See* Kahan & Meares, *The Coming Crisis*, *supra* note 106, at 1175 (arguing that there "is every reason to believe that the majority . . . gave due weight to the dissenters' interests").

149. *See* Privacy Protection Act of 1980, Pub. L. No. 96-440, 94 Stat. 1879 (codified at 42 U.S.C. § 2000aa (1994)) (effectively overturning the Supreme Court's Fourth Amendment decision in *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978)).

Rawls, and Robert Nozick.[150] Nonetheless, moral theory has found its way into the legal academy. And quite possibly the greatest (and surely the most criticized) moral theorist of modern times happens to be a law professor—Ronald Dworkin.[151]

A. Dworkin and the Moral Reading

Over the course of more than two decades, Professor Dworkin has attempted to construct a moral interpretation of the law. He has consistently argued that it is the duty of the courts to make the law "the best it can be," looking to the past for guidance while aspiring to a just and principled future.[152] Judges are required to make moral judgments about the propriety of various legal interpretations given the historical record, the facts of the case before them, and the jurisprudential path that lies ahead. A moral interpretation or, in Dworkin's words, a "moral reading"[153] of the Constitution is but a natural extension of this theory. He is not calling for a legal revolution but a popular realization that lawyers and judges undertake a

150. *See* ISAIAH BERLIN, FOUR ESSAYS ON LIBERTY (1969); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974); JOHN RAWLS, A THEORY OF JUSTICE (1971).

151. Professor Dworkin has authored an impressive body of provocative work challenging the distinction between moral and legal philosophy. *See* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2 (1996) [hereinafter DWORKIN, FREEDOM'S LAW] (advancing the "moral reading" of the Constitution, in which "we all—judges, lawyers, citizens—interpret and apply these abstract [constitutional] clauses on the understanding that they invoke moral principles about political decency and justice"). *See generally* RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM (1993) [hereinafter DWORKIN, LIFE'S DOMINION]; RONALD DWORKIN, LAW'S EMPIRE (1986); RONALD DWORKIN, A MATTER OF PRINCIPLE (1985); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977). He has been heralded as a leading public philosopher and a respected contributor to the science of law whose scholarship has frequently reshaped the legal playing field and influenced the direction of the day's jurisprudential issues. *See* Edward J. McCaffery, *Ronald Dworkin, Inside-Out*, 85 CAL. L. REV. 1043, 1043 (1997) (reviewing DWORKIN, FREEDOM'S LAW, *supra*); T.M. Scanlon, *Partisan for Life*, N.Y. REV. OF BOOKS, July 15, 1993, at 45 (reviewing DWORKIN, LIFE'S DOMINION, *supra*); Mortimer Sellers, *Forming a More Perfect Union*, WASH. POST, May 12, 1996, at X5 (reviewing DWORKIN, FREEDOM'S LAW, *supra*). His works have provided academic fodder of the highest caliber, resulting in harsh, sometimes personal criticism. *See, e.g.*, Allan C. Hutchinson, *Indiana Dworkin and Law's Empire*, 96 YALE L.J. 637, 639 (1987) (reviewing DWORKIN, LAW'S EMPIRE, *supra*, and, while sarcastically comparing Dworkin to the adventure hero Indiana Jones, stating: "[Dworkin] bids us to lift our heads from the trough of mundane legal practice and to gaze upon a juristic splendor that, with will and nerve, could be ours to share"); *see also infra* Part IV.C (discussing additional criticism of Dworkin's theories). Nonetheless, Dworkin is to many "the preeminent Anglo-American legal philosopher of our time and, quite possibly, of any time." McCaffery, *supra*, at 1043.

152. DWORKIN, LAW'S EMPIRE, *supra* note 151, at 411.

153. DWORKIN, FREEDOM'S LAW, *supra* note 151, at 2.

moral reading of constitutional provisions on a daily basis. As a matter of instinct and necessity, legal actors derive moral principles from the Constitution and apply them to real-world cases based on moral conclusions.[154] Any coherent constitutional theory utilizes a moral reading—it is impossible for it not to.[155] Although Dworkin contends that the merger of constitutional law and moral theory is inevitable, an explicit connection has yet to be fully recognized.[156]

In his 1996 book, *Freedom's Law*, Dworkin undertakes precisely this project. Like Ely, he notes that the Constitution contains a mix of abstract and concrete provisions.[157] Some terms require little in the way of interpretation.[158] Other provisions are ambiguous on their face and require theoretical input.[159] Under the moral reading, it is the duty of the courts to interpret and apply the Constitution's abstract clauses by uncovering the fundamental moral principles they were intended to embody.[160]

This is no easy task. A virtually endless assortment of interpretations is possible for the Constitution's open-ended provisions. Dworkin, however, has fashioned a two-prong standard to test the viability of a given constitutional theory. It incorporates both backward- and forward-looking elements, requiring that any contender be sufficiently descriptive of past precedents and prescriptive for future practice.[161] The goal of this standard is to unite constitutional princi-

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154. *See id.* at 3.

155. *See id.* at 3, 12-15.

156. *See* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 151, at 149.

157. *See* DWORKIN, FREEDOM'S LAW, *supra* note 151, at 7-8; *see also infra* note 79 and accompanying text (presenting Ely's position).

158. *See* DWORKIN, FREEDOM'S LAW, *supra* note 151, at 8 (discussing the age requirement for the President mandated in U.S. CONST. art. II, § 1, cl. 5); *see also supra* note 80 (citing Ely's discussion of the same subject).

159. *See* DWORKIN, FREEDOM'S LAW, *supra* note 151, at 7 (discussing the Free Speech Clause, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment); *see also supra* note 81 (citing Ely's similar discussion of the Eighth Amendment). *But see supra* notes 87-91 (discussing Ely's emphasis on the procedural, rather than substantive, purpose of other constitutional provisions).

160. *See* DWORKIN, FREEDOM'S LAW, *supra* note 151, at 2.

161. *See* DWORKIN, LAW'S EMPIRE, *supra* note 151, at 225 ("[L]egal claims are interpretive judgments and therefore combine backward- and forward-looking elements; they interpret contemporary legal practice seen as an unfolding political narrative."). Dworkin has likened this process to a group of authors writing a chain novel:

> In this enterprise a group of novelists writes a novel *seriatim*; each novelist in the chain interprets the chapters he has been given in order to write a new chapter, which is then added to what the next novelist receives, and so on. Each has the job of writing his chapter so as to make the novel being constructed the best it can be, and

ple with legal practice, seeking the best path for the future while not forgetting the road that has already been traveled.[162]

1. *Fit.* The first prong is "fit." A constitutional theory must fit the constitutional background; it must be consistent with text, context, and precedents.[163] An interpretation that cannot be squared with the historical record must be rejected regardless of its normative appeal. Judges are collaborators with courts of the past and future, refining and evolving a body of law built on a foundation of yesterday's decisions with grave implications for the cases of tomorrow. A coherent theory is only possible when courts ensure that their contribution to the ongoing chronicle fits with what has passed before them.[164] This threshold factor restrains the judiciary in its constitutional analysis, disqualifying theories congenial to personal preferences but at odds with legal history.[165] In interpreting constitutional provisions, judges do not write on a blank slate. The methodology of the fit prong examines all the major sources of interpretation. A theory must be generally consistent with the major case precedents of a constitutional provision. The Constitution's structure and text should support the interpretation. And the historical context of a provision's enactment should provide an amenable background.[166]

History is clearly germane to Dworkin's approach, but a constitutional theory need not fit every single case.[167] Some precedents will have been expressly rejected or discredited; others will have vitality

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> the complexity of this task models the complexity of deciding a hard case under law as integrity.

Id. at 229.

162. *See id.* at 410-13.

163. *See id.* at 230-31, 240-48; DWORKIN, FREEDOM'S LAW, *supra* note 151, at 8-12.

164. *See* DWORKIN, FREEDOM'S LAW, *supra* note 151, at 10 ("[Judges] must regard themselves as partners with other officials, past and future, who together elaborate a coherent constitutional morality, and they must take care to see that what they contribute fits with the rest.").

165. *See id.* at 10-11 (arguing that the requirement of integrity prohibits judges from "read[ing] their own moral convictions into the Constitution . . . unless they find it consistent in principle with the structural design of the Constitution as a whole, and also with the dominant lines of past constitutional interpretation by other judges").

166. *See id.* at 8 ("History is crucial . . . because we must know something about the circumstances in which a person spoke to have any good idea of what he meant to say in speaking as he did.").

167. *See* DWORKIN, LAW'S EMPIRE, *supra* note 151, at 230.

only in law school casebooks.[168] The analysis of constitutional text and context must also focus on the level of generality provided in the provision's language. We are bound as a nation to the words of the Constitution and the principles they announce, but not by any extraneous clues as to how the Framers might have applied particular provisions to a given case.[169] This can be characterized as the distinction between "concepts" and "conceptions." The Fourteenth Amendment, for example, maintains that a state government may not "deny to any person within its jurisdiction the equal protection of the laws."[170] The *concept* underlying the provision, Dworkin argues, is that all individuals must receive equal status and concern.[171] How that general principle is to be applied in concrete situations is a particular *conception* of the Fourteenth Amendment. The Framers clearly did not anticipate that the Amendment would prohibit racial segregation in schools, or discrimination against women and homosexuals.[172] That conception, however, is neither dispositive nor binding on future generations. It is the underlying moral concept—equal status and concern for all persons—that must be interpreted and applied in a contemporary setting.[173]

The fit prong can also evaluate a constitutional theory by expanding the analysis "in a series of concentric circles"[174] beyond the

168. For example, a theory need not square with *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding racial segregation). *See* Brown v. Board of Educ., 347 U.S. 483, 494-95 (1954) (expressly overruling *Plessy*). Likewise, a theory might choose to reject those cases that are still law but suffer from desuetude or have been thoroughly repudiated outside of the judiciary. *See, e.g.*, Beauharnais v. Illinois, 343 U.S. 250 (1952) (upholding a statute forbidding group libel); Korematsu v. United States, 323 U.S. 214 (1944) (upholding the internment of Japanese-Americans in detention camps during World War II); *see also* Richard Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243 (1998) (discussing other examples which illustrate the evolution of doctrinal precedent). The fit prong is also not a process of case-counting. Fitness "cannot be a merely mechanical decision; [a judge] cannot simply count the number of past decisions that must be conceded to be 'mistakes' on each interpretation." DWORKIN, LAW'S EMPIRE, *supra* note 151, at 247. "[A judge] must take into account not only the numbers of decisions counting for each interpretation, but whether the decisions expressing one principle seem more important or fundamental or wide-ranging than the decisions expressing the other." *Id.*

169. *See* DWORKIN, FREEDOM'S LAW, *supra* note 151, at 10.

170. U.S. CONST. amend. XIV, cl. 2.

171. *See* DWORKIN, FREEDOM'S LAW, *supra* note 151, at 10.

172. *See id.* at 9.

173. *See* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 151, at 134-36 (distinguishing between broad concepts, which should guide future action, and narrower conceptions, which merely represent an individual's views on an issue).

174. DWORKIN, LAW'S EMPIRE, *supra* note 151, at 250.

particular provision at hand. The Constitution is not a set of disjointed propositions that happen to occupy a single document.[175] Rather, it is a lattice of principles that share the same underlying goals in establishing a form of government. An interpretation of a clause or amendment can be tested by its fit with other constitutional terms, demonstrating its descriptive power outside the narrow confines of the issue at hand.[176] Allied areas of constitutional law can shed light on a particular interpretation by emphasizing overarching goals and limitations. A theory of the Self-Incrimination Clause,[177] for instance, could be judged against the larger body of due process law developed in the criminal justice system.

2. *Justification*. A theory of the Constitution must incorporate not only the essence of the decisions analyzed in the fit prong, but also the broad principles that justify these earlier conclusions.[178] Therefore, the second prong is forward-looking—it asks whether a given interpretation creates a comprehensive constitutional theory that provides guidance in future cases. As such, the second prong demands that a theory justify and unite discrete legal precepts under a single vision of the Constitution.

As an example, First Amendment jurisprudence has flourished under the "marketplace of ideas" theory.[179] As first argued by Milton in the mid-seventeenth century, societal interests are best served when ideas are aired "in a free and open encounter."[180] The good and the bad, truths and falsehoods, should all be allowed to fight it out in a symbolic marketplace.[181] The ideas still standing after vigorous debate and scrutiny, as judged by the public consumer, will be adopted by society. Only by allowing that initial unimpeded grapple can the citizenry distinguish the truly worthy speech from the undeserving. The "marketplace of ideas" theory can also justify a wide range of

175. *See, e.g.*, Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (arguing that the Constitution "is not a series of isolated points pricked out in terms of [particular provisions]").

176. *See* DWORKIN, LAW'S EMPIRE, *supra* note 151, at 245.

177. U.S. CONST. amend. V, cl. 3.

178. *See* DWORKIN, LAW'S EMPIRE, *supra* note 151, at 227-28.

179. *See, e.g.*, Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

180. JOHN MILTON, AREOPAGITICA 52 (John W. Hales ed., London, Oxford Clarendon Press 1882) (1644).

181. *See* Abrams, 250 U.S. at 630 (Holmes, J., dissenting).

First Amendment decisions, from cases protecting flag desecration[182] to those placing limitations on libel law.[183]

Some would argue that authorizing the judiciary to adopt its constitutional theory of choice implicates the countermajoritarian difficulty: an elite, unelected band of judges are allowed to override the will of the people based solely on subjective value judgments. But Dworkin rejects the difficulty outright—it simply does not exist. The goal of democracy is not to ensure that a majority of the citizens necessarily or usually gets its way.[184] Instead, it demands that each individual in the community be accorded equal concern and respect by the institutions of government that formulate and execute policy decisions.[185] Dworkin's constitutional conception of democracy is generally consistent with majority rule—elected officials, for example, should be chosen by popular vote. But majoritarian procedures are adopted to guarantee equal status for individuals, not to satisfy the goals of majority rule. When majoritarianism fails to respect the moral equality of all citizens, it can and should be rejected without remorse in favor of other principles.[186] And once majority rule is dismissed as the defining characteristic of democracy, there is no reason why the Court should be denied final interpretive authority over the Constitution.[187]

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182. *See* Texas v. Johnson, 491 U.S. 397, 418 (1989) (overturning a conviction for burning an American flag).

183. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (stating that the First Amendment "'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people'" (quoting Roth v. United States, 354 U.S. 476, 484 (1957))).

184. *See* DWORKIN, FREEDOM'S LAW, *supra* note 151, at 16-17 (rejecting the "majoritarian premise," and positing that the "defining aim of democracy [is] that collective decisions be made by political institutions whose structure, composition, and practices treat all members of the community, as individuals, with equal concern and respect").

185. *See id.*

186. *See id.*

187. "Democracy does not insist on judges having the last word, but it does not insist that they must not have it." *Id.* at 7. Further:

> [R]ejecting the majoritarian premise means that we may look for the best interpretation with a more open mind: we have no reason of principle to try to force our practices into some majoritarian mold. If the most straightforward interpretation of American constitutional practice shows that our judges have final interpretive authority, and that they largely understand the Bill of Rights as a constitution of principle—if that best explains the decisions judges actually make and the public largely accepts—we have no reason to resist that reading and to strain for one that seems more congenial to a majoritarian philosophy.

Id. at 34-35.

B. Sovereignty Theory

In the end, Dworkin does not present an all-purpose algorithm for constitutional analysis.[188] Instead, he provides a "big tent" under which a variety of legal theories can grow and prosper.[189] The moral reading, in fact, might be better understood as a constitutional theory on creating constitutional theories: look to the past with aspirations for the future to solve present cases. There is no revolutionary content, no Rosetta stone. You do not have to approve of Dworkin's precise moral analysis to agree that his methodology provides a useful framework for constructing a principled constitutional theory.

Using this structure, a sovereignty theory of the Constitution can be developed and then applied as a model of the Fourth Amendment. But before attempting this task, I would like to present a brief critique of the theory underlying current search and seizure doctrine.

1. *The Failure of Privacy*. As previously noted, contemporary Fourth Amendment jurisprudence analyzes issues under the aegis of privacy.[190] Search and seizure case law has adopted the privacy formulation as the primary test of constitutionality.[191] And while critics may disagree with the Court's application of the concept, their scholarship nonetheless works within the privacy framework.[192] Few have strayed beyond the linguistic boundaries set by the judiciary and subsequently accepted by the academy.[193]

Although privacy may have been a promising theory of the Fourth Amendment at one time, it has now lost much of its luster and utility. The Court has interpreted privacy to be a question of fact rather than a constitutional value.[194] As such, privacy becomes a mere

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188. *See* DWORKIN, LAW'S EMPIRE, *supra* note 151, at 412.

189. James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 FORDHAM L. REV. 1335, 1353 (1997).

190. *See supra* Part I.B.

191. *See, e.g.*, Minnesota v. Carter, 119 S. Ct. 469, 474 (1998) (upholding a warrantless search of an apartment because the defendants were there for purely business reasons, and thus lacked any legitimate expectation of privacy).

192. *See, e.g.*, Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1357-74 (discussing Fourth Amendment privacy).

193. For an innovative exception, see Sundby, *"Everyman"'s Fourth Amendment*, *supra* note 24 (offering a paradigm of trust as an alternative to privacy). *See also*, William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016 (1995) (critiquing the use of privacy in criminal procedure doctrine).

194. *See* Sundby, *"Everyman"'s Fourth Amendment*, supra note 25, at 1760 ("[T]he Court is not asking whether bank or phone records *should* be kept private (thus invoking privacy as a

interest which is weighed against and can be defeated by other interests, even rather pedantic policy considerations. This rendition of privacy under the Fourth Amendment contradicts the very purpose of a constitutional liberty—to provide individuals with "political trumps"[195] against majorities and the government institutions they control. Policy interests, even quite strong ones, should be insufficient to deny constitutional guarantees. The very meaning of "rights" allows you to act or remain motionless, speak or remain quiet, despite a public interest in restraining your freedom.[196]

This demotion from right to interest is only exacerbated by a circularity in definition.[197] Each governmental intrusion creates a new, lower baseline of privacy, allowing gradual deterioration of Fourth Amendment protection.[198] Public acceptance of the narrower scope soon follows, with the privacy we expect being a function of the privacy we are given.[199] Scholarly attempts at a normative foundation for privacy have been too scattered to provide relief.[200] Definitions have included everything from one's right to "inviolate personality,"[201] to a check on totalitarianism,[202] to a prerequisite for "respect, love, friendship and trust."[203] As argued by Judith Jarvis Thomson, "the most

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value), but, rather, whether we as a *factual* matter expect others to see and use those records (thus viewing privacy as a measurable fact).") (footnote omitted) (citing Smith v. Maryland, 442 U.S. 735, 743 (1979) (holding that telephone users do not have a reasonable expectation of privacy in the numbers they dial because the telephone company routinely records such information for business purposes); United States v. Miller, 425 U.S. 435, 442 (1976) (holding that no legitimate expectation of privacy attaches to personal banking documents such as checks and deposit slips because the documents "contain only information voluntarily conveyed to the banks")).

195. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 151, at xi.

196. *See id.* at 269.

197. *Cf.* Albert W. Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510 (1986) (offering an excellent critique of interest balancing).

198. *See* Sundby, *"Everyman"'s Fourth Amendment*, *supra* note 24, at 1759-63.

199. *See* Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1146 (1986) ("[W]hat people want is sometimes a product of what they can get."); Wasserstrom & Seidman, *supra* note 1, at 103 ("The amount of privacy we demand is, at least in part, a product of the amount of privacy we are accustomed to having.").

200. *See* Gormley, *supra* note 192, at 1336-39 (cataloging the various foundations proposed to define the right to privacy); Wasserstrom & Seidman, *supra* note 1, at 59 (listing points of disagreement relating to the nature of privacy).

201. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890).

202. *See* Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 783-84 (1989).

203. Charles Fried, *Privacy*, 77 YALE L.J. 475, 477 (1968). For other privacy theories, see ALAN F. WESTIN, PRIVACY AND FREEDOM 7 (1967) ("Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information

striking thing about the right to privacy is that nobody seems to have any very clear idea what it is."[204]

The definitional quandary is compounded by a Supreme Court arguably out of touch with society's true expectations of privacy.[205] Whether infected by some form of hindsight bias,[206] or a distancing effect,[207] the Court has allowed increased police discretion in surveillance activities despite the privacy expectations of most citizens. Law enforcement may ignore "no trespassing" signs and jump over locked fences to sneak onto the property surrounding homes.[208] They may snoop into the buildings adjacent to a residence, peering at even the most private activity occurring in sheds or barns.[209] Police may parse through garbage bags to uncover everything from what someone eats and reads to the medicine she takes.[210] Government officials can obtain the telephone numbers that individuals dial from their homes in order to determine who they have called, whether it be their mothers, paramours, or lawyers.[211] And law enforcement may fly over homes in planes or helicopters, spying on backyard barbeques, sunbathing, and

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about them is communicated to others."); J. Braxton Craven, Jr., *Personhood: The Right to Be Let Alone*, 1976 DUKE L.J. 699, 701 (suggesting "judicial recognition of a universal right of 'personhood' which protects individuals from arbitrary and capricious governmental action, but which, in appropriate situations, can be outweighed by a demonstrated state interest"); Ruth Gavison, *Privacy and the Limits of the Law*, 89 YALE L.J. 421, 423 (1980) ("Our interest in privacy . . . is related to our concern over our accessibility to others: the extent to which we are known to others, the extent to which others have physical access to us, and the extent to which we are the subject of others' attention."); Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 236 (1977) ("Privacy will be defined here as an autonomy or control over the intimacies of personal identity. Autonomy, identity, and intimacy are all necessary (and together normally sufficient) for the proper invocation of the concept of privacy."); Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1425 (1974) (describing the judicially recognized right of privacy as a "zone of prima facie autonomy, of presumptive immunity from regulation, in addition to that established by the first amendment").

204. Judith Jarvis Thomson, *The Right to Privacy*, 4 PHIL. & PUB. AFF. 295, 295 (1975).

205. *See* Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 DUKE L.J. 727 (1993) (reporting an empirical study finding that the Supreme Court's views on expectations of privacy are often inconsistent with those of society).

206. *See id.* at 761 (stating that the degree of intrusiveness is underestimated because courts are aware of police objectives and all challenged searches have uncovered evidence of a crime).

207. *See id.* at 760-61 (arguing that the Justices "are unlikely to have experienced any type of police intrusion, much less the type of intrusion they are asked to analyze in a particular case").

208. *See* United States v. Dunn, 480 U.S. 294 (1987).

209. *See id.*

210. *See* California v. Greenwood, 486 U.S. 35, 40 (1988).

211. *See* Smith v. Maryland, 442 U.S. 735, 742-44 (1979).

romantic interludes.[212] According to the Supreme Court, no reasonable expectation of privacy is implicated in any of these contexts. The intrusions can be undertaken without judicial oversight and in the absence of a warrant or probable cause.

Privacy theory also suffers from the twin vices of over- and underinclusiveness. The Court has stretched the definition of privacy to include a variety of topics that have little in common. The rights to contraceptives[213] and abortions[214] have been incorporated within the mantra of privacy, yet these guarantees are really about decisional autonomy—the right to make certain decisions without governmental interference. It is hard to argue that purchasing a condom in a drug store has anything to do with privacy as that term is commonly understood.[215] Conversely, privacy theory does not capture the full import of the Fourth Amendment. Although it guarantees privacy against certain types of governmental intrusions, constitutional protection goes beyond a right to solitude and frequently has nothing to do with privacy at all.[216] An illegal arrest on a city street certainly is not private, but it does implicate the Fourth Amendment.[217] Police shooting at a fleeing felon is not an intrusion upon a private act, but it also implicates search and seizure guarantees.[218] And compelled surgery to withdraw evidence of a crime may not invade privacy except in some strained sense, but it nonetheless involves Fourth Amendment rights.[219]

For all these reasons and many more, privacy theory fails to provide sufficient content and guidance for the Court. The Fourth Amendment must be reexamined in light of its underlying purpose,

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212. *See* Florida v. Riley, 488 U.S. 445, 450-52 (1989) (admitting "naked eye" observations from a police fly over); California v. Ciraolo, 476 U.S. 207, 212-14 (1986) (same).

213. *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (finding the use of contraceptives to be within the "zone of privacy created by several fundamental constitutional guarantees"); *see also* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (holding that the right of access to contraception found for married people under the Due Process Clause in *Griswold* must be extended to single people under the Equal Protection Clause).

214. *See* Roe v. Wade, 410 U.S. 113, 154 (1973) ("[T]he right of personal privacy includes the abortion decision.").

215. One commonly used dictionary defines privacy as "being apart from company or observation: seclusion." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 927 (10th ed. 1996).

216. *See* Katz v. United States, 389 U.S. 347, 350 (1967).

217. *See id.* at 350 n.4.

218. *See* Tennessee v. Garner, 471 U.S. 1, 7 (1985) ("[A]pprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment.").

219. *See* Winston v. Lee, 470 U.S. 753, 759 (1985) (holding that the Fourth Amendment may prohibit "compelled surgical intrusion into an individual's body for evidence" of a crime).

its place within the framework of the Constitution, and the connection it can make with constitutional theory. In the following sections, a sovereignty theory is developed as an appropriate substitute for privacy theory.

2. *Sovereignty as Solution*. "Sovereignty" refers to the supreme and absolute power to act. It is the source of authority, the right to do anything and everything within a given domain. The sovereign may wield this power however it sees fit. It is independent and unaccountable; the sovereign has no superior. Most people identify sovereignty with government authority. The king, the czar, the legislature, the citizenry—these are the ultimate sources and commanders of authority in a state. By virtue of its sovereign powers, a state may enact laws, levy taxes, regulate commerce, imprison criminals, and conduct all other functions commonly associated with government. The boundaries of this legal and political control are geographically defined, with sovereignty extending to a state's borders but going no further.

The idea of personal sovereignty may be unfamiliar to many and strike others as a non sequitur, but it can nonetheless provide a cogent theory of rights.[220] The sovereign individual exercises autonomy—the power of self-government—within his or her boundaries. He is the ultimate source of authority in his domain, making choices and implementing personal policies at will. Individual sovereignty is merely an analog of state sovereignty, describing a moral agent as inherently sovereign over himself, just as the state is over its holdings. As with the power of government, individual sovereignty is circumscribed by a territorial boundary. Beyond that border lie other sovereigns—most notably, the political state. When an individual intrudes on the sovereignty of another, be it a distinct person or the government, he can no longer claim unimpeded authority. Conversely, the state cannot interfere with the individual's autonomy while he acts within his sovereign domain. This division of ultimate power between the individual and the state is the defining characteristic of the sovereignty theory.[221]

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220. *See* Joel Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?*, 58 NOTRE DAME L. REV. 445, 451 (1983) ("[The person is] a moral agent and possessor of rights, as 'naturally sovereign' over its self as the state is over its territory.").

221. The Court has occasionally spoken in terms of divided sovereignty between citizens and government. *See* Planned Parenthood v. Casey, 505 U.S. 833, 847 (1992) ("[T]here is a realm of personal liberty which the government may not enter."); Thornburgh v. American

Various modern scholars have explored the concept of personal sovereignty as a limitation on government. Isaiah Berlin has argued that "there ought to exist a certain minimum area of personal freedom which must on no account be violated . . . . [A] frontier must be drawn between the area of private life and that of public authority."[222] Likewise, Charles Reich argued in his groundbreaking work, *The New Property*, that "[t]here must be sanctuaries or enclaves where no majority can reach."[223] A quarter century later, Reich expanded on this idea, proposing an "individual sector" where the citizen is sovereign rather than the holder of only such powers as remain unclaimed by government.[224]

Demarcating regions of individual sovereignty is a promising venture, and I will list but a few of the advantages. A healthy democratic government demands individuals who can stake out sovereign zones.[225] Vigorous public debate and political dissent is premised on such sovereignty—without it, the status quo of the prevailing majority would go unchallenged by enlightened but fearful critics. Spirited public discussion about the fate of government requires an inviolate margin between the state and members of the body politic.[226] Likewise, personal sovereignty promotes a healthy citizenry. Space is needed to develop one's talents and capacities, skills and mental fac-

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College of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986) ("[A] certain private sphere of individual liberty will be kept largely beyond the reach of government."); Jacobson v. Massachusetts, 197 U.S. 11, 29 (1905) ("There is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government . . . to interfere with the exercise of that will.").

222. ISAIAH BERLIN, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY, *supra* note 150, at 118, 124. Robert Nozick made similar arguments in his opus, *Anarchy, State, and Utopia*. *See* Nozick, *supra* note 150. Other modern advocates of sovereignty-type limitations on government include John Rawls, Emmanuel Levinas, and Jurgen Habermas. Historical proponents include John Stuart Mill in the nineteenth century, Immanuel Kant in the eighteenth century, and John Locke in the seventeenth century.

223. Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 787 (1964).

224. *See* Charles A. Reich, *The Individual Sector*, 100 YALE L.J. 1409, 1409 (1991) [hereinafter Reich, *Individual Sector*]. Similarly, Professor Joel Feinberg has opined that "there is a domain in which the individual's own choice must reign supreme. On the boundaries of this 'zone' is a 'wall' against state interference." Feinberg, *supra* note 220, at 483 (footnote omitted).

225. *See* Reich, *Individual Sector*, *supra* note 224, at 1409 ("Without a secure and supportive habitat for the individual—a protected personal space—there can be no liberty.").

226. *See* Wasserstrom & Seidman, *supra* note 1, at 109 ("[P]reservation of some private space may be a prerequisite to robust public dialogue. Without such space, it is likely that a public consensus, once established, would be able to replicate itself endlessly.").

ulties.[227] Transparent cages are good breeding grounds for lab rats but not people. Individuals need to know that they may cultivate their own thoughts and abilities without the threat of surveillance or interference by government. Generally it is the person, not the state, that recognizes the best path for this development. Nor should it be forgotten that ours is a nation founded on robust individualism and nonconformity.[228] Only by guaranteeing a sphere of sovereignty can the idiosyncratic individual and the unique minority be allowed to prosper alongside the assimilated majority. Individual sovereignty is consistent with toleration, one of the better angels of our nature.

A theory of sovereignty can also respond to the basic human need for spatial definition. Individuals and, I would argue, their governments, require clear and reliable boundaries of power. Clean delineations of sovereignty satisfies the basic, animalistic need to stake out one's turf. People naturally create fences, walls, and borders; they long to proclaim: "This is mine, this is yours, this belongs to the community."[229] These desires provided the very underpinnings for the concept of property and spurred the development of a distinct body of jurisprudence where individuals are accorded the right to act as they please on their own property, to exclude others from their land, and to be free from intrusion by private citizens or public officials.[230] In addition, trustworthy zones of sovereignty allow individuals to or-

227. *See, e.g.*, Berlin, *Two Concepts of Liberty*, *supra* note 222, at 124 (arguing that infringement of "a certain minimum area of personal freedom" would cause the "individual [to] find himself in an area too narrow for even that minimum development of his natural faculties which alone makes it possible to pursue, and even to conceive, the various ends which men hold good or right or sacred"); *cf.* Reich, *Individual Sector*, *supra* note 224, at 1410 ("[A] healthy individualism supports relationships, family, and community, creates wealth, beauty, and spiritual meaning, respects the rights of others, and performs the duties of sovereign democratic citizenship.").

228. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972) (invalidating a vagrancy ordinance because, inter alia, walking, strolling, and wandering "have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These [activities] have dignified the right of dissent and have honored the right to be nonconformists").

229. Reich, *Individual Sector*, *supra* note 224, at 1413.

230. *See* Oliver v. United States, 466 U.S. 170, 190 n.10 (1984) (Marshall, J., dissenting) ("*[O]ne* of the purposes of the law of real property . . . is to define and enforce privacy interests—to empower some people to make whatever use they wish of certain tracts of land without fear that other people will intrude upon their activities."); Rakas v. Illinois, 439 U.S. 128, 144 n.12 (1978) ("One of the main rights attaching to property is the right to exclude others."); *id.* at 153 (Powell, J., concurring) ("[P]roperty rights reflect society's explicit recognition of a person's authority to act as he wishes in certain areas, and therefore should be considered in determining whether an individual's expectations of privacy are reasonable.").

der their affairs. People will only prepare and invest for the future if they know that the lines set today will not vacillate or simply disappear tomorrow. Sturdy boundaries of power provide this confidence. Likewise, government officials need predetermined, understandable limitations for their day-to-day conduct. The "good cop" wants clear guidance; the "bad cop" must be constrained by legal barriers.[231] Individual sovereignty serves both goals.

The most important aspect of sovereignty theory is its bottom line. By articulating zones of individual sovereignty, it provides a solid floor for all government activity. In essence, the theory proclaims to the state that it may freely govern to the point where individual sovereignty begins—but it may then go no further. Sovereignty theory articulates an inviolate baseline of rights for all citizens, prohibiting both blunt intrusions and stealthy encroachments, and creates an embankment on the slippery slope. Dworkin's moral reading established a constitutional floor which was beyond the power of political majorities,[232] and sovereignty theory shares this commitment to fundamental individual rights.

C. Scholarly Criticism

Moral theories are subject to a variety of criticisms. Such theoretical approaches tend to adopt vague principles at a high level of abstraction. Although they may sound functional, some scholars contend that moral principles are generally useless in determining concrete cases. Their terms are "reminiscent of the rhetoric of Motherhood and Apple Pie,"[233] universally accepted but entirely empty of tangible content. Dworkin's moral reading of the Constitution has been particularly vulnerable to this critique. "His addiction to abstraction," argues Raoul Berger, "dogs his every step."[234]

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231. *See* Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. PITT. L. REV. 307, 320-21 (1982) (arguing that a simple rule should be preferred to one which is theoretically superior but difficult to apply).

232. *See* McCaffery, *supra* note 151, at 1081 ("In Dworkin's model, courts are the last bastion of fundamental individual rights; they set a floor of minimally equal concern and respect.").

233. TUSHNET, *supra* note 64, at 140.

234. Raoul Berger, *Ronald Dworkin's The Moral Reading of the Constitution: A Critique*, 72 IND. L.J. 1099, 1100 (1997) (reviewing DWORKIN, FREEDOM'S LAW, *supra* note 151); *see also* Cass R. Sunstein, *Freedom's Law: The Moral Reading of the American Constitution*, NEW REPUBLIC, May 13, 1996, at 35, 38 (reviewing DWORKIN, FREEDOM'S LAW, *supra* note 151, and observing that Dworkin "works almost entirely from philosophical abstractions").

Even if moral principles could be forged for earthly application, critics contend that there is no deep-seated rationale for picking one principle over another or for choosing a particular moral theory rather than its competitor. There is simply no reason to believe that two people will come to the same moral solution for a particular constitutional dispute; in fact, a controversy is likely to produce as many answers as there are commentators given the endless variety of moral theories. "There is not just one moral reading," points out Professor Cass Sunstein in his critique of *Freedom's Law*.[235] "And Dworkin's adversaries—including [Robert] Bork and [Learned] Hand—are making moral claims, and offering moral readings, of their own."[236]

What's worse, critics argue, is that moral theory allows political agendas to be smuggled into constitutional law under the cover of principled analysis. Moral theory can plausibly be invoked to support any cause or outcome.[237] Numerous scholars have attacked Dworkin's moral reading of the Constitution on precisely this count, noting the blatant selectivity in his use of precedents and history.[238] Such chicanery has no place in constitutional adjudication, critics maintain. Moral theory collapses interpretation and constitutional amendment into a single judicial enterprise, transforming judges into moral philosophers who pick and choose among subjective value judgments. But judges are not inherently superior moral theorists; there are no "philosopher-kings" in America.[239] Instead, judges are just men and women, largely selected from an elite band of society. In fact, their insulation from the trials and tribulations of the average citizen may make courts the least competent branch of government to assess con-

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235. Sunstein, *supra* note 234, at 37.

236. *Id.*

237. *See* ELY, *supra* note 4, at 50 ("[Y]ou can invoke natural law to support anything you want. . . . Thus natural law has been summoned in support of all manner of causes in this country . . . and often on both sides of the same issue.").

238. *See, e.g.*, Berger, *supra* note 234, at 1104 & n.46, 1107; Richard A. Epstein, *The First Freedoms*, N.Y. TIMES, May 26, 1996, § 7 (Magazine), at 2 (reviewing DWORKIN, FREEDOM'S LAW, *supra* note 151, and criticizing Dworkin's "selective invocation" of the liberty provisions of the Constitution); Sellers, *supra* note 151 (noting Dworkin's attempt to "redefine the word 'democracy' to mean not 'majority rule' or rule by elected representatives, but whatever structure will most likely 'treat all members of the community, as individuals, with equal concern and respect'"); Sunstein, *supra* note 234, at 38 ("Readers will be frustrated to find that Dworkin rarely puts counter-arguments in their strongest form."); Adam Wolfson, *Telling the Court What to Think*, WALL ST. J., May 24, 1996, at A9 ("In the end, Mr. Dworkin simply evades the question of why human fetuses do not have a right to life.").

239. *See* LEARNED HAND, THE BILL OF RIGHTS 73 (1958) ("For myself it would be most irksome to be ruled by a bevy of Platonic Guardians.").

temporary morality. When the judiciary strikes down government action based on some moral theory, it is tough to show that the court is doing anything more than substituting its value judgments for that of the political majority.

Much of this criticism, however, can be rebutted. Generally, those who attack Dworkin's moral reading present "inside" rather than "outside" objections: they agree with the theory's basic structure but disagree with its application in a given context.[240] Such criticism jeopardizes only a particular application of the moral reading, not the theory itself.[241] Moreover, Dworkin readily admits that his liberal leanings are reflected in his legal analysis. In fact, he contends it is not only acceptable to incorporate one's moral judgments into constitutional theory, it is inevitable.[242] To do otherwise is to hide from public scrutiny and debate the true grounds for judicial decisionmaking.[243] Other scholars of different political persuasions are invited to provide superior moral readings of the Constitution.[244]

It can be argued, however, that these responses do not address the devastating postmodern critique of moral theory. There is no universal good, critics argue, no predetermined set of moral rights or principles that can be taken as a given. The "given" incorporated into modernist approaches is not handed down from on high but is instead constructed by individuals based on experience or other evidence. Interpretation endows the given with an epistemological status but only on the basis of preconceived beliefs held by the interpreter. The im-

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240. *See* McCaffery, *supra* note 151, at 1046 (distinguishing between "Dworkin's interpretive method, on the one hand, and his own particular instantiations *of* that practice, or *within* it, on the other").

241. Professor James Fleming "distinguish[es] between Dworkin's . . . moral reading and Dworkin's own application of it, and urge[s]: 'Do as Dworkin says, not as he does.'" Fleming, *supra* note 189, at 1349.

242. *See* DWORKIN, FREEDOM'S LAW, *supra* note 151, at 36-37 ("Of course my constitutional opinions are influenced by my own convictions of political morality. So are the opinions of lawyers who are more conservative and more radical than I am. . . . I not only concede but emphasize that constitutional opinion is sensitive to political conviction.").

243. *See id.* at 37 ("Constitutional politics has been confused and corrupted by a pretense that judges . . . could use politically neutral strategies of constitutional interpretation. . . . The actual grounds of decision are hidden from both legitimate public inspection and valuable public debate.").

244. *See id.* at 38:

> My arguments can certainly be resisted. But I hope they will be resisted in the right way: by pointing out their fallacies or by deploying different principles—more conservative or more radical ones—and showing why these different principles are better because they are grounded in a superior morality, or are more practicable, or are in some other way wiser or fairer.

port of these beliefs stems from an interpretation of their meaning against the background of other beliefs and interpretations, which in turn are founded on still other beliefs and interpretations, and so on. Not only is interpretation caught in a terminal spiral of yet more interpretation, but the number of possible constructions is limited only by the number of interpreters.[245]

Postmodernism employs a "deconstruction" methodology to destroy all universalist claims. Every time a scholar constructs a universal theory founded on undeniable first principles, the postmodernist deconstructs the theory by demonstrating that the principles are only made fundamental by excluding other feasible precepts.[246] The critic can then construct an equally plausible theory based on these alternate principles. In the end, universal theories can only survive by denying the validity of other perspectives and interpretations.

This moral skepticism is the foundation of the Critical Legal Studies (CLS) movement and its marxist, feminist and racial-inquiry cognates. Contemporary society is riddled with illegitimate hierarchies of power resulting from the alleged universalism of modernist thought, CLS theorists argue.[247] By excluding the viewpoints of women, racial minorities, the poor, and other marginalized groups, society has constructed narrow moral standards of reason, truth, and goodness. These principles are then converted into law, backed by the authority of the state, and utilized by the politically powerful to maintain their strength while oppressing those of different perspectives.

Postmodernism in general and the CLS movement in particular attempt to expose universalism as a fraud. And, quite frankly, modernism cannot muster a credible response. American society has historically subjugated women, oppressed minorities, and castigated the poor. It is simply undeniable in the face of slavery, disenfranchisement, segregation, professional disability, and official caste crea-

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245. *Cf.* JACQUES DERRIDA, SPEECH AND PHENOMENA (David B. Allison trans., 1973).

246. *See* Andrew M. Jacobs, *God Save This Postmodern Court: The Death of Necessity and the Transformation of the Supreme Court's Overruling Rhetoric*, 63 U. CIN. L. REV. 1119, 1144 (1995) ("[P]ostmodernism attacks the foundationalism of modernism, or the modernist belief that knowledge rests on some ultimately verifiable truths.").

247. *See* Jay M. Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. Rev. 829, 852 (1983) ("[C]ontract doctrine is created and perpetuated as a belief system to conceal the reality of economic injustice in society. Society is composed of illegitimate hierarchies in which dominant economic groups systematically exploit their subordinates [by] inducing acceptance of values and institutions that appear to support the status quo.").

tion.[248] But, that said, postmodernism fails to provide a solution. It simply knocks down the current legal regime without proposing an alternate system; deconstruction taken to the extreme is nihilism under another title. In reality, absolute skepticism is both untenable and unpalatable to postmodern scholarship. Even the most skeptical skeptic agrees that slavery and genocide are wrong, for example, and therefore represent "universal" principles.[249] Moreover, "the internal skeptic can't be skeptical all the way down," argues Dworkin, "because he builds his skepticism on some positive moral position. If he claimed that no moral judgment or conviction or instinct of any kind could be true, he would condemn his own theory."[250]

Nonetheless, postmodernism offers two interrelated caveats for moral theory. First, ostensibly universal moral principles can be the source of oppression by excluding other perspectives. Second, only constant critical analysis can reveal such covert injustice. The solution, I argue, is to accept the postmodern challenge as a necessary limitation of any moral theory. The goal should still be finding universal moral principles, but with an understanding that what seems fundamental and just in modern society may be uncovered as coercive and unjust in the future. A moral theory, therefore, cannot be arrogantly self-confident; it must instead be humbly self-critical.

Individual sovereignty, I believe, offers a *post*-postmodern theory of the Constitution which meets this heightened standard of va-

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248. *See, e.g.*, U.S. CONST. art. I, §§ 2, 9, art. IV, § 2, cl. 3 (constitutional provisions implicitly allowing slavery) (amended by U.S. CONST. amends. XIII, XV); U.S. CONST. amend. XV (enfranchising African Americans in 1870); U.S. CONST. amend. XIX (enfranchising women in 1920); U.S. CONST. amend. XXIV (prohibiting poll taxes in 1964); Edwards v. California, 314 U.S. 160 (1941) (invalidating a statute barring the entry of indigents into the state); Plessy v. Ferguson, 163 U.S. 537, 551 (1896) (upholding racial segregation under the "separate but equal" theory); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873) (upholding a ban on women practicing law); Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (holding that, inter alia, African-American slaves were not members of the American political community entitled to legal recognition).

249. But the postmodern skeptic is unlikely to call them "universal principles":

> He [will deny] that these practices are *really* wrong, or that their wrongness is "out there" in reality. He insists, rather, that the wrongness is "in here," in our own breasts, that we have "projected" moral quality onto reality, that events are not, in themselves, right or wrong good or bad, apart from our emotions or projects or conventions, that our moral convictions are not, after all, true or false or part of what we do or do not know, but are only, in complex ways, products of our invention or manufacture. He is skeptical, in other words, not about convictions but about what we might call the "face value" view of these convictions.

Ronald Dworkin, *Objectivity and Truth: You'd Better Believe It*, 25 PHIL. & PUB. AFF. 87, 92 (1996).

250. *Id.* at 94.

lidity. Underlying this theory is a universal interest shared by all individuals—the interest in living life according to one's own judgments, consistent with all other individuals having that same right. In other words, each individual would agree to maximize her personal sovereignty so long as other persons also maintain equivalent areas of autonomy. These spatial zones of sovereignty would be adopted by a citizenry in the "original position."[251] Behind the "veil of ignorance,"[252] denied knowledge of what their particular circumstances entail, individuals would choose these sovereign areas to be protected against governmental intrusion. But whatever zones are chosen, sovereignty theory must remain vigilantly self-conscious. The areas of individual sovereignty supported in history, precedent, and contemporary values of today may provide insufficient protection or be normatively unjustified tomorrow.

D. A Model of the Fourth Amendment

The difficult task then is to locate the domains of individual sovereignty that must be protected by the Fourth Amendment in the here and now. Drawing borders between citizens and the state requires near certainty to avoid claims of arbitrary selection or hidden political agendas. Criticism can only be met by constructing zones that will stand as archetypes of individual sovereignty—places garnering a moral consensus among the population. Although substantial disagreement is likely as the list of potential candidates expands, I believe that, at the very least, two relevant domains of personal sovereignty will be on everyone's list: *body* and *home*. They represent conspicuous elements of the sovereign individual in contemporary society. These zones are not perfect, nor do they perfectly reflect the entirety of individual sovereignty. It is quite possible that other areas of individual autonomy exist and should be recognized.[253] But I believe they offer the "best" zones of sovereignty and can help make

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251. RAWLS, *supra* note 149 at 12 (describing a situation in which "no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength and the like").

252. *Id.*

253. In fact, I have elsewhere constructed an individual rights model of criminal procedure that incorporates a third zone of personal sovereignty—the mind. *See* Luna, *supra* note 125 (manuscript at 58-71). The government can "search" the mind through scientific innovations such as the lie-detector or medieval torture devices like the rack. But for the most part, searches and seizures of the mind will be covered by the Self-Incrimination Clause of the Fifth Amendment. *See id.*

the Fourth Amendment the very best it can be in the context of modern America.

The importance of these paradigms as historical and contemporary concepts is the subject of countless works, but I nonetheless will add a few words on why the body and the home are appropriate archetypes for the sovereignty theory. As will be discussed in the next section, the body and home occupy a unique position in the Court's jurisprudence; it has gone out of its way to protect rights associated with these areas. In other words, the body and home paradigms "fit" the case precedents. They also square with the spatial orientation of the Constitution in general and the Fourth Amendment in particular.[254] In their daily practice, government agents would be provided with definitive limitations. Although tough questions cannot be avoided,[255] both the beat cop and the average citizen understand when someone's body or home is being invaded. And it can be forcefully argued that the exercise of all rights in society presupposes individual sovereignty in these areas. Without autonomy over the home and body, the rights to free speech and due process would be shallow guarantees.[256]

These sovereign zones also have great normative appeal. Control over one's body and home is the very essence of personhood. We define ourselves by our physical beings and the area where we conduct both basic and intimate activities: *This is who I am*. *This is where I live*. Deference to these zones is central to personal dignity. When society protects an individual's body and home, it recognizes him as a moral agent deserving of respect. It announces to the community that his personal choice, his very way of life is legitimate and that his means of self-description must be tolerated.

But, most importantly, it allows an individual to control his own destiny. We all have dictators in the recesses of our minds—we long for power and control over something, anything. Clearly, unbounded autonomy is inconsistent with organized society. It is, in fact, anarchy. An individual's personal choice of public policy will often be rejected for lack of popular support. The fact that "I Like Ike" does not preordain a presidential election. But by reserving the body and home to

254. *See infra* Part IV.A.1.

255. For example, should a homeless man's tent and a traveler's R.V. be deemed "homes"?

256. *See* Monrad G. Paulsen, *The Exclusionary Rule and Misconduct by the Police*, *in* POLICE POWER AND INDIVIDUAL FREEDOM 87, 97 (Claude R. Sowle ed., 1962) ("Security in one's home and person is the fundamental without which there can be no liberty.").

the individual—that which is the very essence of his being—we allow him to maintain very real control over his own life.

Reverence for the body and home is not a new concept; it has roots in the dawn of man, expressed in biblical times and invoked in the first laws.[257] Enlightenment liberalism claimed these concepts as fundamental. In his *Second Treatise of Government*, Locke argued that "every man has a *property* [right] in his own *person*. This nobody has any right to but himself."[258] The writ of habeas corpus and the demise of indentured servitude represented the moral truth that a person's body belongs to himself and not to others. Likewise, the axiom that "a man's home is his castle" derives from visions of individual sovereignty.[259]

The body and home have remained archetypes of sovereignty in modern society. People view governmental activity in these personal domains as particularly intrusive.[260] There is, in fact, a psychological need for "some locus that is inviolable by others except at the person's express invitation."[261] In literature, the visceral dread invoked by negative utopias stems in large part from the unmitigated invasion of fictional governments into the individual's home and body.[262] The

257. *See* Gavison, *supra* note 203, at 464 n.131 ("A certain sphere of privacy has been protected from the earliest times. Anglo-Saxon law and German tribal law protected the peace that attached to every freeman's dwelling, and offered compensation for damage to property, insulting words, and the mere act of intrusion."); Milton R. Konvitz, *Privacy and the Law: A Philosophical Prelude*, 31 LAW & CONTEMP. PROBS. 272, 272 (1966) (describing Adam, Eve, and Noah as biblical figures concerned with maintaining bodily privacy); Jason S. Marks, *Mission Impossible? Rescuing the Fourth Amendment from the War on Drugs*, 11 CRIM. JUST. 16, 16-17 (1996) (citing Roman legal codes for the proposition that "autonomy and inviolability of the person and the home stand as the first principle of natural law").

258. JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT § 27 (1690), *reprinted in* TWO TREATISES OF GOVERNMENT 305 (Peter Laslett ed., Cambridge Univ. Press 2d ed. 1967).

259. *Cf.* William Pitt, Speech on the Excise Bill, *quoted in* Frank v. Maryland, 359 U.S. 360, 378-79 (1959) (Douglas, J., dissenting):

> The poorest man may in his cottage bid defiance to all the force of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter, the rain may enter—but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement!

See generally Luna, *supra* note 125 (manuscript at 60 nn.213 & 215) (listing sources supporting the sovereignty of the home).

260. *See* Slobogin & Schumacher, *supra* note 205, at 737-38 (reporting survey that shows people perceive government searches of homes and bodies as among the most intrusive searches imaginable).

261. Sidney M. Jourard, *Some Psychological Aspects of Privacy*, 31 LAW & CONTEMP. PROBS. 307, 310 (1966).

262. *See* GEORGE ORWELL, NINETEEN EIGHTY-FOUR 4 (1949):

sanctity of these zones has also been enshrined in the constitutions and fundamental law of foreign nations throughout the world.[263] Even primitive cultures respect the hallowed nature of the body and home.[264] By maintaining these zones of individual sovereignty, explicit recognition is given to societal norms that transcend history and are linked to human existence.

This conception of the sovereignty theory is both consistent with, and provides content for, an individual rights model of the Fourth Amendment. According to this model, the Amendment guarantees individual liberties to every citizen. It defends substance rather than procedure, ensuring a baseline of constitutional protection to each moral agent. Fair process alone is insufficient. The government may not conduct surveillance activities below the constitutional floor despite the otherwise equitable nature of its procedures. Sovereignty theory, in turn, provides the content of that constitutional floor—the substantive zones of individual sovereignty.

The individual rights model of the Fourth Amendment is fairly straightforward: the strongest presumption[265] of invalidity attaches to government searches and seizures of an individual's body or home.

> In the far distance a helicopter skimmed down between the roofs, hovered for an instant like a blue-bottle, and darted away again with a curving flight. It was the Police Patrol, snooping into people's windows. . . . Any sound that Winston made [in his home], above the level of a very low whisper, would be picked up by [the telescreen]; moreover, so long as he remained within the field of vision which the metal plaque commanded, he could be seen as well as heard.

See also ALDOUS HUXLEY, BRAVE NEW WORLD (1932) (depicting official use of severe electric shocks to condition infants to hate books and flowers).

263. *See generally* S.E. FINER ET AL., COMPARING CONSTITUTIONS 116-17, 128, 131, 133, 233, 252, 300 (1995).

264. *See* WESTIN, *supra* note 203, at 15:

> Whether the primitive household is nuclear or extended, most societies have rules limiting free entry into the house by nonresidents, as well as rules governing the outsider's conduct once he enters. Even in those societies where entry is fairly free, there will usually be rules limiting what a person may touch or where he may go within the house.

Individual sovereignty, moreover, appears to be an animalistic rather than a solely human concept:

> One basic finding of animal studies is that virtually all animals seek periods of individual seclusion or small-group intimacy. That is usually described as the tendency toward territoriality, in which an organism lays private claim to an area of land, water, or air and defends it against intrusion by members of its own species.

Id. at 8.

265. *See, e.g.*, Edna Ullmann-Margalit, *Revision of Norms*, 100 ETHICS 756, 759 ("presumptions operate as corrective devices which regulate in advance the direction of error, where errors are believed to be inevitable"). *See also* Jeremy Bentham, Treatise on Judicial Evidence 197-98 (1825) ("in doubtful cases [the judge should] consider the error which acquits as more justifiable, or less injurious to the good of society, than the error which condemns").

Relevant examples are endless, including arrests, entries into domiciles, collection of bodily fluids, and any other intrusion into the home or body. In such circumstances, the state has invaded a zone of individual sovereignty—the area where a citizen exercises ultimate power without accountability. By searching the body or home, the government deprives the individual of his right to decide, to act, and to exclude without interference. At the same time, the government appropriates this power and establishes itself as *de facto* sovereign. These acts are *ultra vires*, beyond the boundaries of official authority.

On its face, the individual rights model appears to provide an impregnable barrier between government and individuals. But although the boundary is robust, it is not insurmountable: there is no such thing as an absolute right.[266] Because individual liberties will always have exceptions, the goal is that the limitations be few and wholly consistent with the right. In other words, the exceptions should prove the rule rather than become the rule.

The sovereignty-based model is compatible with three discrete exceptions to an otherwise irrebuttable presumption of unconstitutionality. First, the individual can consent to a search of his home or body. As a practical matter, the criminal justice system would be seriously impeded if consent became an insufficient predicate for a valid search. More importantly, this limitation is wholly consistent with the underpinnings of the sovereignty theory. If an individual consents to a search or seizure, she is exercising primary authority.[267] The right to exclude necessarily implies the right to include, and as long as the final determination is made by the person whose body or home is being searched, sovereignty remains with the individual.[268]

The second exception is when the government agent possesses individualized suspicion of wrongdoing. A suspicion-based departure

266. There may, however, be "core" applications of a right that are absolute. *See, e.g.*, Griffin v. California, 380 U.S. 609, 615 (1965) (holding that the Fifth Amendment's privilege against self-incrimination bars a prosecutor from commenting on the accused's silence and likewise bars a judge from instructing a jury that such silence may be considered evidence of guilt).

267. Arguably, an individual who is unable to consent to a search is not truly sovereign.

268. This limitation, of course, assumes that the consent is voluntary. Coerced consent and its philosophical cousin, the unconstitutional conditions doctrine, are beyond the scope of this Article. *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (establishing Fourth Amendment standard for assessing voluntary consent to search); Richard A. Epstein, *The Supreme Court, 1987 Term—Forward: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988) (critiquing unconstitutional conditions doctrine); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989) (same).

from the individual rights model conforms to both constitutional text and context and the underlying philosophy of the sovereignty theory. The Fourth Amendment expressly allows searches and seizures based on a particular quantum of suspicion—that is, "probable cause"[269]—thereby delimiting a circumstance when the citizen is not sovereign. Since the Framers' time, individualized suspicion has been viewed as a necessary component of valid searches and seizures,[270] particularly when the government seeks to invade a person's body[271] or home.[272]

Individualized suspicion provides an objective standard or "yardstick" with which to measure the constitutionality of police activities.[273] The government must justify a search or seizure with external, articulable facts—facts which are beyond the state's control. It may intrude upon a zone of sovereignty if and only if a citizen's actions give rise to individualized suspicion.[274] The standard sets up a

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269. U.S. CONST. amend. IV.

270. *See* Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 667 (1995) (O'Connor, J., dissenting) ("For most of our constitutional history, mass, suspicionless searches have been generally considered *per se* unreasonable within the meaning of the Fourth Amendment."); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 655 (1989) (Marshall, J., dissenting) (invoking the "time-honored and textually based principles of the Fourth Amendment—principles the Framers of the Bill of Rights designed to ensure that the Government has a strong and individualized justification when it seeks to invade an individual's privacy"); Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. Rev. 483, 487-517 (1995) (arguing that the Fourth Amendment's historical context demonstrates that the Framers intended to prohibit suspicionless searches and seizures).

271. *See* Schmerber v. California, 384 U.S. 757, 769-70 (1966):

> The interests in human dignity and privacy which the Fourth Amendment protects forbid any [bodily] intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

272. In fact, individualized suspicion without a warrant has been deemed insufficient to justify a search or seizure in the home. *See* Vale v. Louisiana, 399 U.S. 30, 34 (1970) (citations omitted) ("'Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant.' That basic rule 'has never been questioned in this Court.'").

273. New Jersey v. T.L.O., 469 U.S. 325, 359 (1985) (Brennan, J., concurring in part and dissenting in part).

274. *See* Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1458-59 (1996) (describing the "paradoxical" feature of the Fourth Amendment that creates "an individual right, the scope of which is defined by a matter extrinsic to the individual and his or her conduct and culpability: what the government knows"); Sundby, "*Everyman*"*'s Fourth Amendment*, *supra* note 24, at 1766-67 ("If undertaken without adequate individualized suspicion, a search or seizure to which the Warrant Clause applied could not be redeemed through policy arguments as to why the intrusion should have been allowed anyway or by a broad appeal to societal approval of the government's actions.").

simple procedure which provides a degree of certainty[275] by disciplining government agents and supplying predictability for members of society. Moreover, individualized suspicion is the Fourth Amendment's central protection against arbitrary and invidious state action.[276] It limits official intrusions to circumstances that provide a level of confidence in the eventual success of a given search or seizure.[277] Particularized suspicion also supports the philosophical underpinnings of the criminal justice system: people should be punished for their past deeds and not their future propensities.[278] Suspicionless searches and seizures are premised on what an individual is likely to do rather than what he has already done. They presume an individual guilty in contravention of the great first principle of American criminal procedure—each citizen is legally innocent until proven guilty beyond a reasonable doubt.[279]

Most importantly, individualized suspicion is consistent with a zone of personal sovereignty secured to each citizen. It empowers the individual, ensuring initial autonomy over his domain. "Searches based on individualized suspicion," argued Justice O'Connor, "afford potential targets considerable control over whether they will, in fact, be searched, because a person can avoid such a search by not acting in an objectively suspicious way."[280] If a person goes about his life

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275. *See* Terry v. Ohio, 392 U.S. 1, 37 (1968) (Douglas, J., dissenting) (arguing that the term "probable cause" "rings a bell of certainty that is not sounded by phrases such as 'reasonable suspicion'"); *cf.* Erik G. Luna, *Welfare Fraud and the Fourth Amendment*, 24 PEPP. L. REV. 1235, 1284-85 (1997) (footnotes omitted):

> As its name implies, probable cause deals with probabilities—the likelihood that a certain fact will be found true. The appropriate considerations "are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Probable cause is a "fluid concept" which accommodates the factual and legal scenario at hand. Although it cannot be "reduced to a neat set of legal rules," probable cause in the criminal context can be roughly defined as "a reasonable ground for belief of guilt." "Probable cause exists where the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed."

276. *See* Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 457-58 (1990) (Brennan, J., dissenting).

277. *See* Schmerber v. California, 384 U.S. 757, 770 (1966) (stating that individualized suspicion requires "a clear indication" that the desired evidence will be found). *See generally* Colb, *supra* note 274.

278. *Cf.* Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) (invalidating vagrancy ordinance that allowed arrest for innocuous activity).

279. *See In re* Winship, 397 U.S. 358, 363 (1970) (stressing that the "reasonable-doubt standard plays a vital role in the American scheme of criminal procedure").

280. Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 667 (1995) (O'Connor, J., dissenting).

without making a scene or raising suspicions, he retains the right to to be left alone. Primary power and control, the necessary incidents of personal sovereignty, belong to the citizen. The government demonstrates respect for the individual, for her zones of sovereignty and her basic dignity, when it acts only with the predicate level of suspicion.[281]

The final exception to the model stems from the sovereignty of individuals other than the person subject to the search or seizure. Constitutional liberties are powers or immunities which may be exercised by each and every citizen; the vesting of a right in one person presupposes that all other individuals possess that same right. But the very existence of the same right in all moral agents has an implicit limitation: an individual may not exercise that right to the derogation of the rights of another.[282] "Your right to swing your arms," quipped

281. The Warrant Clause of the Fourth Amendment demands a particular level of individualized suspicion presented in a specific manner: warrant-based searches and seizures are only valid if based on a neutral and detached magistrate's determination of probable cause. The warrant itself is intended to prevent random or arbitrary state action by injecting a judicial officer into the process. In theory, the warrant requirement will force government agents to articulate the relevant facts as a coherent theory of probable cause that can then be thoroughly scrutinized by the magistrate. Real-world practice, however, is not so clean. Some scholars have argued that magistrates take their responsibilities less than seriously, serving as "rubber stamps" for searches and seizures. *See* Stephen A. Saltzburg, *Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151, 196, 172 (1980); William A. Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 GEO. L.J. 1361, 1412 (1981). There are also a variety of situations that preclude law enforcement from securing a warrant before acting. When police are chasing a fleeing felon who darts into a residence, it would be impractical (and a little bit absurd) to require a warrant before allowing the pursuit to continue. *See* United States v. Santana, 427 U.S. 38, 43 (1976) (holding that the "hot pursuit" doctrine permits police to search a suspect who has retreated from a public area into her home); Warden v. Hayden, 387 U.S. 294, 298 (1967) (holding that police may make a warrantless search of a home into which a robbery suspect has just entered). Although the process must generally be respected, some exigent circumstances should excuse the warrant requirement. Likewise, there are situations which justify a lower level of suspicion than probable cause. For example, beat cops arguably need the power to conduct a "stop and frisk" on less than probable cause when they have a reasonable suspicion that criminal activity is afoot. *See* Terry *v*. Ohio, 392 U.S. 1, 30 (1968) (emphasizing that the "stop and frisk" exception allows an officer to "protect[] . . . himself and others . . . and neutralize the threat of harm if it materializes"). These issues, however, are beyond the scope of this Article. The thrust of this exception to the sovereignty-based model is the need for individualized suspicion: an objective, external set of facts justifying an intrusion into a person's zone of sovereignty.

282. The French Revolutionaries recognized this principle over two centuries ago: "[T]he only limitations on the individual's exercise of his natural rights are those which ensure the enjoyment of these same rights to all other individuals." THE DECLARATION OF THE RIGHTS OF MAN AND THE CITIZEN Art. 4 (1789), *reprinted in* HUMAN RIGHTS SOURCEBOOK 744, 744 (Albert P. Blaustein et al. eds., 1987).

Zachariah Chafee, "ends just where the other man's nose begins."[283] In terms of the Fourth Amendment model, an individual's sovereignty cannot be invaded as a matter of governmental policy unless the personal sovereignty of others is directly and substantially endangered.

The philosophical basis for this limitation was first articulated by John Stuart Mill in 1859. In his timeless piece, *On Liberty*, Mill delineates the "harm principle" as prescribing government's power to impede individual autonomy.[284] That "one very simple principle . . . is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number . . . is to prevent harm to others."[285] Mill distinguishes between "self-regarding" harm and "other-regarding" harm: self-regarding activities have primary and direct affect only on the interests of the decisionmaker. In contrast, other-regarding activities affect "directly and in the first instance" the interests of individuals other than the actor. Self-regarding harm, therefore, primarily and substantially injures the decisionmaker only, while other-regarding harm directly injures other persons.

If I get drunk in my apartment, for example, make a huge mess, cut my hand on a broken bottle, and then pass out on the couch, I have inflicted self-regarding harm. It is my apartment, my hand, and my hangover. As long as I was quiet, no other person is worse for the wear. In contrast, if I become intoxicated and then get behind the wheel of a car, I pose the very real threat of both self-regarding and other-regarding harm. Not only could I end up injuring or killing myself, but I could maim or kill other drivers or pedestrians.

Clearly, self-regarding harm can have ripple effects on other individuals. The hangover I suffer might affect my performance in class or the courtroom, and hence my students or my clients. But these are the indirect, remote effects of my self-regarding activities. According to Mill, government can regulate only those acts which primarily, chiefly, or directly harm other individuals.[286] Injury or the substantial

283. ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES 31 (1941).

284. JOHN STUART MILL, ON LIBERTY (1859), *reprinted in* ON LIBERTY, REPRESENTATIVE GOVERNMENT, THE SUBJECTION OF WOMEN: THREE ESSAYS BY JOHN STUART MILL (Oxford Univ. Press 1912). It should be noted that Mill has typically been characterized as a utilitarian rather than an advocate of universal moral rights. But despite its obstensible origin in Benthamite thought, Mill's "harm principle" is consistent with neo-Kantian moral theory.

285. *Id.* at 14-15.

286. *See id.* at 99-101.

possibility of injury to others can be viewed as jurisdictional in nature, providing the prerequisite for government intrusion into zones of personal sovereignty.[287] When the first-order harm accrues solely to the decisionmaker, state interference is intolerable. Only direct injury to other persons provides license to regulate or prohibit.[288]

The harm principle possesses both practical and theoretical merit. It prevents arguably gratuitous, paternalistic limitations on individual autonomy. Paternalism seeks to protect or promote the citizenry's physical, moral or economic well-being regardless of personal choice. Such action is not only degrading, but often incorrect. Each individual has his own vision of the good life which can be achieved only through state respect for autonomy and free will. The ability to choose one's path is just as important as the path itself. There is also little empirical support justifying prohibitions on sheerly self-regarding activity such as drug use.[289]

Most importantly, the harm principle can be squared with the sovereignty-based model of the Fourth Amendment. An individual's sovereignty over his body and home cannot be defeated by ordinary policy considerations. The belief that mass residential searches will uncover evidence of tax fraud, for instance, should be an insufficient predicate for government action. What can defeat an individual's claim of sovereignty is a *real*, *direct* and *substantial* threat to the sovereign zones of other citizens.

A "real" threat is one that is self-evident under the circumstances or empirically demonstrable. This incorporates a quasi-statistical, probabilistic element into the formula. The possibility that

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287. *See id.* at 92-93:

> As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it, becomes open to discussion. But there is no room for entertaining any such question when a person's conduct affects the interests of no persons besides himself. . . . In all such cases there should be perfect freedom, legal and social, to do the action and stand the consequences.

288. The leading modern scholar on the harm principle is Professor Joel Feinberg, who has written extensively on the matter. *See* 1 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS (1984); 2 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS (1985); 3 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF (1986); 4 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING (1988).

289. *See generally* Erik G. Luna, *Our Vietnam: The Prohibition Apocalypse*, 46 DEPAUL L. REV. 483 (1997) (discussing the failure of drug prohibition); Robert W. Sweet & Edward A. Harris, *Just and Unjust Wars: The War on the War on Drugs—Some Moral and Constitutional Dimensions of the War on Drugs*, 87 NW. U. L. REV. 1302 (1993) (reviewing THOMAS SZASZ, OUR RIGHT TO DRUGS: THE CASE FOR A FREE MARKET (1992)) (same).

a police officer might accidentally shoot and kill an innocent individual is real: it happens every year, in every major city, to very real victims.[290] But the chance that a secretary might stab a co-worker in the chest with a sharp pencil is largely imaginary. By "direct," I mean that a primary, first-order injury will be sustained by an individual other than the person being searched. This is the previously discussed distinction between self-regarding and other-regarding harm. A "substantial" threat is one that poses irremediable consequences of a tragic or disastrous nature. This will invariably involve a danger to physical safety in one's body or home—a shooting, an explosion, a raging fire. When a real, direct and substantial threat to the body or home of other citizens is presented, a search and seizure regime can be consistent with the sovereignty theory. Although government may be invading the sovereignty of the individual searched, it is doing so only to protect the sovereignty of others. In modern constitutional parlance, there must be a tight fit between ends and means when the government seeks to invade the home or body. The means—*invading an individual's sovereignty*—must be justified by a compelling end—*a real, direct, and substantial threat to the sovereignty of others.*

The individual rights model of the Fourth Amendment based on the sovereignty theory can be described very simply. Government searches and seizures of an individual's body or home receive the strongest presumption of unconstitutionality. Only three exceptions can be invoked to justify a body or home search: (1) voluntary consent; (2) individualized suspicion of wrongdoing; or (3) real, direct and substantial threats to the bodies or homes of other individuals.[291] Searches and seizures that do not implicate the body or home might also carry an initial presumption of invalidity. But that presumption should not be fatal. Beyond the body and home, society as a whole is sovereign, not the individual.[292]

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290. *See, e.g.*, Editorial, *Overkill*, U.S.A. TODAY, Feb. 9, 1999, at 16A (criticizing shooting of unarmed man by New York police officers); Editorial, *Deadly Crises Series*, ST. PETERSBURG TIMES, Nov. 23, 1998, at 8A (discussing "questionable shootings by police in recent years involving suspects who were unarmed, acting strangely, victims of mistaken identity or shot in the back," shootings that raise "questions about whether officers are adequately trained and disciplined in the use of deadly force").

291. Moreover, searches generally must be pursuant to a judicially issued warrant absent exigent circumstances. I leave the parameters of the warrant requirement for another day. *See supra* note 281.

292. By employing the zones of sovereignty and the enumerated exceptions, the individual rights model of the Fourth Amendment can address (virtually) all search and seizure issues. But as I articulate elsewhere, the individual rights model of *criminal procedure* cannot directly

Once the individual rights model of the Fourth Amendment is understood, the question becomes whether the zones of sovereignty are consistent with a moral reading of the Constitution.

1. *Fit*. The body and home archetypes "fit" the constitutional record. First and foremost, the text of the Fourth Amendment supports these zones of sovereignty. It expressly guarantees the right to be secure in one's "person[]" and "house[]" from unreasonable searches and seizures.[293] Other constitutional terms buttress these areas of individual sovereignty. The Thirteenth Amendment outlaws the institution of slavery.[294] The Third Amendment forbids the quartering of soldiers in a person's home without the owner's consent.[295] These and other textual provisions of the Constitution are consistent with each citizen being the ultimate sovereign over her body and home.

The context of the Fourth Amendment is also compatible with the sovereignty theory. The "hated hallmark of colonial rule" was the writ of assistance issued by the British Crown.[296] This instrument gave royal customs inspectors the unfettered right to intrude into a home without justification in order to search for contraband.[297] A similar device, the general warrant, had been used in England to stamp out seditious libel but was eventually condemned.[298] A search of an individual's home pursuant to a general warrant, argued British jurists, was "totally subversive of the liberty of the subject"[299] and "worse than the Spanish Inquisition."[300]

The American colonists held similar sentiments against the writ of assistance. They vehemently complained that "our houses and even our bed chambers are exposed to be ransacked, our boxes, chests, and trunks broke open, ravaged and plundered" by customs

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answer various problems in the criminal justice system by reference to the sovereign zones. Instead, a number of conceptual tools consistent with individual sovereignty are required to complete the criminal procedure model. *See* Luna, *supra* note 125 (manuscript at 67-69).

293. U.S. CONST. amend. IV.

294. *See* U.S. CONST. amend. XIII.

295. *See* U.S. CONST. amend. III.

296. Stanley v. Georgia, 394 U.S. 557, 569 (1969) (Stewart, J., concurring).

297. *See* Steagald v. United States, 451 U.S. 204, 220 (1981).

298. *See id.*

299. Wilkes v. Wood, 98 Eng. Rep. 489, 498 (K.B. 1763).

300. Huckle v. Money, 95 Eng. Rep. 768, 769 (K.B. 1763).

agents.[301] An attorney for aggrieved Colonists argued that "the freedom of one's house" was "one of the most essential branches of English liberty." [302] "A man's house," he continued, "is his castle; and while he is quiet, he is as well guarded as a prince in his castle."[303] The abuse of the writs to intrude on the sovereignty of the home became a precipitating cause of the American Revolution[304] and the motivation for the framing and adoption of the Fourth Amendment. [305]

Most importantly, the home and body archetypes fit the Court's constitutional jurisprudence. In the Fourth Amendment context, a search of the body "instinctively gives us the most pause."[306] The Court has noted that an "intrusion into an individual's body . . . implicates expectations of privacy and security of such magnitude that the intrusion may be 'unreasonable' even if likely to produce evidence of a crime."[307] Such bodily intrusions threaten the individual's "most personal and deep-rooted expectations of privacy."[308] Outside of search and seizure law, the Court has strictly scrutinized state acts against the body that "represent[] a substantial interference with that

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301. ROBERT ALLEN RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 1776–1791, at 25 (1955).

302. TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 37 (1969) (citation omitted).

303. Id.

304. See Berger v. New York, 388 U.S. 41, 58 (1967) (stating that the writs were "a motivating factor behind the Declaration of Independence"); United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting) (stating that hatred for the writs was "so deeply felt by the Colonies as to be one of the potent causes of the Revolution"); Harris v. United States, 331 U.S. 145, 159 (1947) (Frankfurter, J., dissenting) (stating that abuse of the writs "more than any one single factor gave rise to American independence"); Boyd v. United States, 116 U.S. 616, 625 (1886) (stating that the writs "were fresh in the memories of those who achieved our independence").

305. See Payton v. New York, 445 U.S. 573, 582 (1980) ("It is familiar history that indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment.") (footnote omitted); Stanford v. Texas, 379 U.S. 476, 482 (1965) ("[T]he Fourth Amendment was most immediately the product of contemporary revulsion against a regime of writs of assistance . . . ."). For authoritative discussions of the writs of assistance and the history of the Fourth Amendment, see LANDYNSKI, supra note 2, at 19-48; LASSON, supra note 2, at 13-78; TAYLOR, supra note 302, at 24-44. Although the Framers of the Constitution were not immediately concerned with searches and seizures of the body, their reverence for the body as an archetype of sovereignty in general can be inferred from the protection of the writ of habeas corpus, see U.S. CONST. art. I, § 9, cl. 2, the prohibition of "cruel and unusual punishments," U.S. CONST. amend. VIII, and the general provisions of the Due Process Clause, see U.S. CONST. amend. V.

306. Bell v. Wolfish, 441 U.S. 520, 558 (1979).

307. Winston v. Lee, 470 U.S. 753, 759 (1985).

308. Id. at 760.

person's liberty,"[309] inflict "irreparable injury,"[310] and "shock[] the conscience."[311] It has recognized that such acts are offensive to "human dignity."[312] Likewise, Chief Justice Earl Warren maintained that government agents "must stop short of bruising the body, breaking skin, puncturing tissue or extracting body fluids, whether they contemplate doing it by force or by stealth."[313] "Every violation of a person's bodily integrity is an invasion of his or her liberty,"[314] Justice Stevens has argued. Such violations "engender 'deep degradation' and 'terror'"[315] in the individual and deny the "moral fact that a person belongs to himself and not others nor to society as a whole."[316]

The sovereignty of the body can be demonstrated by a few case examples. In *Schmerber v. California*,[317] the Court found that government agents may obtain a blood sample when they have probable cause to believe that the individual was driving while intoxicated.[318] But without that quantum of individualized suspicion, such searches would be intolerable. "[W]ith respect to searches involving intrusions beyond the body's surface," argued Justice Brennan, "[t]he interests in human dignity . . . which the Fourth Amendment protects forbid any such intrusions based on the mere chance that desired evidence might be obtained."[319] When individualized suspicion is lacking, a person's control over his own body must receive deference.

Two decades later, the Court held that there are situations where even individualized suspicion cannot defeat the sovereignty of the body. In *Winston v. Lee*,[320] the government had probable cause to believe that a bullet from a failed armed robbery was lodged in the defendant's body.[321] But the Court held that "a more substantial justifi-

309. Washington v. Harper, 494 U.S. 210, 229 (1990) (citation omitted).

310. Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942).

311. Rochin v. California, 342 U.S. 165, 172 (1952).

312. Schmerber v. California, 384 U.S. 757, 769-70 (1966).

313. Breithaupt v. Abram, 352 U.S. 432, 442 (1957) (Warren, C.J., dissenting).

314. Washington v. Harper, 494 U.S. 210, 237 (1990) (Stevens, J., dissenting).

315. Bell v. Wolfish, 441 U.S. 520, 593 (1979) (Stevens, J., dissenting) (citation omitted).

316. Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 777 n.5 (1986) (Stevens, J., concurring) (citation omitted). The lower federal courts have likewise found that "breaches of the 'integrity of the body' result in the greatest invasion of privacy." Capua v. City of Plainfield, 643 F. Supp. 1507, 1514 (D.N.J. 1986).

317. 384 U.S. 757 (1966).

318. *See id.* at 770-72.

319. *Id.* at 769-70.

320. 470 U.S. 753 (1985).

321. *See id.* at 757.

cation is required" before the state can intrude on an individual's bodily integrity.[322] "A compelled surgical intrusion into an individual's body for evidence . . . implicates expectations of [bodily] security of such magnitude that the intrusion may be 'unreasonable' even if likely to produce evidence of a crime."[323] Official action of this type "involves a virtually total divestment of [an individual's] ordinary control" over his body.[324]

And in *Tennessee v. Garner*,[325] the Court considered the use of deadly force against a fleeing felon.[326] The police in that case clearly had probable cause to seize the suspect. The problem was the effect deadly force had on the individual's bodily sovereignty: "The intrusiveness of a seizure by means of deadly force is unmatched. The suspect's fundamental interest in his own life need not be elaborated upon."[327] When the suspected criminal is "nonviolent," law enforcement may not use deadly force.[328] In such circumstances, the individual's sovereignty over his body and his very life must be given the utmost respect.

The Court has also vindicated bodily sovereignty outside of the Fourth Amendment context. Due process forbids the government from pumping a suspect's stomach for evidence[329] or involuntarily administering antipsychotic drugs to a defendant on trial.[330] Sterilizing an inmate violates equal protection by "forever depriv[ing him] of a basic liberty."[331] Penalizing an individual for his physical status, disease or disorder constitutes cruel and unusual punishment under the Eighth Amendment.[332] The Court's death penalty jurisprudence can be viewed as a recognition of the sanctity of the corporeal being and an attempt to restrict those situations when the state may take life

322. *Id.* at 767.

323. *Id.* at 759.

324. *Id.* at 765.

325. 471 U.S. 1 (1985).

326. *See id.* at 3.

327. *Id.* at 9.

328. *Id.* at 11.

329. *See* Rochin v. California, 342 U.S. 165, 174 (1952) (holding that obtaining evidence through stomach pumping is a "method[] that offend[s] the Due Process Clause").

330. *See* Riggins v. Nevada., 504 U.S. 127, 135 (1992) (holding that a state may not coercively administer antipsychotic drugs "absent a finding of overriding justification and a determination of medical appropriateness").

331. Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942).

332. *See* Robinson v. California, 370 U.S. 660, 666 (1962) (invalidating a statute that had made "the 'status' of narcotic addiction a criminal offense").

from the body.[333] And the line of reproductive freedom cases stands for the right of individuals to control both their intimate bodily activities[334] and the procreative function of their bodies.[335]

The individual sovereignty in the home also finds support in Supreme Court language and precedents. "A special respect for individual liberty in the home has long been part of our culture and our law,"[336] the Court has opined, "embedded in our traditions since the origins of the Republic."[337] The American citizenry has chosen "to dwell in reasonable security and freedom from surveillance,"[338] as reflected in the Fourth Amendment. "At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."[339] The "sanctity of private dwellings," therefore, has been "afforded the most stringent Fourth Amendment protection."[340] The Court has placed a greater burden on officials who invade the home.[341] That protection extends both to the "area intimately linked to the home"[342] and to nontraditional residential dwellings, such as apartments[343] and hotel rooms.[344] In sum, the

333. *See generally* Furman v. Georgia, 408 U.S. 238, 239-40 (1972) (per curiam) (holding that Georgia's and Texas's practices of imposing the death penalty violated the Eighth Amendment); *id.* at 290 (Brennan, J., concurring) ("The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity."); *id.* at 306 (Stewart, J., concurring) ("The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. . . . And it is unique . . . in its absolute renunciation of all that is embodied in our concept of humanity.").

334. *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (holding that "a [marital] relationship [lies] within the zone of privacy created by several fundamental constitutional guarantees"); *see also* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.") (citations omitted).

335. *See* Roe v. Wade, 410 U.S. 113, 153 (1973) ("This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

336. City of Ladue v. Gilleo, 512 U.S. 43, 58 (1994) (citation omitted).

337. Payton v. New York, 445 U.S. 573, 601 (1980) (footnote omitted).

338. Johnson v. United States, 333 U.S. 10, 14 (1948).

339. Silverman v. United States, 365 U.S. 505, 511 (1961) (citations omitted).

340. United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976) (citation omitted).

341. *See, e.g.*, United States v. United States Dist. Court, 407 U.S. 297, 313 (1972) (speculating that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed").

342. California v. Ciraolo, 476 U.S. 207, 213 (1986).

343. *See* Clinton v. Virginia, 377 U.S. 158, 158 (1964) (excluding evidence obtained by a listening device lodged in wall dividing two apartments).

home is the "archetype"[345] of individual sovereignty protected by the Fourth Amendment.

Supreme Court decisions almost invariably accord deep respect for the home even when there are weighty countervailing interests. Beginning with a string of Prohibition-era cases, the Court has "drawn a firm line at the entrance to the house."[346] The search of a residence without a warrant has long been deemed "in itself unreasonable and abhorrent to our laws."[347] Even probable cause will not ordinarily justify the warrantless search of a home.[348] Law enforcement may not make a warrantless, nonconsensual entry into a suspect's home to make an arrest.[349] Nor can police enter a third party's dwelling to arrest a suspect in the absence of a warrant or exigent circumstances.[350] Likewise, the arrest of a suspect outside of his home, only a few feet from the front steps, will not justify a subsequent search of the residence.[351] And even when a suspect is validly arrested in his home, a warrantless search of the entire house violates the Fourth Amendment.[352] Moreover, the Court has strictly limited those exigencies that might excuse a warrant to major offenses involving an

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344. *See* Stoner v. California, 376 U.S. 483, 490 (1964) ("No less than a tenant of a house, or the occupant of a room in a boarding house, a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures.") (citations omitted).

345. Payton v. New York, 445 U.S. 573, 587 (1980) (quoting Dorman v. United States, 435 F.2d 385, 389 (D.C. Cir. 1970)).

346. *Id.* at 590.

347. Agnello v. United States, 269 U.S. 20, 32 (1925); *see also* Taylor v. United States, 286 U.S. 1, 5 (1932) (holding that a warrantless entry of a garage adjacent to a dwelling in a search for contraband whiskey was unreasonable); Amos v. United States, 255 U.S. 313, 317 (1921) (denying that a suspect's constitutional rights were waived when his wife admitted officers to their home to conduct a warrantless search).

348. *See* Vale v. Louisiana, 399 U.S. 30, 34 (1970) (observing that there are few situations in which a warrantless search of a dwelling, even with probable cause, will withstand constitutional scrutiny); *Agnello*, 269 U.S. at 33 ("Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant.").

349. *See Payton*, 445 U.S. at 583, 603 (1980).

350. *See* Minnesota v. Olson, 495 U.S. 91, 93 (1990) (holding that police may not make a warrantless, nonconsensual entry into a house to arrest a suspect who is a guest there); Steagald v. United States, 451 U.S. 204, 205-06 (1981) (holding that a police officer may search for the subject of an arrest warrant in the home of a third party only after obtaining a search warrant or when exigent circumstances are present).

351. *See Vale*, 399 U.S. at 33-34 ("If a search of a house is to be upheld as incident to an arrest, that arrest must take place *inside* the house, not somewhere outside—whether two blocks away, twenty feet away, or on the sidewalk near the front steps.") (citations omitted).

352. *See* Chimel v. California, 395 U.S. 752, 768 (1969) ("The search here went far beyond the petitioner's person and the area from which he might have obtained either a weapon or something that could have been used as evidence against him.").

immediate danger of violence.[353] Once the threat dissipates, police may not conduct warrantless home searches to investigate even the most heinous completed crime: there is no "murder scene exception" to the Fourth Amendment.[354]

The juxtaposition of two modern Fourth Amendment cases further demonstrates the Court's reverence for the home. In *United States v. Knotts*,[355] federal officials placed a tracking device inside a can of chloroform which was subsequently purchased by the suspect.[356] With the aid of the "beeper," the agents were able to trace the chloroform to a secluded cabin.[357] The Court found no Fourth Amendment violation in the use of the beeper to track the suspect's route. The government action "amounted principally to the following of an automobile on public streets and highways,"[358] and the use of "scientific enhancement of this sort raises no constitutional issues which visual surveillance would not also raise."[359] One year later, the Court considered essentially the same fact pattern. In *United States v. Karo*,[360] law enforcement officers attached a beeper to a can of ether which was picked up by the defendant.[361] This time the agents used the beeper not only to follow the public movements of the can, but also to determine that it was "actually located at a particular time in [a] private residence and is in the possession of the person . . . whose residence is being watched."[362] This additional fact made the government surveillance unacceptable to the Court.[363] The Fourth Amendment forbids officials from invading the sovereignty of an individual's

353. *See* Welsh v. Wisconsin, 466 U.S. 740, 753 (1984) (striking down warrantless home arrest for a traffic offense and noting that "an important factor to be considered when determining whether any emergency exists is the gravity of the underlying offense for which the arrest is being made"); *see also* Mincey v. Arizona, 437 U.S. 385, 392 (1978) ("[W]hen the police come upon the scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises.").

354. *See* Thompson v. Louisiana, 469 U.S. 17, 21 (1984) (per curiam); *Mincey*, 437 U.S. at 395.

355. 460 U.S. 276 (1983).

356. *See id.* at 278.

357. *See id.* at 278-79.

358. *Id.* at 281.

359. *Id.* at 285.

360. 468 U.S. 705 (1984).

361. *See id.* at 708.

362. *Id.* at 715.

363. *See id.* at 716 ("Indiscriminate monitoring of property that has been withdrawn from public view would present far too serious a threat to privacy interests in the home . . . .").

home, whether by stealth or by force, and regardless of those surveillance activities that might be acceptable away from the home.

The home archetype also receives constitutional support outside the search and seizure context. In *Moore v. City of East Cleveland*,[364] an ordinance that restricted the family members who could live in a residence was struck down under the Due Process Clause.[365] The Court "acknowledged a 'private realm of family life which the state cannot enter,'" particularly "when the government intrudes on choices concerning family living arrangements" in the home.[366] In concurrence Justice Stevens argued that the ordinance violated "a fundamental right" of a home owner "to decide who may reside on his or her property."[367] In *Stanley v. Georgia*,[368] the Court reversed a conviction for possessing obscene material in one's home.[369] The right to free speech "takes on an added dimension" when a person's home is involved.[370] "If the First Amendment means anything," argued Justice Marshall, "it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."[371] Remarkably, the individual sovereignty of the home has been invoked to both invalidate[372] and uphold[373] laws under the

364. 431 U.S. 494 (1977).

365. *See id*. at 505-06.

366. *Id.* at 499 (Powell, J., plurality opinion) (citations omitted).

367. *Id.* at 520 (Stevens, J., concurring).

368. 394 U.S. 557 (1969).

369. *See id*. at 538.

370. *Id.* at 564.

371. *Id.* at 565.

372. *See* City of Ladue v. Gilleo, 512 U.S. 43, 58 (1994) (invalidating a municipal ordinance that prohibited homeowners from displaying signs, including those with a political message, on their properties); Martin v. City of Struthers, 319 U.S. 141, 142, 149 (1943) (striking down an ordinance that forbade solicitors from summoning homeowners to their doors to distribute handbills or circulars).

373. *See* Frisby v. Schultz, 487 U.S. 474, 476-77, 488 (1988) (upholding an ordinance that prohibited persons from picketing before another individual's private residence); FCC v. Pacifica Found., 438 U.S. 726, 748 (1978) (upholding FCC restrictions on the broadcast of indecent language, partly because broadcast media "confront the citizen . . . in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an outsider"); Rowan v. United States Post Office Dep't, 397 U.S. 728, 738 (1970) (holding that vendors of sexually explicit materials have no First Amendment right to send unwanted material into the home of another, since persons need not be "captives" to objectionable speech inside their homes); Breard v. Alexandria, 341 U.S. 622, 644 (1951) (upholding a municipal ban on door-to-door commercial solicitations, in part because salesmen infringe on "some householders' desire for privacy"); Kovacs v. Cooper, 336 U.S. 77, 86-87 (1949) (sustaining an ordinance forbidding the use of "sound trucks" on public streets because loud and raucous noises impair homeowners' use of their properties).

First Amendment. In upholding restrictions on sound trucks, solicitors, and picketers, the Court has often remarked on the unique nature of the home, "the last citadel of the tired, the weary, and the sick," and has recognized that "[p]reserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value."[374] And in striking down limitations on homeowner speech, the Court has noted the "special respect for individual liberty in the home . . . [which] has special resonance when the government seeks to constrain a person's ability to *speak* there."[375]

In sum, the body and home archetypes of individual sovereignty fit the constitutional record. They are consistent with the text and context of the Constitution and can be squared with the Supreme Court's jurisprudence. And in particular, the body and home fit nicely within the scheme of the Fourth Amendment.

2. *Justification*. A constitutional theory, however, must do more than fit the historical record. It must also justify that record and provide guidance for future decisions. The question is not whether the home and body archetypes or the individual rights model are compatible with the Fourth Amendment. Rather, the issue goes to the very idea of sovereignty and sovereign zones within the constitutional framework: Can sovereignty theory justify the Court's jurisprudence? Does it provide legitimacy for the Constitution?

Post-Enlightenment philosophy begins with a very simple precept: each individual is endowed with free will, capable of making decisions and understanding the consequences of her choices. The distinguishing characteristic of humanity is the ability to reason, to make and review judgments in a rational manner. Individuals can test their belief systems, inventory their thoughts, challenge intuitions and convictions, and establish new beliefs based on the process of reason. Free will and rationality serve as the very basis for treating all humans with respect and dignity.

But the concept goes further, beyond human ability to the issue of human freedom—not only *can* individuals make moral choices and accept responsibility for their actions, but they *should* be allowed to do so. Each human is a discrete moral agent who must be afforded the opportunity to exercise his free will in a way consistent with re-

374. *Frisby*, 487 U.S. at 484 (citations omitted).

375. *Gilleo*, 512 U.S. at 58.

spect for the existence of other moral agents. Without the authority to act on one's beliefs, the ability to reason has little value. The only way to respect individuals who inherently claim dominion of reason is to acknowledge their right to exercise their beliefs. Human worth is defined by voluntary actions based on reflective thought, and only accomplishments achieved pursuant to personal autonomy can breed dignity.[376] If individuals are denied this right, the very concept of free will is rejected.

Moreover, Immanuel Kant argued that denying free will and autonomy violates the "categorical imperative"—that individuals must be treated as ends in themselves, not merely means to another's ends.[377] Although this ideal of moral equality is centuries old, it has an eternal resonance: people are endowed with equal capacity for moral reasoning, must be accorded equal respect and dignity, and cannot be conduits to another human being's goals.[378] A moral system based on free will and the categorical imperative would view personal autonomy as its highest value. An individual must be free to pursue his own vision of the good life, to exercise his free will in a manner consistent with the autonomy of others. And as a consequence, the only moral form of government is one that accepts the idea of free will, recognizes the moral equality of all citizens, and respects the individual's right to autonomy.[379]

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376. *See* ALAN GEWIRTH, HUMAN RIGHTS: ESSAYS ON JUSTIFICATION AND APPLICATIONS 22-23 (1982).

377. *See* IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 54-55 (Lewis White Beck trans., 2d ed., MacMillan Publ'g Co. 1990) (1785).

378. As Berlin argued, the consequences of the categorical imperative are substantial:

> [I]f the essence of men is that they are autonomous beings—authors of values, of ends in themselves, the ultimate authority of which consists precisely in the fact that they are willed freely—then nothing is worse than to treat them as if they were not autonomous, but natural objects, played on by causal influences, creatures at the mercy of external stimuli, whose choices can be manipulated by their rulers, whether by threats of force or offers of rewards. To treat men in this way is to treat them as if they were not self-determined. 'Nobody may compel me to be happy in his own way,' said Kant. 'Paternalism is the greatest despotism imaginable.' This is so because it is to treat men as if they were not free, but human material for me, the benevolent reformer, to mold in accordance with my own, not their, freely adopted purpose.

BERLIN, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY, *supra* note 222, at 136-37.

379. Dworkin has argued for this limitation as follows:

> Government must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived. Government must not only treat people with concern and respect, but with equal concern and respect.

DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 151, at 272-73.

If this all sounds familiar, it is. This is the concept of personal sovereignty—an individual is the "uncommanded commander"[380] of his domain. He is both the source and the administrator of final authority regarding his life. The only limitations on this power are found at the borders, where the individual's sovereignty ends and another person's autonomy begins. The sovereignty theory can therefore justify the Supreme Court's precedents by adopting and vindicating philosophical first principles: free will and moral equality.

A theory of individual sovereignty can also provide legitimacy for the official use of coercive force. The American form of government generally follows majority rule; the electorate chooses its representatives who in turn select policies and enact statutes. This system is clearly legitimate in the eyes of the political majority because it directly selects the decisionmakers and indirectly chooses the law. But those who lose in the process are subject to policies that presumably would not have been adopted had they been victorious at the polls. This raises the issue of governmental legitimacy *vis-à-vis* the political minorities: why are majoritarian decisions morally binding on the dissenters when they have not consented to the policies or politicians?

The best solution, I believe, comes from a sovereignty-based vision of the Constitution. Using the social contract metaphor, individuals relinquish a specific amount of authority to the political process behind the veil of ignorance. Although each person is unaware of whether he will stand with the victors or the losers, he nonetheless agrees that certain issues must be collectively determined by society and that majority rule is the only workable means of making the relevant decisions. But the individual still retains areas of freedom, subject matters of decisional autonomy, or, in other words, zones of personal sovereignty. They are withdrawn "from the vicissitudes of political controversy" and enshrined as constitutional rights, thereby placed "beyond the reach of majorities and officials."[381] The conundrum of government legitimacy is solved: both the *ex post* winners and losers agree in the *ex ante* to turn over certain powers to the majoritarian process for the good of society while reserving zones of personal sovereignty for the good of the individual.

380. Feinberg, *supra* note 220, at 448.

381. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

Moreover, this vision of the Constitution is consistent with the historical record.[382] As argued by John Locke, each individual is "free, equal, and independent"[383] in the pre-government world; he is absolutely sovereign and cannot be "subjected to the Political Power of another."[384] But because of "strong obligations of Necessity, Convenience, and Inclination,"[385] he enters into a social contract to ensure safety and peace. Each individual cedes a certain portion of his sovereignty to the state for the protection of the common good.[386] But relinquishment of power is strictly circumscribed; the contract specifically enumerates those rights transferred to government and those jealously held by the citizenry. Individuals retain, among other rights, ultimate sovereignty over their homes and bodies.[387]

Locke's writings were a primary authority for the Colonists and his social contract furnished the political theory for both the American Revolution and the framing of the Constitution.[388] Individuals were the fount of all sovereignty; state power depended on the voluntary relinquishment of a portion of this sovereignty for its very existence. Governments were merely the "agents and trustees of the people,"[389] authorized to act only within proscribed limits. This political philosophy ensured that the Constitution was more than just words—it was, as Justice Holmes would later describe it, "a constituent act."[390] As a matter of structure, the document was clearly concerned about sovereignty by its division of power between the federal

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382. In one sense, this is a question of "fit." Dworkin notes, however, that "[q]uestions of fit arise at [the justification] stage of interpretation as well." DWORKIN, LAW'S EMPIRE, *supra* note 151, at 256.

383. LOCKE, *supra* note 258, § 95, at 348.

384. *Id.*

385. *Id.* § 77, at 336.

386. *See id.* § 95, at 348-49:

> The only way whereby any one divests himself of his Natural Liberty and *puts on the bonds of Civil Society* is by agreeing with other men to join and unite into a Community, for their comfortable, safe, and peaceable living one amongst another, in a secure Enjoyment of their Properties, and a greater Security against any that are not of it.

387. *See id.* § 27, at 305 ("Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a *Property* in his own *Person*. This no Body has any Right to but himself.").

388. *See* Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law* (pt. 2), 42 HARV. L. REV. 365, 395-404 (1928) (discussing Locke's great influence on the colonial and revolutionary generations).

389. THE FEDERALIST NO. 46, at 330 (James Madison) (Benjamin Fletcher Wright ed., 1961).

390. Missouri v. Holland, 252 U.S. 416, 433 (1920).

and state governments and then between the three branches of the federal government. But more importantly, the Constitution established the political and, I would argue, the physical boundaries between individuals and coercive government. Invasions into personal sovereignty would violate the first principles of the social compact as beyond the legitimate power of the state.[391] Under the Constitution, Alexander Hamilton argued, government could not "penetrate the recesses of domestic life, and control, in all respects, the private conduct of individuals."[392] The individual retained these zones of sovereignty.

Since the framing, Supreme Court justices have reiterated that the Constitution marks the border between individual sovereignty and government authority.[393] In particular, the first eight amendments staked out sovereign zones for the citizenry, zones that are removed from the political docket and outside the compass of majority rule.[394] The final two amendments in the Bill of Rights affirmed this understanding. The Ninth Amendment declared that the enumeration of rights did not deny the existence of other rights retained by the peo-

391. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) ("An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.").

392. 2 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 268 (2d ed. 1836).

393. *See* William J. Brennan, Jr., *My Encounters with the Constitution*, 26 THE JUDGES' J. 7, 10 (1987) ("[T]he text [of the Constitution] marks the metes and bounds of official authority and individual autonomy."); *see also* Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 867 (1960):

> The historical and practical purposes of a Bill of Rights, the very use of a written constitution, indigenous to America, the language the Framers used, the kind of three-department government they took pains to set up, all point to the creation of a government which was denied all power to do some things under any and all circumstances, and all power to do other things except precisely in the manner prescribed.

394. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy . . . ."); *see also* Watts v. Indiana, 338 U.S. 49, 61 (1949) (Jackson, J., concurring) (interpreting the Bill of Rights to have established "the maximum restrictions upon the power of organized society over the individual that are compatible with the maintenance of organized society itself").

ple.[395] Conversely, the Tenth Amendment reminded government that it possessed only those powers which had been expressly delegated.[396]

Probably the most eloquent articulation of the boundaries between the individual and government was delivered by Justice Brandeis, dissenting in *Olmstead v. United States*:[397]

> 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.[398]

By guaranteeing individual zones of sovereignty, we ensure that "the right to be let alone" will always contain a baseline of constitutional protection.

V. SUSPICIONLESS SEARCHES AND THE FOURTH AMENDMENT MODELS

The vast majority of police activity would pass muster under both the individual rights and the antidiscrimination models of the Fourth Amendment. Most searches in the United States are conducted pursuant to consent or individualized suspicion. The individual rights model expressly allows such intrusions; the antidiscrimination model takes a deferential position on searches that do not implicate a malfunction in the political process. As such, consent- and suspicion-based searches provide an inadequate arena in which to test the models. The real proving ground is where the state lacks both consent and individualized suspicion for its actions.

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395. *See* Griswold v. Connecticut, 381 U.S. 479, 488 (1965) (Goldberg, J., concurring) ("The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.").

396. *See id.* at 490 n.5 (Goldberg, J., concurring) ("The Tenth Amendment similarly made clear that the States and the people retained all those powers not expressly delegated to the Federal Government.").

397. 277 U.S. 438 (1928)

398. *Id.* at 478 (Brandeis, J., dissenting).

A. Common Ground

Even in the area of suspicionless searches, the two Fourth Amendment models would often reach the same conclusions, although for very different reasons. Both would uphold one form of checkpoint detention: stopping all vehicles in search of drunk drivers.[399] Everyone shares the burden of these detentions, the antidiscrimination model would point out, and therefore the entire community internalizes the associated costs. Under the individual rights model, in contrast, these checkpoints constitute a seizure of the driver, however brief, and interfere with her bodily autonomy. But the grave danger to the sovereignty of others from intoxicated motorists justifies the detention. Cars become lethal weapons when placed in the hands of inebriated drivers, posing the real, direct, and substantial threat of injuring or killing other motorists or pedestrians. Statistical evidence only confirms this hazard.[400]

Likewise, each model would validate suspicionless searches of regulated businesses, whether it be firearms dealers,[401] automobile junkyards[402] or liquor licensees.[403] Neither the home or body is implicated by such state action, precluding the strictest scrutiny under the individual rights model. Under the antidiscrimination approach, the costs of these regulatory searches will be passed on to the average consumer, ensuring that the burden is diffusely felt by the community. Moreover, commercial enterprises exert substantial influence in

399. *Cf.* Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 445 (1990) (holding that "the balance of the state's interest in preventing drunken driving . . . [justifies] the degree of intrusion upon individual motorists who are briefly stopped").

400. *See* 4 LAFAVE, *supra* note 2, § 10.8(d), at 690 ("Drunk drivers cause an annual death toll of over 25,000 and in the same time span cause nearly one million personal injuries and more than five billion dollars in property damage."); *see also* Perez v. Campbell, 402 U.S. 637, 657 (1971) (Blackmun, J., concurring) ("Slaughter on the highways of this Nation exceeds the death toll of all our wars."); Breithaupt v. Abram, 352 U.S. 432, 439 (1957) ("The increasing slaughter on our highways . . . now reaches the astounding figures only heard of on the battlefield.").

401. *Cf.* United States v. Biswell, 406 U.S. 311, 317 (1972) (holding that a suspicionless inspection and seizure of sawed-off rifles pursuant to the Gun Control Act of 1968 was not unreasonable).

402. *Cf.* New York v. Burger, 482 U.S. 691, 703-12 (1987) (holding that a warrantless search of an automobile junkyard, conducted pursuant to a regulatory statute, was not unreasonable).

403. *Cf.* Colonnade Catering Corp. v. United States, 397 U.S. 72, 77 (1970) (upholding an act of Congress making it illegal for a liquor licensee to refuse admission to an inspector).

the legislative process and possess sufficient political power to vindicate their interests.[404]

Both models would also support *Camara*-style health and safety inspections[405] and searches at airports and government buildings.[406] The building inspections approved in *Camara* were both routine and areawide, guaranteeing that the entire community bore the costs of such intrusions. Similarly, searches conducted at airports and government buildings directly affect all individuals entering these facilities; there is little room for discretion and no individual or minority group is selected for disparate treatment. If these types of intrusions are unreasonable, the antidiscrimination model holds, the political majority will demand reform and thereby protect the interests of all citizens.

Under the individual rights model, the archetypes of individual sovereignty are clearly invoked by these state actions. Health and safety inspections demand entry into one's home; airport and building searches can scour an individual's body. But both government activities are in response to the type of harm that can excuse otherwise unacceptable intrusions—real, direct and substantial threats to the sovereign zones of other citizens. "[F]ires and epidemics may ravage large urban areas," argued the *Camara* Court.[407] The historic examples are legion, from the spread of contagious disease in Hell's Kitchen to the great fires in Chicago and San Francisco. The modern exemplars are no less tragic. Airport and building searches attempt to prevent the violent terrorist acts which have become all too familiar. Whether spurred by the airline hijackings of the 1970s, the explosion of Pan-Am flight 103 over Lockerbie, Scotland, or the recent bombings in Oklahoma City and abroad, society has begun to require the utmost security in airports and government buildings. By intruding

404. Both models would also uphold suspicionless search regimes of the work areas of government employees. *Cf.* O'Connor v. Ortega, 480 U.S. 709, 725 (1987) (O'Connor, J., plurality opinion) (upholding a search of an employee's desk and file cabinets). According to the individual rights model, there is no intrusion into the employee's body or home; under the antidiscrimination model, the burden of the search is spread across the entire "community" of employees, a group that is neither discrete nor politically insular.

405. *See* Camara v. Municipal Court, 387 U.S. 523, 535 (1967) (noting that "fires and epidemics may ravage large urban areas").

406. *See* National Treasury Employees Union v. Von Raab, 489 U.S. 656, 674-75 & n.3 (1989) (noting that the government's interest in preventing hijackings justifies suspicionless searches of all airline passengers).

407. *Camara*, 387 U.S. at 535.

on the sovereignty of the individuals searched, the state is preserving the personal sovereignty of all citizens.

On the other hand, both models would strike down a regulatory search scheme that was found to be constitutional. In *Wyman v. James*,[408] the Court held that welfare recipients could be required to submit to suspicionless "home visits" by social workers in order to maintain the receipt of benefits.[409] The antidiscrimination model would invalidate the search scheme as an exemplar of a political majority externalizing the law enforcement burdens on a powerless minority. Welfare recipients are insulated from the political process, often viewed as social pariahs, and frequently members of racial minorities. Such an invasion into the sovereignty of the home is also unjustified under the individual rights model—there was no individualized suspicion, no voluntary consent, and no other-regarding harm to be avoided at all costs. "It is the precincts of the *home* that the Fourth Amendment protects," argued Justice Douglas in his *Wyman* dissent.[410] It is "as important to the lowly as to the mighty."[411]

B. Theoretical Divergence

Up to this point, the models lead to the same legal conclusions. The decisive moment, however, is when they reach the theoretical crossroads and take different decisional paths. It is there that each model must be judged for better or worse. An analysis of various forms of government searches and seizures can sufficiently distinguish the approaches.

1. *Illegal Alien Checkpoints.* The antidiscrimination model would not only allow checkpoints for drunk drivers, but would uphold indiscriminate mass detentions based on any legitimate

408. 400 U.S. 309 (1971).

409. *See id.* at 326.

410. *Id.* at 332 (Douglas, J., dissenting).

411. *Id.* at 333 (Douglas, J., dissenting). Both models would likely strike down suspicionless body-cavity searches of pretrial detainees and home searches of probationers. *Cf.* Bell v. Wolfish, 441 U.S. 520, 558-60 (1979) (upholding suspicionless body-cavity searches); Griffin v. Wisconsin, 483 U.S. 868, 880 (1987) (upholding searches of probationers' homes based on "reasonable grounds"). The antidiscrimination model would strictly scrutinize such searches because the relevant costs are not diffusely spread throughout the political community but instead are borne by discrete and insular groups. In contrast, the individual rights model would find these intrusions into the home and body to be unjustified and unconstitutional if not based on individualized suspicion, consent, or real, direct, and substantial threats to the sovereignty of others.

government objective. In particular, the model would validate the checkpoints for illegal aliens[412] that have become commonplace in states on the U.S.-Mexico border. Like the DUI checkpoints, the burden of these detentions is shared by all members of the community, with each passing motorist relinquishing a fraction of his liberty. If the seizures are truly unreasonable or if the ends are unjustified, the antidiscrimination model would anticipate redress through the political process.

But this approach "elevates the adage 'misery loves company' to a novel role in Fourth Amendment jurisprudence,"[413] argues the proponent of the individual rights' model. The fact that everyone pays the cost of checkpoint detentions is beside the point; the real issue is whether the resulting bodily seizure can be justified by a real, direct, and substantial threat to the sovereignty of others. Neither drunk driver nor illegal alien checkpoints demonstrate massive statistical achievement: both are "successful" in less than 2% of all passing vehicles.[414] The difference between the two, however, stems from the type of danger averted by the detention schemes. As mentioned above, DUI checkpoints attempt to uncover intoxicated motorists who pose a mortal threat to others through their incompetent operation of multi-ton, high-speed machines. In contrast, illegal alien checkpoints try to prevent the surreptitious and unlawful entry of foreign citizens—a laudable goal by any standard. But unlike drunk drivers, illegal aliens do not pose an inherently grave danger to the personal sovereignty of others. It has been argued that the flow of illegal aliens threatens the integrity of American borders and drains resources from the economy. Even if that is assumed to be true, any threat is diffuse and financial rather than direct and lethal to other individuals. Illegal alien checkpoints, therefore, cannot be squared with the individual rights model of the Fourth Amendment.

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412. *Cf.* United States v. Martinez-Fuerte, 428 U.S. 543, 545 (1976) (holding that the Fourth Amendment permits border patrol officers to search automobiles for illegal aliens without individualized suspicion).

413. Delaware v. Prouse, 440 U.S. 648, 664 (1979) (Rehnquist, J., dissenting).

414. *See* Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990) ("Stated as a percentage, approximately 1.6 percent of the drivers passing through the checkpoint were arrested for alcohol impairment . . . . By way of comparison, . . . illegal aliens were found in only 0.12 percent of the vehicles passing through the checkpoint.").

2. *Student Searches.* In *New Jersey v. T.L.O.*,[415] the Supreme Court upheld the inspection of a high school student's purse based on "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."[416] The search for contraband cigarettes in that case "was based upon an individualized suspicion that [the student] had violated school rules," and therefore the Court did "not consider the circumstances that might justify school authorities in conducting searches unsupported by individualized suspicion."[417] But suppose that a school district established a mass-inspection scheme for nicotine products. School authorities, for example, would pat-down every student entering the campus in search of cigarettes or smokeless tobacco. The antidiscrimination model would find no fault with this search regime. The relevant cost to liberty is borne by all students, and not just a discrete subgroup. And because the minors are virtually represented in the political process by their parents,[418] the model would defer to the school board's decision to implement such a program.

In contrast, the individual rights model would find the mass searches to be unconstitutional. A frisk of a student's person clearly implicates individual sovereignty, invading her right to bodily autonomy. But under the facts of this hypothetical, it is unlikely the government could muster a sufficient justification for the mass-search scheme. Although the potential health effects from tobacco consumption are severe, they do not constitute the type of threat to the sovereignty of others cognizable under the model. The long-term danger of tobacco-related disease is very real, but it is neither direct nor immediate: a particular pack of cigarettes will not be the but-for cause of lung cancer, for example, and the manifestation of such an ailment will occur only after years of smoking. More importantly, the consequences of tobacco consumption are primarily self-regarding and therefore irrelevant to the individual rights model.

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415. 469 U.S. 325 (1985).

416. *Id.* at 342.

417. *Id.* at 342 n.8.

418. *See* Kahan & Meares, *The Coming Crisis of Criminal Procedure*, *supra* note 106, at 1173 ("[R]andom drug-testing of student athletes is exempted from the warrant requirement not because student athletes exercise significant influence in the political process but because their parents, who naturally take their children's interests to heart, do.")

3. *Thermal-Imager Searches.* For a number of years, the government has utilized "thermal imagers" to search private residences for illegal drug cultivation.

> A thermal imager operates by observing and recording the differential heat patterns emanating from various objects within its view. . . . Activities that generate a significant amount of heat . . . produce a heat "signature" that the imager can detect. . . . [T]his heat signature [can] indicate the presence of high intensity lights used to grow marijuana indoors.[419]

In all reported cases considering this type of search, drug-enforcement agents focused their attention on the homes of discrete individuals without having first obtained a search warrant. Nonetheless, the federal judiciary has been unable to reach a consensus regarding the constitutionality of thermal-imager searches.[420]

Consider a hypothetical where such searches were authorized by the relevant legislative body and were conducted on an areawide basis. For example, assume that law enforcement was empowered to fly over an entire city block using thermal imagers to detect marijuana cultivation within that area.[421] As long as disgruntled individuals had an opportunity to be heard by their elected representatives and the law-enforcement burden was spread across the entire community, the antidiscrimination model would defer to the political process and uphold the mass-search scheme.

The individual rights model, however, would strike down these searches as violative of the Fourth Amendment. Thermal-imager scanning of private residences compromises the sovereignty of an individual's home. Not only can an imager identify the "use of showers and bathtubs, ovens, washers and dryers, and any other household appliance that emits heat," but it can "determine the origin of two commingled objects emitting heat in a bedroom at night."[422] And although drug production is not a trivial offense, the government would not be able to justify such an intrusion under the individual rights

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419. United States v. Kyllo, 140 F.3d 1249, 1251 (9th Cir. 1998) (citations omitted).

420. *See Kyllo*, 140 F.3d at 1255 (invalidating search); United States v. Cusumano, 67 F.3d 1497, 1510 (10th Cir. 1995), *vacated on other grounds*, 83 F.3d 1247 (10th Cir. 1996) (invalidating search); United States v. Robinson, 62 F.3d 1325, 1332 (11th Cir. 1995) (upholding search); United States v. Ishmael, 48 F.3d 850, 857 (5th Cir. 1995) (upholding search); United States v. Myers, 46 F.3d 668, 670 (7th Cir. 1995) (upholding search); United States v. Pinson, 24 F.3d 1056, 1059 (8th Cir. 1994) (upholding search).

421. *Cf. Robinson*, 62 F.3d at 1327 (thermal-imager search conducted by a helicopter crew).

422. *Kyllo*, 140 F.3d at 1254-55.

model. Domestic cultivation of marijuana may be generally deplorable and a major source of contraband, but it simply does not present a real, direct, and substantial threat to the sovereignty of others.

4. *Public Housing Sweeps*. Beginning in the summer of 1993, the Chicago Housing Authority instituted a suspicionless search program for government-subsidized apartment buildings.[423] Police were empowered to conduct "sweeps" of all residential units located within the buildings on the occurrence of certain preconditions, including reports of random gunfire.[424] The sweeps resulted in exhaustive searches of closets, drawers, refrigerators, and personal items in every home.[425] But because of "logistical difficulties,"[426] the sweeps normally took place several days after the shootings occurred and never earlier than forty-eight hours after the incidents.[427]

Nonetheless, such a search program would be upheld under the antidiscrimination model of the Fourth Amendment. The sweeps were expressly endorsed by the political representatives of the affected residents,[428] and everyone who lived in the projects was burdened by the searches. Rather than focusing on discrete individuals or groups, the law-enforcement costs associated with the sweeps were internalized by the entire community. Although there were undoubtedly dissenters among the residents, each individual had an opportunity to air his concerns in the political process. If the sweeps were truly unreasonable, antidiscrimination model advocates would argue, the equally affected political majority would rescind the policy.

In contrast, such sweeps are unconstitutional according to the individual rights model. The searches strike at the very heart of personal sovereignty—the individual's home. Although the model does not measure invalidity in degrees, it is hard to ignore the depth of the invasion. No area of the resident's domicile, from bedroom to bathroom, was free from official scrutiny. The state-sanctioned rummaging through closets, drawers, and cabinets was virtually indistinguishable from searches pursuant to the writ of assistance. Mass searches would nearly always uncover intimate details of a resident's life

423. *See* Pratt v. Chicago Hous. Auth., 848 F. Supp. 792, 793-94 (N.D. Ill. 1994).

424. *See id*. at 793.

425. *See id.*

426. *Id.*

427. *See id.*

428. *See id*. at 793 (reporting that eighteen of nineteen local advisory panel presidents supported searches).

wholly unrelated to the investigation's purpose. Nor could the government justify its actions by exigent circumstances. The searches were largely gratuitous, occurring days after the reported gunplay. Any criminality had long since subsided and the evidence very likely taken outside the purview of the sweep.

Building sweeps expose three major flaws in the antidiscrimination model. As an initial matter, it places an individual's rights and sovereignty in the discretion of the political majority. The federal district court said as much in striking down the mass search program:

> Many tenants within CHA housing, apparently convinced by sad experience that the larger community will not provide normal law enforcement services to them, are prepared to forgo their own constitutional rights. They apparently want this court to suspend their neighbor's rights as well.[429]

A Fourth Amendment grounded in political process theory provides no floor of rights that is impervious to government interference. In one sense, the theory converts rights into mere interests—values which should be considered and weighed but can nonetheless be disregarded should popular will so demand. It is arguable that a "right" subject to the caprice of a majority is by definition no right at all.[430] In another sense, the theory allows for drifting, disposable rights—a concept incompatible with free will, moral equality, individual sovereignty, and the social compact. There must always be a baseline of autonomy, an immutable zone of sovereignty which allows free will to be exercised. If rights are subject to manipulation by majority vote, there is no barrier to the elimination of the constitutional baseline altogether. Although this may not come to pass, the potential must be vigilantly protected against.

The second pitfall of the antidiscrimination model is essentially an elaboration of the first. The model poses the classic "slippery slope" dilemma: if we allow building sweeps for reports of gunfire, we should also allow them for unspecified allegations of domestic violence or drug trafficking occurring somewhere within an apartment building. Mass searches for drug sales would justify sweeps for simple drug use. Building sweeps for the victimless crime of drug use could

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429. *Id.* at 796.

430. *Cf.* DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 151, at xi ("Individual rights are political trumps held by individuals."); *id.* at 269 ("If someone has a right to do something, then it is wrong for the government to deny it to him even though it would be in the general interests to do so.").

be extended to residential searches for other victimless crimes—prostitution or gambling, for instance. And maybe a housing authority in Georgia would institute a sweep program for "'the infamous crime against nature'"[431]—consensual sodomy between adults.

"Ridiculous," some would argue. Such police activities would not be condoned by even the most reactionary majority. And I would generally agree. But again the problem with the antidiscrimination model of the Fourth Amendment is that it would not prevent such intrusions if a majority were so inclined. Constitutional rights not only must stand firm against the political realities of today, but also the unthinkable contingencies of tomorrow. There is little danger to a robust public dialogue, for example, if Skokie prevents the Nazis from marching through town.[432] Hate mongers have next to no influence on the political system and hate speech is largely considered to be outside the rational boundaries of political debate. Yet the right to rally under the swastika is constitutionally protected because we believe that every individual has the right to air his views. More importantly, there is a real fear of the slippery slope: If hate speech is prohibited, why not offensive speech? Or mildly irritating speech? The First Amendment refuses to go down that road; neither should the Fourth Amendment.

The final problem with the antidiscrimination model is a variation of the first two. The model makes a very appealing argument that a community subjected to oppressive search tactics will merely toss the political rascals out. But unfortunately, majorities in times of perceived public crisis can make very poor decisions and follow the loudest rather than wisest voice. Claims of necessity are frequently accepted without deliberation, based on minimal hindsight and nonexistent foresight. The Red Scare, Jim Crow, Japanese internment camps, and McCarthyism were all accepted by a substantial portion of the citizenry. "History teaches that grave threats to liberty often come in times of urgency," argued Justice Thurgood Marshall, "when constitutional rights seem too extravagant to endure."[433] Political leaders can act out of well-intentioned zeal and a good dose of elec-

431. Bowers v. Hardwick, 478 U.S. 186, 197 (1986) (Burger, C.J., concurring) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *215 (1769)).

432. *Cf.* Collin v. Smith, 578 F.2d 1197, 1203 (7th Cir. 1978) ("The asserted falseness of Nazi dogma, and, indeed, its general repudiation, simply do not justify its suppression.").

433. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting).

toral fear,[434] giving a majority what it wants while destroying that which the individual needs. In a very short time, the hydraulic pressures of apparent social imperative can overwhelm the senses of the political majority and the sensibilities of the government official.[435] The antidiscrimination model will sometimes put up a fight, but tyranny is crafty and can allude the model's strictures. The only protection against illegitimate pressures is an unwavering constitutional floor, a zone of individual sovereignty that cannot be invaded on popular demand.

5. *Government Drug Testing.* Drug testing has become an incident of employment throughout America, particularly in government jobs. Although testing previously had been used in military and drug-rehabilitation centers, President Reagan's executive order in 1986 set the stage for a massive governmental regime.[436] Since that time, federal and state agencies and various regulated industries have been legally required to test employees.[437] Many school districts have enacted programs to test their students.[438] A number of reasons are proffered for the testing programs, from cutting costs and increasing safety to fighting the war on drugs.[439]

a. The Process. A drug test can be triggered by various events[440] or as part of a random process. The individual is required to give a specimen, usually urine, under the direct or indirect observation of a

434. *See* Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

435. *See* Northern Sec. Co. v. United States, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting) (discussing the "immediate overwhelming interest which appeals to the feelings and distorts the judgment" of economists and statesmen).

436. *See* Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (1986).

437. For cases confronting these requirements, see, e.g., *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 660-63 (1989) (detailing drug testing of federal agents); *Loder v. Glendale*, 14 Cal. 4th 846, 853-56 (1997) (detailing drug testing of city employees). *See also* 41 U.S.C. §§ 701, 702 (1990) (requiring that federal contractors and grant recipients establish a drug-free workplace, but not requiring drug testing as a condition).

438. *See, e.g.*, Vernonia Sch. Dist. v. Acton, 515 U.S. 646 (1995).

439. *See, e.g.*, Schulhofer, *supra* note 33, at 128-29.

440. These events might include any of the following: applying for employment; seeking a promotion or transfer; the occurrence of an accident; being part of a trainee program; returning to work after time off; or an annual physical exam. *See, e.g.*, Scott S. Cairns & Carolyn V. Grady, *Drug Testing in the Workplace: A Reasoned Approach for Private Employers*, 12 GEO. MASON U. L. REV. 491, 495-99 (1990); Michelle L. O'Brien, Webster v. Motorola*: Employees Reclaiming the Right to Privacy*, 30 NEW ENG. L. REV. 547, 576 n.293 (1996).

monitor.[441] The sample is then subjected to a sensitive though somewhat inaccurate chemical screening test for the presence of drug metabolites. Positive samples are often, but not always, validated by highly accurate confirmatory tests.[442] Nonetheless, mistakes are frequently made in the testing process, resulting in false positives. The ingestion of certain legal substances can also trigger a positive test. Inaccuracy, however, usually stems from false negatives due to the inherent limitations of the testing process[443] or chicanery employed to avoid detection.[444] But for the sake of argument, assume testing errors to be insignificant.

The real problem stems from what drug testing can and cannot tell you. A positive test indicates the presence of metabolites, the chemicals that remain in the body after it has processed a substance. Metabolites can linger in the body for up to a month after an individual has ingested a given drug.[445] The best a test can do, therefore, is signal drug use at some time in the past. It cannot prove that an individual is presently under the influence of an illicit substance.[446] And

441. *See, e.g.*, Council on Scientific Affairs, *Scientific Issues in Drug Testing*, 257 JAMA 3110, 3111 (1987); Lawrence Miike & Maria Hewitt, *Accuracy and Reliability of Urine Drug Tests*, 36 U. KAN. L. REV. 641, 642 (1988); Stephen Plass, *A Comprehensive Assessment of Employment Drug Testing: Legal Battles over Delicate Interests*, 27 SAN DIEGO L. REV. 29, 46 (1990); Mark A. Rothstein, *Workplace Drug Testing: A Case Study in the Misapplication of Technology*, 5 HARV. J.L. & TECH. 65, 77-78 (1991); Richard H. Schwartz, *Urine Testing in the Detection for Drugs of Abuse*, 148 ARCHIVES INTERNAL MED. 2407, 2408 (1988); Phoebe W. Williams, *Governmental Drug Testing: Critique and Analysis of Fourth Amendment Jurisprudence*, 8 HOFSTRA LAB. L.J. 1, 27 (1990).

442. *See* Miike & Hewitt, *supra* note 441, at 646-47.

443. *See id*. at 649-51.

444. *See* Williams, *supra* note 441, at 27.

445. *See, e.g.*, Edward M. Chen et al., *Common Law Privacy: A Limit on an Employer's Power to Test for Drugs*, 12 GEO. MASON U. L. Rev. 651, 676-77 (1990); Craig M. Cornish & Donald B. Louria, *Employment Drug Testing, Preventative Searches, and the Future of Privacy*, 33 WM. & MARY L. REV. 95, 107 (1991); Thomas L. McGovern, *Employee Drug Testing Legislation: Redrawing the Battlelines in the War on Drugs*, 39 STAN. L. REV. 1453, 1457 (1987); Craig Zwerling et al., *The Efficacy of Preemployment Drug Screening for Marijuana and Cocaine in Predicting Employment Outcome*, 264 JAMA 2639, 2640 (1990).

446. *See* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 652 (1989) (Marshall, J., dissenting); Chen, *supra* note 445, at 673 n.131; Council on Scientific Affairs, *Issues in Employee Drug Testing*, 258 JAMA 2089, 2089 (1987); Council on Scientific Affairs, *supra* note 441, at 3111; James Felman & Christopher J. Patrini, *Drug Testing and Public Employment: Toward a Rational Application of the Fourth Amendment*, 51 LAW & CONTEMP. PROBS. 253, 266 (1988); Marsha F. Goldsmith, *Drug Testing Upheld, Decried*, 259 JAMA 2341, 2341 (1988); Schulhofer, *supra* note 33, at 124; Task Force on the Drug-Free Workplace, Institute of Bill of Rights Law, *Proposal for a Substance Abuse Testing Act: The Report of the Task Force on the Drug-Free Workplace, Institute of Bill of Rights Law*, 33 WM. & MARY L. REV. 5, 42 (1991); Williams, *supra* note 441, at 9.

because of its limitations as a tool of detection, drug testing blurs the line between employment-related acts and purely personal conduct. A positive result is just as likely, if not more likely, to detect off-duty rather than on-duty activity.[447] It is, in the words of one federal court, "a blunt instrument . . . silent as to when or how much of the drug was taken, the pattern of the employee's drug use, or whether the employee was intoxicated when the test was given."[448]

The indiscriminate nature of testing would largely be irrelevant if a strong nexus could be shown between drug use in general and the particular costs or injuries to be avoided. Unfortunately, such a connection has yet to be made as an empirical matter.[449] Nor is such a proposition self-evident. A positive result will generally indicate a casual user who presents no threat to safety or performance rather than a chronic abuser who poses a real danger in certain employment contexts.[450] The justification for drug testing requires an evidentiary leap of faith: because an individual used drugs in the past, we assume that drug use will affect his job performance at some time in the future.

b. The Precedents. The Supreme Court has taken four swings at the drug-testing issue, upholding three programs and striking one down. In each case, it has had no problem finding that government-

447. *See* National Treasury Employees Union v. Yeutter, 918 F.2d 968, 973 (D.C. Cir. 1990) (noting that "the fact that an employee tests positive does not necessarily indicate on-the-job impairment, very recent drug use, or habitual drug use"); Beattie v. St. Petersburg Beach, 733 F. Supp. 1455, 1457 (M.D. Fla. 1990) (noting that "urinalysis allows the government to delve into both job-related and off-duty aspects of an employee's private life").

448. National Fed'n of Fed. Employees v. Cheney, 884 F.2d 603, 609 (D.C. Cir. 1989); *see also* George D. Lundberg, *Mandatory Unindicated Urine Drug Screening: Still Chemical McCarthyism*, 256 JAMA 3003, 3004 (1986) (discussing the lack of interpretive information available from urine drug testing).

449. *See* Cornish & Lauria, *supra* note 445, at 108; Jonathan V. Holtzman, *Applicant Testing for Drug Use: A Policy and Legal Inquiry*, 33 WM. & MARY L. REV. 47, 90-91 (1991); Arthur J. McBay, *Efficient Drug Testing: Addressing the Basic Issues*, 11 NOVA L. REV. 647, 647-48 (1987); John P. Morgan, *The "Scientific" Justification for Urine Drug Testing*, 36 KAN. L. REV. 683, 685-88 (1988); Richard Saltus, *Workplace Drug Tests Questioned: Report Finds Little Evidence of Effectiveness of Programs*, BOSTON GLOBE, Nov. 30, 1993, at 33; Eric D. Wish, *Preemployment Drug Screening*, 264 JAMA 2676, 2676 (1990); Kevin B. Zeese, *Drug Testing Here to Stay?*, 12 GEO. MASON L. REV. 545, 548-49 (1990); Zwerling et al., *supra* note 445, at 2639.

450. *See* Chen, *supra* note 445, at 679 (stating that 90% of all drug users are "casual" or "occasional" users); Rothstein, *supra* note 441, at 87-88 ("As many as ninety-eight percent of all positive workplace tests may arise from casual marijuana use.").

mandated testing implicates the Fourth Amendment.[451] The procurement of the sample has been deemed both a search and a seizure, while the later analysis of the sample constitutes yet another official search.[452] The Court has also agreed that the special needs doctrine provides the appropriate framework for constitutional analysis, calling for judicial balancing of the government interest in drug testing against the individual's interest in privacy.[453]

In *Skinner v. Railway Labor Executives' Ass'n*,[454] the Court upheld postaccident drug screening for railroad employees.[455] In a companion case, *National Treasury Employees Union v. Von Raab*,[456] it validated a drug-testing program for customs employees who were directly involved in drug interdiction or carried firearms.[457] Eight years after its first foray into the issue, the Court upheld mandatory

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451. *See* Chandler v. Miller, 117 S. Ct. 1295, 1300 (1997); Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 652 (1995); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1989); *Skinner*, 489 U.S. at 616-18.

452. *See Skinner*, at 616-18.

453. *See Vernonia*, 515 U.S. at 653-54; *Von Raab*, 489 U.S. at 665-66; *Skinner*, 489 U.S. at 619-20.

454. 489 U.S. 602 (1989).

455. The *Skinner* Court found a special government interest in testing railroad employees to prevent drug-related accidents and fatalities. *See id.* at 620-21. It then balanced the individual's interest in privacy against the government's reason for testing. Although the privacy interests were not *de minimus*, they were substantially reduced by the nonintrusive testing procedure and the highly regulated nature of the industry. *See id.* at 624-27. In contrast, the government's interests were "compelling," with employees undertaking duties replete with physical danger to other individuals from even a brief lapse of attention. One faulty step could precipitate extensive injuries and fatalities without an opportunity for a supervisor to intervene. And the potential carnage from intoxicated workers was well supported by railroad experience. *See id.* at 628-29. The Court found that drug testing served the complementary goals of prevention and deterrence—preventing railway catastrophes by deterring drug use among employees.

456. 489 U.S. 656 (1989).

457. The *Von Raab* Court found a special need in deterring drug users from attaining such positions, and then went on to balance the interests involved. *See id.* at 665-66. As in *Skinner*, the employee's privacy interests were diminished by the "operational realities" of customs service employment and the limited intrusion required by the testing procedure. *Id.* at 671-73. In comparison, the government interests in testing employees who carry firearms or are involved in drug interdiction were weighty. Individuals whose primary responsibilities include ferreting out contraband, argued the Court, constitute "our Nation's first line of defense" in the drug war. *Id.* at 668. Not only are these employees subject to bribery and blackmail by smugglers, but drug users are likely to be "unsympathetic to their mission of interdicting narcotics." *Id.* at 669-70. Moreover, those who carry firearms are empowered to use deadly force when necessary, posing genuine risks of injury to innocent citizens. *See id.* at 670-71. The Court also considered the drug testing of customs employees who handled classified materials. It found the interest in protecting sensitive information to be "compelling," but remanded that portion of the case to determine whether the covered employees did in fact handle classified materials. *See id.* at 677-78.

drug testing for student-athletes in *Vernonia School District v. Acton*.[458] In each of these three cases, the Supreme Court found the government interest to be compelling and the privacy interest of the individual to be nominal at best. But in its most recent case, *Chandler v. Miller*,[459] the Court struck down a requirement that candidates for certain state offices submit to drug testing and receive negative results.[460] This time the individual's privacy interests outweighed all claims of official necessity.[461]

So what type of rubric have these cases created? A "Rohrschach-like balancing test," Justice Thurgood Marshall quipped in *Skinner*.[462] Although there is an ostensible logic to the decisions, with mathematical balancing as the medium, the actual weighing process is largely a mystery. Scholars have excoriated the Court for its unprincipled drug-testing jurisprudence,[463] arguing that balancing tests are inherently manipulable with even proper guidance from a higher court.[464] A legal free-for-all results when the boundaries are only loosely sketched and the rules are made up on an ad hoc basis. Not

458. 515 U.S. 646 (1995). As an initial matter, the *Vernonia* Court found that the public school context universally presents a special need for government that requires a balancing of the interests. *See id*. at 652-53. Students within the school environment generally have lesser expectations of privacy because of their age and their submission to medical examinations and procedures. *See id*. at 656-57. Student-athletes have an even lower interest in privacy based on the communal undress of locker rooms and mandatory preseason physical exams. *See id*. at 657. In addition, the testing requirements were deemed relatively noninvasive. *See id.* at 658-60. The school's interests in testing, in contrast, were sufficiently important. Deterring drug use by schoolchildren was "at least as important" as the government interests in *Skinner* and *Von Raab*. *Id*. at 651. Student-athletes were particularly susceptible to physical injury on the playing field due to intoxication. *See id*. at 662. Athletes known to be drug users would also serve as poor role models for other athletes or the student population in general. *See id*. at 663.

459. 117 S. Ct. 1295 (1997)

460. *See id*. at 1298-99.

461. Although the testing procedures in *Chandler* were relatively noninvasive, the government interests were insufficient to justify the search. *See id*. at 1303. There was no evidence of a drug-abuse problem by elected officials in Georgia, and the testing procedures themselves were not well designed to ferret out drug users. Instead, normal law enforcement methods were deemed more than sufficient to protect the citizenry from drug-addicted politicians. Candidates for office are under unrelenting public scrutiny and cannot hide such personal flaws. *See id.* at 1303-04. In the end, the only justification for the drug-testing regime was symbolic—declaring the moral virtue of government leaders. "The Fourth Amendment," the Court concluded, "shields society against that state action." *Id.* at 1305.

462. 489 U.S. at 639 (Marshall, J., dissenting).

463. For lucid analyses of the Court's unprincipled drug-testing jurisprudence see LaFave, *supra* note 39, at 2556-59; Schulhofer, *supra* note 33, at 90-123.

464. *Cf.* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 958-631 (1987); Louis Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022, 1022-23 (1978).

surprisingly, the lower courts have expressed dismay with respect to their delegated task.[465]

Without sufficient guidance from the Supreme Court, unstable and conflicting case law would seem to be the inevitable result. That prediction has, in fact, become a reality. Lower courts have, for example, both *upheld* and *struck down* drug-testing programs for the following individuals:

- attorneys[466]
- automobile drivers[467]
- carpenters[468]
- clerks[469]
- computer specialists[470]
- custodians[471]
- federal executive branch employees[472]
- firefighters[473]

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465. *See* Harmon v. Thornburgh, 878 F.2d 484, 488-89 (D.C. Cir. 1989) (footnote omitted):

> [The Court] made no effort to articulate an analytical rule by which legitimate drug-testing programs could be distinguished from illegitimate ones. It simply weighed individual privacy interests against the government's policy objectives, enumerating several factors that it deemed relevant in performing this balancing process. The Court did not, however, indicate whether it deemed the case a close one, in the sense that minor variations in the facts would have tipped the balance in the other direction. Nor did it indicate which (if any) of the relevant factors would be *essential* to a constitutional testing plan.

Another appellate opinion lamented that the *Von Raab* "balancing test is inherently, and doubtless intentionally, imprecise." Willner v. Thornburgh, 928 F.2d 1185, 1187 (D.C. Cir. 1991). "Nonetheless," the court conceded, "balance we must." *Id.* at 1188.

466. *See Willner*, 928 F.2d at 1185 (upheld); *Harmon*, 878 F.2d at 484 (struck down).

467. *See* American Fed'n of Gov't Employees v. Sanders, 926 F.2d 1215 (D.C. Cir. 1991) (upheld); Federation of Gov't Employees v. Sullivan, 787 F. Supp. 255 (D.D.C. 1992) (struck down).

468. *See* Burka v. New York City Transit Auth., 751 F. Supp. 441 (S.D.N.Y. 1990) (struck down); National Fed'n of Fed. Employees v. Cheney, 742 F. Supp. 1 (D.D.C. 1990) (upheld).

469. *See* Romaguera v. Gegenheimer, No. CIV.A 91-4469, 1996 WL 229836, at *1 (E.D. La. May 3, 1996) (struck down); *Cheney*, 742 F. Supp. at 1 (upheld).

470. *See* National Treasury Employees Union v. Yeutter, 918 F.2d 968 (D.C. Cir. 1990) (struck down); *Romaguera*, 1996 WL 229836, at *1 (upheld); National Treasury Employees Union v. Watkins, 722 F. Supp. 766 (D.D.C. 1989) (struck down).

471. *See* Bolden v. Southeastern Pa. Transp. Auth., 953 F.2d 807 (3d Cir. 1991) (struck down); *Cheney*, 742 F. Supp. at 1 (upheld); Middlebrooks v. Wayne County, 521 N.W.2d 774 (Mich. 1994) (upheld).

472. *See* Stigile v. Clinton, 110 F.3d 801 (D.C. Cir. 1997) (upheld); Hartness v. Bush, 919 F.2d 170 (D.C. Cir. 1990) (upheld); Hartness v. Bush, 794 F. Supp. 15 (D.D.C. 1992) (struck down); Connelly v. Newman, 753 F. Supp. 293 (N.D. Cal. 1990) (struck down).

- health and safety inspectors[474]
- high school students[475]
- law enforcement officers[476]
- secretaries[477]
- soldiers[478]
- teachers[479]
- truck drivers/commercial vehicle operators[480]

Even where there is no conflict between the lower court decisions, the specter of whimsy still lingers. Drug testing college athletes,[481] meter readers,[482] plumbers,[483] and postal workers[484] is unconstitutional. But testing horse trainers,[485] chemists,[486] elevator maintainers,[487] and cashiers[488] is not.

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473. *See* Wilcher v. City of Wilmington, 139 F.3d 366 (3d Cir. 1998) (upheld); Beattie v. St. Petersburg Beach, 733 F. Supp. 1455 (M.D. Fla. 1990) (struck down); Johnson v. City of Plainfield, 731 F. Supp. 689 (D.N.J. 1990) (struck down).

474. *See Yeutter*, 918 F.2d at 968 (struck down); Stanziale v. County of Monmouth, 884 F. Supp. 140 (D.N.J. 1995) (struck down); Plane v. United States, 796 F. Supp. 1070 (W.D. Mich. 1992) (upheld); American Fed'n of Gov't Employees v. Derwinski, 777 F. Supp. 1493 (N.D. Cal. 1991) (struck down).

475. *See* Willis v. Anderson Community Sch. Corp., 158 F.3d 415 (7th Cir. 1998) (struck down); Todd v. Rush County Schs., 139 F.3d 571 (7th Cir. 1998) (upheld); Brooks v. East Chambers Sch. Dist., 730 F. Supp. 759 (S.D. Tex. 1989) (struck down).

476. *See* Verri v. Nanna, 972 F. Supp. 773 (S.D.N.Y. 1997) (upheld); Pike v. Gallagher, 829 F. Supp. 1254 (W.D. Mich. 1993) (struck down); *Johnson*, 731 F. Supp. at 689 (struck down).

477. *See* United Teachers v. Orleans Parish Sch. Bd., 142 F.3d 853 (5th Cir. 1998) (struck down); International Bhd. of Elec. Workers v. United States Nuclear Regulatory Comm'n, 966 F.2d 521 (9th Cir. 1992) (upheld).

478. *See* United States v. Campbell, 41 M.J. 177 (C.M.A. 1994) (struck down); United States v. Bickel, 30 M.J. 277 (C.M.A. 1990) (upheld).

479. *See* Knox County Educ. Ass'n v. Knox County Bd. of Educ., 158 F.3d 361 (6th Cir. 1998) (upheld); *United Teachers*, 142 F.3d at 856-57 (struck down); Georgia Ass'n of Educators v. Harris, 749 F. Supp. 1110 (N.D. Ga. 1990) (struck down).

480. *See* Rutherford v. Albuquerque, 77 F.3d 1258 (10th Cir. 1996) (struck down); Keaveney v. Town of Brookline, 937 F. Supp. 975 (D. Mass. 1996) (upheld); Owner-Operator Indep. Drivers Ass'n v. Pena, 862 F. Supp. 470 (D.D.C. 1993) (upheld).

481. *See* University of Colorado v. Derdeyn, 863 P.2d 929 (Colo. 1993).

482. *See* O'Keefe v. Passaic Valley Water Comm'n, 602 A.2d 760 (N.J. Super. 1992).

483. *See* Burka v. New York City Transit Auth., 751 F. Supp. 441 (S.D.N.Y. 1990).

484. *See* American Postal Workers Union v. Frank, 725 F. Supp. 87 (D. Mass. 1989).

485. *See* Phelps v. State Racing Comm'n, 611 So. 2d 739 (La. App. 1992).

486. *See* National Treasury Employees Union v. Hallet, 776 F. Supp. 680 (E.D.N.Y. 1991).

487. *See Burka*, 751 F. Supp. at 443.

488. *See* Brunson v. Commonwealth, 570 A.2d 1096 (Pa. Commw. 1990).

Trying to find the underlying principle of current drug-testing jurisprudence is a herculean task. And assuming some type of statistical analysis could discern a common thread running through the cases, its usefulness as a legal principle would be highly dubious. If the judiciary is serious about the issue of drug testing, the Fourth Amendment demands a clear, simple substitute for the current doctrine.

c. The Fourth Amendment Models. The antidiscrimination model would uphold virtually all drug-testing regimes. Again, the defining issue is whether the relevant community can be seen as internalizing the costs of a given program or whether a discrete and insular minority is forced to bear the entire burden. In both *Skinner* and *Von Raab*, the groups affected—railway and customs employees—cannot be categorized as politically impotent. Rather, these groups are represented by potent lobbies and powerful unions. If drug testing were to be viewed as particularly offensive to the employees, they retain the ultimate trump card: the power to strike. Moreover, the public at large can be seen as internalizing the costs as a matter of economic supply and demand. Employees will demand higher wages or other benefits as compensation for relinquishing a portion of their individual liberty. This added expense will then be passed on to the general population in the form of higher taxes.

The drug-testing policy in *Chandler* is susceptible to similar analysis under the antidiscrimination model. Candidates for public office are a politically powerful lot almost by definition. They are generally backed by one of the two dominant institutions of government: the Republican and Democratic parties. Individually, candidates are almost invariably influential, wealthy, and members of the racial majority. And the public must internalize the costs of a drug-screening regime, with some otherwise superior candidates being driven from the market and others demanding more perks or higher salaries for their forfeiture of bodily integrity. In the end, it will be the general citizenry that will bear these burdens in the form of less-talented representation or higher taxes.

The testing program in *Vernonia* may provide the best example of the political process theory at work. The entire school community felt the burden of the testing program, since any student who wanted to play sports had to submit to drug testing. It is hard to conceive of student-athletes as a discrete minority—their membership generally transcends the boundaries of race, color, creed, or gender. It is even harder to view them as insular. Athletes tend to wield the greatest

power on a school campus and are virtually represented by the single most influential group in a given school district. Although they themselves may not "exercise significant influence in the political process . . . their *parents*, who naturally take their children's interests to heart, do."[489]

The individual rights model of the Fourth Amendment would not be so deferential. Drug testing directly implicates an individual's sovereignty over his own body; the required disrobing and official observation are intrusions of the first order. Urination is banned in public, avoided in conversation, and carried out in areas constructed with personal solitude in mind.[490] A violation of this zone of sovereignty is, at a minimum, "'extremely distressing'"[491] and "offensive to personal dignity."[492] Even more disturbing is the compulsory nature of such testing procedures, commandeering all autonomy over one's bodily functions. "Neither the law of the land nor the law of nature," argued Justice Brennan, "supports the notion that petty government officials can require people to excrete on command."[493] The seizure of bodily fluids and the subsequent chemical search for evidence of wrongdoing compounds the intrusion on individual sovereignty. It is, in fact, government surveillance of the inside of one's body. Testing is also an indirect intrusion into the sovereignty of the home. It is often admitted that the goal of drug screening is to uncover off-duty conduct,[494] disclosing activities which almost invariably occur in a residence. As such, the tests provide government with a "periscope" into an individual's home.[495]

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489. Brief Amicus Curiae of the Chicago Neighborhood Orgs. in Support of Petitioner, City of Chicago v. Jesus Morales (No. 97-1121) (cert. granted Apr. 20, 1998), *available in* 1998 WL 328366, at *9 (U.S. June 19, 1998) (emphasis added); *see also* Kahan & Meares, *The Coming Crisis of Criminal Procedure*, *supra* note 106, at 1173.

490. *See* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 645-46 (1989) (Marshall, J., dissenting) (arguing that "[u]rination is among the most private of activities").

491. *Id.* at 646 (quoting Fried, *supra* note 203, at 489 (discussing the detrimental effect of violating the cultural privacy surrounding excretory functions)).

492. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 680 (1989) (Scalia, J., dissenting) (discussing the effect of monitoring the collection of mandatory urine samples).

493. United States v. Montoya de Hernandez, 473 U.S. 531, 560 (1985) (Brennan, J., dissenting).

494. *See* Feliciano v. City of Cleveland, Nos. C85-3356, C86-4373, 1992 WL 59128, at *2 (N.D. Ohio Mar. 10, 1992) (noting in the record the alleged statement of a superior officer regarding surprise mandatory drug testing of police cadets: "'We want to see what you have been doing this weekend.'").

495. Jones v. McKenzie, 833 F.2d 335, 339 (D.C. Cir. 1987).

But the model would not call for the invalidation of every screening program. Drug tests based on an individualized suspicion of on-duty intoxication fall within an exception to the model's strictures. Likewise, individuals who voluntarily consent to be tested waive any constitutional protection. The interesting issue is when the government may test *without* suspicion or consent. In such circumstances, the government may only invade an individual's bodily sovereignty when there exists a real, direct, and substantial threat to the sovereign zones of other citizens. In other words, Mill's "harm principle" must be implicated.

The inherent limitations of drug testing must also be factored in, requiring a particularly compelling physical danger to other individuals. As mentioned previously, a positive result only establishes drug use at some time in the past. It cannot indicate when the substance was ingested, how much was taken, the pattern of drug use, nor whether the individual became intoxicated while on- or off-duty. Any connection between a positive test and potential harm requires what I have termed an evidentiary leap of faith—someone who has used drugs in the past will become inebriated on the job at some time in the future. The assumption itself is not a very strong one and needs to be rephrased as an issue of danger and probabilities: the potential harm is so great that we cannot take even a minute chance that an individual will be intoxicated. The Court itself has referred to this limiting principle, discussing people who "discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences . . . [and who] can cause great human loss before any signs of impairment become noticeable."[496] Individual jurists[497] and scholars[498] have also argued that an evidentiary leap of faith can be justified when the potential danger is so grave that no risk is tolerable.

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496. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 628 (1989).

497. *See Von Raab*, 489 U.S. at 684 (Scalia, J., dissenting); *see also* Brinegar v. United States, 338 U.S. 160, 183 (1949) (Jackson, J., dissenting):

> If we assume . . . that a child is kidnaped [sic] and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and undiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger.

498. *See* 4 LAFAVE, *supra* note 2, § 10.3(e), at 488-505; Schulhofer, *supra* note 33, at 156.

The railroad employees in *Skinner* and the customs agents who actually carried firearms in *Von Raab* present the type of threat that would allow suspicionless drug testing under the individual rights model. The potential danger from a slight mistake in judgment is not only life threatening but empirically demonstrable. It is self-evident that an error by a train conductor could lead to the death of everyone on board; likewise, a law enforcement agent who unholsters his weapon can kill an innocent person in the blink of an eye. There simply is no opportunity for review by superiors, and such scenarios have in fact produced terrible tragedies. Between 1975 and 1983, drugs or alcohol were involved in forty-five train accidents resulting in thirty-four fatalities, sixty-six injuries, and over $28 million in damage.[499] In January of 1987, sixteen people were killed in a train collision in which drugs were believed to be a contributing factor.[500] And the record is replete with law enforcement officers accidentally killing innocent bystanders or harmless suspects.[501] The grave danger to the personal sovereignty of these third parties—whether it be train passengers or people caught in the crossfire—justifies the intrusion into the bodily sovereignty of the individual tested.

In contrast, the other drug-testing programs considered by the Court lack the requisite nexus to tragic or disastrous consequences. The customs agents considered in *Von Raab*—who were involved in drug interdiction but did not carry firearms—posed no grave danger to the individual sovereignty of other individuals.[502] Not only were the harms advanced by the government (e.g., bribery and blackmail) unrelated to any lethal repercussions, the government was unable to recite "even a single instance in which any of the speculated horribles actually occurred."[503]

Likewise, *Vernonia* presented no possibility of tragic physical danger to other individuals. The evidence in that case could only demonstrate some drug use at the schools, a decrease in student discipline, and one coach's belief that an athlete had suffered injury because of his drug use.[504] The single alleged incident of physical harm

499. *See Skinner*, 489 U.S. at 608.

500. *See Conrail Crew Allegedly Used Drugs*, L.A. TIMES, Jan. 15, 1987, at 24.

501. *See supra* note 290 and accompanying text.

502. This analysis would also apply to customs employees who handled classified materials. *See supra* note 457.

503. *Von Raab*, 489 U.S. at 683 (Scalia, J., dissenting).

504. *See* Acton v. Vernonia Sch. Dist., 23 F.3d 1514, 1519 (9th Cir. 1994), *vacated and remanded*, 515 U.S. 646 (1995).

was not only relatively minor, but self-inflicted and therefore immaterial under the individual rights model. No connection in fact or logic could be demonstrated between the drug-testing program and a real, direct, and substantial threat to the sovereignty of others.[505]

Finally, the screening program in *Chandler* could only be justified by its symbolic value.[506] Candidates for public office do not engage in high-risk, safety-sensitive tasks that place individuals in physical danger.[507] Even if a threat of harm were to be assumed, politicians are under constant public scrutiny, presenting ample opportunities to uncover drug abuse.[508] And as a matter of historical fact, the record failed to reveal any drug use among elected officials. The testing program did not address a potential danger to the physical sovereignty of other citizens and therefore could not be sustained.

d. The Limits of the Antidiscrimination Model. The individual rights model of the Fourth Amendment would preclude suspicionless drug testing in all but the most compelling circumstances. Unless the government can demonstrate a real, direct, and substantial threat of physical harm to other individuals, drug screening is an impermissible violation of bodily sovereignty. In contrast, the antidiscrimination model requires only that the relevant community internalize the costs of a drug-testing policy. The needs of the lone citizen, as well as the effects on his dignity and bodily integrity, are irrelevant. If a political majority wishes to live in a police state of omnipresent chemical surveillance, the individual must submit. As noted previously, the antidiscrimination model provides no constitutional floor undergirding the impulses of a political majority.

This dilemma leads directly into a slippery slope, and with respect to drug testing the slide has in fact begun. *Vernonia* was first extended from student-athletes to all students involved in extracurricular activities, including those in the school band and the chess

505. Moreover, students are under constant supervision, providing ample opportunity to identify those under the influence of intoxicants. *See* Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 678-79 (1995) (O'Connor, J., dissenting). As noted by Justice O'Connor, "the far more reasonable choice would have been to focus on the class of students found to have violated published school rules against severe disruption in class and around campus." *Id.* at 685.

506. *See* Chandler v. Miller, 117 S. Ct. 1295, 1305 (1997).

507. *See id.*

508. *See id.* at 1304.

club.[509] Then drug testing was expanded to all students who drive cars to and from school. A few school districts adopted screening programs for all students in a particular grade.[510] Now gubernatorial candidates in California and Georgia want to enact drug-testing regimes for all public school students.[511] *Skinner* and *Von Raab* have been extended in a similar fashion in the state employment context. San Diego County, for example, now drug tests all applicants for government jobs, regardless of the position sought.[512] Secretaries and police officers alike are subject to the screening process; no connection is required between the job and any of the government interests asserted in Supreme Court precedents. Other counties and states look to follow San Diego's lead.[513]

Although the Court has cautioned that its drug-testing cases have not opened "broad vistas for suspicionless searches,"[514] the political branches of government have acted otherwise. Drug screening has either been proposed or adopted for driver's license applicants,[515] college students at state-supported universities,[516] participants in job-training programs,[517] and welfare recipients.[518] The only limit on po-

509. *See* Todd v. Rush County Schs., 139 F.3d 571, 572-73 (7th Cir. 1998) (Ripple, J., dissenting from denial of petition for rehearing en banc).

510. *See, e.g., Around Texas and Southwest: District Weighs Mandatory Drug Tests*, DALLAS MORNING NEWS, Jan. 8, 1998, at 24A (reporting on the proposal of a school district in Hot Springs, Arkansas, to implement both mandatory and random drug tests of students).

511. *See* Robert B. Gunnison, *Davis Has Auditioned 23 Years for Governorship*, SAN FRAN. CHRON., May 26, 1998, at A1 (reporting that the lieutenant governor (now governor) of California "want[ed] random drug testing of public school students"); Charles Walston & Kathey Pruitt, *Campaign Notebook: Drug Tests Urged in State Schools*, ATLANTA J. & CONST., Apr. 1, 1998, at B8 (reporting on a gubernatorial candidate's proposal for "random drug testing of students at schools throughout Georgia").

512. *See* Board Directed Expansion of Pre-Employment Medical and Drug Testing, Minute Order No. 26, County of San Diego Board of Supervisors (Aug. 5, 1997) (on file with author).

513. *See, e.g., News from Every State*, USA TODAY, Mar. 30, 1998, at 13A (reporting Michigan's drug-testing proposal).

514. Chandler v. Miller, 117 S. Ct. 1295, 1304 (1997).

515. *See* Larry Lipman, *Tobacco Bill Reignited: Senate Republicans Attach Anti-Drug Amendment*, ATLANTA J. & CONST., June 10, 1998, at A1 (discussing proposed amendment to comprehensive tobacco bill to "provide $10 million a year in grants to states that institute voluntary drug testing for teen drivers' license applicants"); Paul Magnusson, *Analysis & Commentary: The Ten Worst Ideas of the Campaign*, BUS. WEEK, Nov. 11, 1996, at 39 (critiquing President Clinton's proposal to "deny drivers' licenses to teenagers who fail a urine drug test").

516. *See Clamping Down on Campus Drug Use*, U.S. NEWS & WORLD REP., Apr. 15, 1991, at 12 (discussing Virginia Governor L. Douglas Wilder's proposal of mandatory drug testing for students at state-supported colleges and universities).

517. *See Job-Training Bill Conferees Should Accept Senate Reforms*, COLUMBUS DISPATCH, May 13, 1998, at 8A (criticizing a proposed amendment to a job-training reform bill that would

tential subjects of drug testing is legislative imagination, with each new testing scheme providing a bootstrap for the next.[519] Yet the greatest danger may not lie in drug testing itself, but the path it paves for a more powerful surveillance tool—genetic testing.[520] Society has already witnessed the use of genetic analysis in the courtroom; its potential as an instrument of law enforcement is simply awesome. Officials in a German hamlet, for instance, recently summoned all 18,000 young men in the region to give genetic samples for use in a murder investigation.[521] A similar police technique had been used in England in 1987.[522] And the FBI has recently established a national DNA database for investigative purposes.[523] The potential for abuse as a eugenic weapon has not gone unnoticed.[524]

"requir[e] states to conduct random drug testing of all participants" in the program as a condition of receiving grant money).

518. *See* Karen Brandon, *Counties Test Out Welfare Reforms: Many Ways Explored to Move Recipients Off of Rolls, Into Jobs*, CHI. TRIB., May 4, 1998, at 1 (discussing, *inter alia*, a proposal to institute "mandatory drug tests for welfare recipients"); Gary Heinlein, *Welfare Reform Splits the Senate*, DET. NEWS, Mar. 30, 1998, at D1 (discussing the partisan debate over a proposal to require drug tests for welfare recipients); *Legislature '98: Winners and Losers*, ST. PETERSBURG TIMES, May 3, 1998, at 5B (listing as a bill that passed the state legislature an act to test welfare-to-work applicants in North Florida and the Panhandle).

519. *See* Richard C. Reuben, *Privacy: The Issue of the '90's*, 10 CAL. LAW. 39, 40 (1990) (quoting Professor Yale Kamisar who opined, "I can see everyone having to take drug tests").

520. *See* Council on Ethical and Judicial Affairs, American Med. Ass'n, *Use of Genetic Testing by Employers*, 266 JAMA 1827, 1827 (1991) (discussing the potential for employer abuse of the genetic information gathered through the federal "human genome project").

521. *See* Lori Montgomery, *18,000 Men Called for DNA Test: Massive Screening Follows Slaying in German Hamlet*, SAN DIEGO UNION-TRIB., May 21, 1998, at A20.

522. *See id.*

523. *See* Nicholas Wade, *F.B.I. Set to Open its DNA Database for Fighting Crime*, N.Y. TIMES, Oct. 12, 1998, at A1.

524. "'The DNA database started with pariahs—the sex offenders—but has already been enlarged to include other felons and will probably be extended to include everyone, giving elites the power to control "unruly" citizens.'" *Id.* (quoting Professor Phillip Bereano). Although most states currently limit the use of DNA databases to law enforcement purposes, "Alabama authorizes the use of its samples for 'educational research or medical research or development,' an apparent invitation to genetic inquiry." *Id.* Benjamin Keehn, a Boston public defender who represents several defendants challenging the DNA sampling, fears the potential use of the databanks:

> It's a very dangerous slippery slope. . . . Why not round up poor people? . . . Poor people are more likely to commit a crime, so shouldn't we have their DNA on file? Of course, there are benefits every time you get a cold hit. There are going to be dramatic success stories. But where does it stop? Why not take DNA samples at birth?

Carey Goldberg, *DNA Databanks Giving Police Powerful Weapon, and Critics*, N.Y. TIMES, Feb. 19, 1998, at A1 (quoting Benjamin Keehn).

To some, these events signal the coming of a "brave new world."[525] But others view such fears as alarmist and gross overreactions. Americans cherish their privacy and freedom, skeptics argue, and the political majority can be trusted to protect these values. Unfortunately, majoritarian vigilance for the sovereign individual is not guaranteed. When the public is faced with grave social threats, enlightened discussion is often impossible. Majorities can lose their sensibilities in the heat of the moment, demanding solutions without considering the costs. A political process theory which assumes rational debate and decisionmaking ignores the fact that rationality can break down in the face of perceived public crises.

It has been said that truth is the first casualty of war. America's war on drugs has proven that the second casualty is logic. Billions of dollars are spent each year on drug interdiction and law enforcement, yet such efforts have done little to suppress narcotics trafficking. Nor will they, some have argued.[526] As long as there is a demand for drugs, Adam Smith's "invisible hand" will provide the supply. And as long as government's goal is the total elimination of drug use, failure is predestined. America's experience with Prohibition more than supports this conclusion.

Unfortunately, anything short of all-out war is deemed "morally scandalous."[527] National and local leaders brand casual drug users

525. Phil Bereano & Richard Sclove, *Life, Liberty and the Pursuit of Genetic Testing*, WASH. POST, Mar. 22, 1998, at C5 (arguing that "a technology with the potential to improve and prolong lives could be used to create a nightmarish brave new world"); *see also* Cornish & Lauria, *supra* note 445, at 120-21 (arguing that with "the increased use of predictive judgments . . . individuals who grow up with certain genetic, biochemical, or behavioral profiles may find it difficult to overcome the odds of these predictive judgments").

526. *See* Luna, *supra* note 289, at 518-23 (arguing that the war on drugs will continue to fail as long as the program focuses on limiting supply rather than demand); Steven B. Duke & Albert C. Gross, *Preface* to AMERICA'S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS, at xv-xix (1993) (arguing that the federal government has spent over $12 billion annually in the war on drugs and yet the number of cocaine addicts almost doubled between 1985 and 1993); SZASZ, *supra* note 289, at xiii-xvii (arguing that the desire for drugs has been present since colonial times and that "nearly everything the American government, American law, American medicine, the American media, and the majority of the American people now think and do about drugs is a colossal and costly mistake, injurious to innocent Americans and foreigners, and self-destructive to the nation itself").

527. Donald Baer, *A Judge Who Took the Stand*, U.S. NEWS & WORLD REP., Apr. 9, 1990, at 26 (quoting former "drug czar" William Bennett).

"accomplice[s] to murder"[528] who should be "taken out and shot."[529] Law enforcement uses every tactic approved by the Court, from sifting through people's garbage and trespassing on private property to aerial surveillance of homes.[530] Paramilitary gadgets like the parabolic microphone and thermal imager penetrate walls to gather evidence of drugs. And thousands of individuals enter the prison system each year pursuant to steadily increasing penalties for drug crimes. All this is accepted by the public not because it is inherently rational, but because such policies are viewed as necessary to win the war on drugs. According to one public opinion poll, "62 percent of those questioned said they would be willing to give up 'a few of the freedoms we have in this country' to significantly reduce illegal drug use."[531] Little if any justification is required; increased punishment and law enforcement is taken as an unmitigated good. Drug testing is but a natural outgrowth of this phenomenon, subject to the same hydraulic pressures. Expansion of screening programs is considered by many to be per se legitimate as a means of fighting the drug war, and as such, no justification is necessary for new drug-testing programs.

The antidiscrimination model of the Fourth Amendment does not stand in the way of an irrational but cost-internalizing community. If a majority wants to subject the entire population to random drug tests, political process theory does not object. And although the antidiscrimination model provides an ostensible limitation on abusive programs, it is unlikely to detect veiled misdeeds once drug testing is fully ensconced. Blood and urine samples can reveal highly personal information unrelated to drug use, including epilepsy, diabetes, high blood pressure, clinical depression, schizophrenia, sexual disease, and pregnancy.[532] A number of cases have uncovered employers secretly analyzing their worker's bodily fluids to attain such information.[533]

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528. Stephen Chapman, *Nancy Reagan and the Real Villains in the Drug War*, CHI. TRIB., Mar. 6, 1988, at 3 (quoting former First Lady Nancy Reagan).

529. Joseph D. McNamara, *The War on Drugs Is Lost*, NAT'L REV., Feb. 12, 1996, at 34, 43 (citing comment of former Los Angeles police chief Daryl Gates in testimony before United States Senate).

530. *See supra* notes 20-26 & 419-23 and accompanying text.

531. Richard Morin, *Many in Poll Say Bush Plan Is Not Stringent Enough; Mandatory Drug Tests, Searches Backed*, WASH. POST, Sept. 8, 1989, at A1.

532. *See* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 647 (1989) (Marshall, J., dissenting); Loder v. City of Glendale, 927 P.2d 1200, 1236 (Cal. 1997) (Mosk, J., concurring in part and dissenting in part).

533. *See, e.g.*, Bereano & Sclove, *supra* note 525, at C5 (discussing instances where people lost jobs as a result of secret genetic testing).

Drug-testing programs may have also been used to discriminate on the basis of race[534] and status,[535] and as a means of political retaliation.[536]

Finally, drug testing pursuant to the antidiscrimination model may in fact defeat the very purpose of the model itself. The primary characteristic of official power in contemporary society is its tendency to shape individuals into archetypes of normality.[537] That, in fact, is the precise purpose of criminal punishment—singling out social outliers for sanction or disability, and thereby creating a caste backed by official force. Although the antidiscrimination model has the ostensible goal of spreading costs throughout a community, its bottom line is greater police power to marginalize certain elements within that community. The ultimate question, however, is whether the resulting caste can be normatively justified. Racial minorities will be deemed discrete and insular under the antidiscrimination model and therefore worthy of protection. Yet murderers and rapists will not—and that seems palatable on some normative basis.

But what about inner-city drug users facing the nation's insatiable desire for drug testing? Drug screening is designed to weed out a particular group of individuals—those who use drugs. Its avowed goal

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534. *See Employees of Boeing Claim Discrimination in Lawsuit in Seattle*, WALL ST. J., Mar. 18, 1998, at B5 (alleging discriminatory remarks such as "blacks can't pass a drug test"); Albert R. Karr, *Black Workers Sue Amtrak*, WALL ST. J., May 5, 1998, at A1 (discussing suit charging that "some managers help white workers avoid drug testing"); *Metro Digest*, DENVER POST, Mar. 10, 1998, at B2 (discussing lawsuit against the Hertz Corporation for racial discrimination in the frequency of drug testing); *Racial Factor Seen in Tests White House Did for Drugs*, N.Y. TIMES, Oct. 7, 1998, at A14 ("Two black members of the Clinton cabinet said they had to submit urine samples, apparently for drug tests, before obtaining their jobs, while two white Cabinet officials said they did not . . . ."); Hollis R. Towns, *Caddies Charge East Lake Club with Bias*, ATLANTA J. & CONST., Apr. 1, 1998, at B3 (claiming that black caddies were subjected to drug tests while white caddies were not); *see also* Wormley v. Arkla, 871 F. Supp. 1079, 1084-85 (E.D. Ark. 1994) (denying summary judgment for defendant on Title VII claim that drug testing was used as a tool of racial discrimination).

535. *See* Margaret Gillerman, *Berkeley's Acting Police Chief, Who Failed 2 Drug Tests, Wins Back Job*, ST. LOUIS POST-DISP., Apr. 21, 1998, at B3 (detailing retention of police chief despite failing drug tests).

536. *See* John Nolan, *Drug-Test Order Riles Councilman*, CLEVELAND PLAIN-DEALER, Mar. 22, 1998, at 5B (arguing that the mayor proposed drug tests because a councilman advocated legalizing marijuana for medicinal purposes); *Saturday File Odds and Ends: More* Stevens vs. Brown, ORLANDO SENTINEL, June 6, 1998, at 1 (arguing that politicians are calling on opponents to submit to drug testing as a political maneuver).

537. *See* MICHEL FOUCAULT, DISCIPLINE AND PUNISH 199 (1975) (claiming that the principles of discipline center around the "constant division between the normal and the abnormal, to which every individual is subjected," and the "existence of a whole set of techniques and institutions for measuring, supervising and correcting the abnormal").

is to lower costs, increase productivity, and reduce accidents. But as noted previously, the evidence cannot support these claims. The original goal of government drug testing, however, does not require empirical support. By implementing job-screening programs, drug users are segregated from other members of society.[538] They were initially relegated to a secondary employment market,[539] but even those opportunities are now being foreclosed by the logarithmic expansion of testing regimes. In the end, drug users may be prevented from attaining gainful employment, denied medical and welfare benefits, and shut out of job-training programs.[540] They become the discrete and insular minority that the antidiscrimination model was intended to protect. But they are only a secondary caste, beyond the purview of political process theory.

CONCLUSION

This Article has developed two models of the Fourth Amendment from comprehensive theories of the Constitution. The antidiscrimination model stems from a political process theory of the Constitution. It suggests that the Fourth Amendment is driven by procedural concerns relating to political representation rather than by substantive individual rights. As long as the costs of a policy are diffusely spread throughout a community, majoritiarian decisions should be deferred to despite the effects on individual citizens. In contrast, the individual rights model derives from a sovereignty theory of the Constitution, which argues that the Fourth Amendment is a personal liberty secured to each citizen rather than to collective groups. Individuals wield ultimate authority in their zones of sover-

538. *See* Felman & Petrini, *supra* note 446, at 279 n.168 (arguing that workplace drug testing is at least partially motivated by the desire to police drug use and to eliminate drug users from the workplace).

539. *See, e.g.*, Cornish & Lauria, *supra* note 445, at 122 (arguing that "the stigma attached to a drug-related firing may make it very difficult to find future employment . . . [because] second employers may not want to take a chance with the applicant"); Holtzman, *supra* note 449, at 82-84 (arguing that, especially in some fields, addicts are unable to find employment in major sectors of the economy due to drug-screening requirements and may only find jobs in lesser areas).

540. *See* F. Allan Hanson, *Some Social Implications of Drug Testing*, 36 U. KAN. L. REV. 899, 903-04 (1988) (arguing that drug addicts are slowly being eliminated from the workforce and predicting that as drug addicts become a larger percentage of the unemployed, welfare and medical benefits will be lessened or eliminated as well); Holtzman, *supra* note 449, at 82-84 (arguing that addicts "who are handicapped by their youth, old age, educational level, minority status, or who have skills that are specific to certain industries, may not be able to find other jobs easily, if at all"); *supra* text accompanying notes 514-19.

eignty, subject to government interference in only the most compelling circumstances. This model, therefore, provides a constitutional baseline of rights that cannot be manipulated or wholly erased by political majorities.

Eventually the Court will have to address the plight of the Fourth Amendment directly—not with minor adjustments, but with wholesale change. And when that time comes, great care must be taken to ensure that the solution is not in fact much worse than the problem. I fear that the antidiscrimination model presents precisely this danger. It undoubtedly works quite well during peaceful times of thoughtful debate and deliberation. But when perceived exigencies heighten popular anxiety, political majorities often abandon logic in favor of emotion. The antidiscrimination model not only defers to irrational decisionmaking but provides a theoretical justification for oppressive police tactics. In such times, the Fourth Amendment cannot stand idle as the hysterical mob threatens the lone citizen. It must protect personal sovereignty not only for the welfare of the individual but for the good of all society.