We Hear You Knocking, But You Can't Come In: The Supreme Court's Application of Common Law in Cases of Knock and Announce Entry

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I. INTRODUCTION

In 2006, the Supreme Court decided in *Hudson v. Michigan*[1] that the exclusionary rule does not apply when the police fail to knock and announce their presence before executing an otherwise valid search warrant.[2] This decision created a stir among many observers who feared that the exclusionary rule had been severely limited by this decision.[3] Equally important to the threat against the exclusionary rule is the threat this decision poses to the Fourth Amendment as a whole. While *Hudson* did not explicitly grant latitude to law enforcement officials to interpret and execute a search warrant in a manner that had not been stipulated by the search warrant, the *Hudson* decision had the same effect.[4] *Hudson* is only the latest in a series of cases dealing with the exclusionary rule and knock and announce warrants.[5]

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[1] 126B S.Ct. 2159 (2006).

[2] The exclusionary rule simply states that evidence obtained illegally must be excluded from being introduced in a criminal trial. Weeks v. United States U.S., 232 U.S. 383, 398 (1914) (federal application); Mapp v. Ohio, 367 U.S. 643, 655–56 (1961) (state application).

[3] *See, e.g.*, J. Spencer Clark, Note, Hudson v. Michigan: *"Knock-and-Announce"—An Outdated Rule?*, 21 BYU J. PUB. L. 433, 444–45 (2007); Brooke G. Malcolm, Note, *Constitutional Law—Exclusionary Rule—Violation of the Knock and Announce Rule Does Not Require Suppression of Evidence Seized Pursuant to Valid Search Warrant*, 37 CUMB. L. REV. 327, 336–37 (2007).

[4] *See Hudson*, 126B S.Ct. at 2165–66. The Court makes an attempt to allay these fears citing to 42 U.S.C. § 1983 (creating a civil remedy for civil rights violations) and § 1988(b) (authorizing attorney's fees to civil rights plaintiffs); *see also* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978); Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971)); Monroe v. Pape, 365 U.S. 167 (1961). The functional effect of the decision is to produce just such a result. Lusine Ajdaharian, Note, *Knocking Down the "Knock-and-Announce" Rule*, 29 WHITTIER L. REV. 183, 198 (2007).

[5] *See Hudson* 126B S.Ct. at 2159 n.6 for the line of recent cases. The knock and announce rule applies when a search warrant stipulates that law enforcement must knock and announce their presence

In just over a decade the Court has made five decisions dealing with the knock and announce rule.[6] This is a striking number when one considers that in all of its prior history the Court issued decisions on this issue only four times.[7] The action of the Court has sparked scholarly interest in the issue. Recently, Craig Hemmens and Chris Mathias reviewed the Court's decision in *United States v. Banks,*[8] and concluded that, "[t]he Court has declared the knock and announce rule and its common law exceptions part and parcel of the Fourth Amendment."[9] Hemmens and Mathias make a point that should be repeated:[10] the Supreme Court relies upon the common law in knock and announce cases to determine when an exception ought to be granted.[11] In *Hudson v. Michigan*, *United States v. Banks*, *United States v. Ramirez*,[12] *Richards v. Wisconsin*,[13] and *Wilson v. Arkansas*[14] the Court openly relied on common law exceptions to knock and announce warrants; in *Ramirez* it relied on the common law to justify forcible entry when a "no-knock" warrant was being enforced.[15] Legal scholars since *Miller v. United States*[16] and *Ker v. California*[17] have examined knock and announce rulings in order to understand the status of the Fourth Amendment.[18] Criminal Justice scholars have examined these cases and concluded that the Court has made

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before entering a residence. *Weeks*, 232 U.S. at 398; *Mapp*, 367 U.S. 655–56. The exceptions to this rule will be explored in this article.

[6] *See Hudson*, 126B S.Ct. 2159; *see also* United States v. Banks, 540 U.S. 31 (2003); United States v. Ramirez, 523 U.S. 65 (1998); Richards v. Wisconsin, 520 U.S. 385 (1997); Wilson v. Arkansas, 514 U.S. 927 (1995).

[7] Sabbath v. United States, 391 U.S. 585 (1968); Wong Sun v. United States, 371 U.S. 471 (1963); Ker v. California, 374 U.S. 23 (1963); Miller v. United States, 357 U.S. 301 (1958).

[8] 540 U.S. 31 (2003).

[9] Craig Hemmens & Chris Mathias, United States v Banks: *The Knock and Announce Rule Returns to the Supreme Court*, 41 IDAHO L. REV. 1, 36 (2004).

[10] Craig Hemmens "*The Police, the Fourth Amendment, and Unannounced Entry:* Wilson v. Arkansas, 33 CRIM. L. BULL. 29 (1997); Mark Josephson, *Fourth Amendment Must Police Knock and Announce Themselves Before Kicking in the Door of a House?,* 86 J CRIM. L & CRIMINOLOGY 1229 (1996).

[11] Hemmens, *supra* note 10 at 31–33; Josephson, *supra* note 10, at 1230–32.

[12] 523 U.S. 65 (1998).

[13] 520 U.S. 385 (1997).

[14] 514 U.S. 927 (1995).

[15] *See Ramirez*, 523 U.S. at 73 (holding that § 3109 codifies the common-law exceptions to the knock and announce requirement).

[16] 357 U.S. 301 (1958).

[17] 374 U.S. 23 (1963).

[18] *See, e.g.,* Daniel McKenzie, *What Were They Smoking?: The Supreme Court's Latest Step in a Long, Strange Trip Through the Fourth Amendment*, 93 J. CRIM. L. & CRIMINOLOGY 153 (2003); Robert G. Blakey, *The Rule of Announcement and Unlawful Entry:* Miller v. United States *and* Ker v. California, 112 U. PA. L. REV. 499 (1964).

its decisions in reaction to the changing needs of law enforcement due to the changing nature of crime, specifically drug crimes.[19]

This article explores two additional facets (a) why the Court has relied on the common law for justification in these cases; and (b) what these decisions mean for federalism. Other than the common law, the Court had three legal sources available when making the decisions listed above, state statutes, state case law and federal statutes, yet it settled on the common law for its justification. This article will show that the common law was in fact relied upon by the Court in reaching its Constitutional determination, that the common law should not have been relied upon, and that the knock and announce decisions have resulted in a judicial doctrine that runs counter to the tenets of originalism while also expanding state authority beyond the realm of traditional federalism. Part II will provide a brief history of knock and announce warrants. Part III will look at Justice Scalia's majority opinion in *Hudson*, examining his reliance on the common law principles of *Wilson v. Arkansas* and the logic of *United States v. Leon*[20] in his *Hudson* opinion. Part IV describes the three options – apart from the common law – available to the *Hudson* majority. Part IV goes beyond *Hudson* to show that these options were available in all other knock and announce cases since 1996 as well. Through historical inquiry, this section also will demonstrate that the common law lost favor early in the nation's history, and that federal common law was purportedly abandoned in *Erie Railroad Co. v. Tompkins*.[21] Part V will analyze the Court's knock and announce decisions with respect to federalism and originalism, and show that the Court's application of the common law contradicts principles of federalism and originalism.

II. HISTORY OF KNOCK AND ANNOUNCE

The knock and announce rule is rooted in English Common Law, first addressed in *Semayne's Case* in 1604.[22] A civil case, the King's Bench found that "[t]he House of every one is to him his castle and fortress, as well for his defense against injury and violence, as for his repose."[23] As such,

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[19] Hemmens & Mathias, *supra* note 9, at 36. Such a theory of law enforcement is made in the 1994 "Contract with America," which directly states a need to tighten the exclusionary rule. Republican Contract with America, *available at* http://www.house.gov/house/Contract/Contract.htmil (last visited Nov. 26, 2007).

[20] 468 U.S. 897 (1984).

[21] 304 U.S. 64 (1938).

[22] Semayne's Case, 77 Eng. Rep. 194 (K.B. 1603).

[23] *Id.* at 195.

> In all cases when the King is party, the Sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do execution of the King's process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open the doors . . . .[24]

Semayne's Case provided three reasons for the knock and announce rule. The first regarded decreasing the potential for violence, as the King's Bench in *Semayne's Case* acknowledged the right for the owner or his servants of a house to kill thieves and trespassers in defense of himself and his house.[25] The second purpose of the knock and announce rule was to protect the privacy of the homeowner, as the home is for his repose.[26] The third rationale was to prevent the destruction of property which, given that doors and shutters could not easily be replaced in 17th century England, would leave a home open to further destruction or robbery from others.[27]

The knock and announce rule was later applied in criminal cases in *The Case of Richard Curtis*[28] in 1757, which also acknowledged that "[n]o precise form of words is required in a case of this kind.[29] It is sufficient that the party hath notice, that the officer cometh not as a mere trespasser, but claiming to act under a proper authority."[30]

As a result of British rule, the English legal system and its traditions were imported to the American colonies.[31] The American legal system

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[24] *Id.*

[25] *Id.* at 196–97.

[26] *Id.* at 195–96.

[27] *Id.* at 197; *Announcement in Police Entries,* 80 YALE L.J. 139, 142 (1970).

[28] 168 Eng. Rep. 67 (K.B. 1757).

[29] *Id.* at 68.

[30] *Id.*

[31] Wilson v. Arkansas, 514 U.S. 927, 933 (1995) ("The common law knock and announce principle was woven quickly into the fabric of early American law. Most of the States that ratified the Fourth Amendment had enacted constitutional provisions or statutes generally incorporating English common law, *see, e.g.*, N. J. Const. of 1776, § 22, in 5 Federal and State Constitutions 2598 (F. Thorpe ed. 1909) ("The common law of England . . . shall still remain in force, until [it] shall be altered by a future law of the Legislature"); Ordinances of May 1776, ch. 5, § 6, in 9 Statutes at Large of Virginia 127 (W. Hening ed. 1821) ("The common law of England . . . shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by the legislative power of this colony"); N. Y. Const. of 1777, Art. 35, in 5 Federal and State Constitutions 2635 (F. Thorpe ed. 1909) ("Such parts of the common law of England . . . as . . . did form the law of [New York on April 19, 1775] shall be and continue the law of this State, subject to such alterations and provisions as the legislature of this State shall, from time to time, make concerning the same"), and a few States had enacted statutes specifically embracing the common-law view that the breaking of the door of a dwelling was permitted once admittance was refused, *see, e.g.*, Act of Nov. 8, 1782, ch. 15, P6, in Acts and Laws of Massachusetts 193 (1782); Act of Apr. 13, 1782, ch. 39, § 3, in 1 Laws of the State of New York 480 (1886); Act of June 24, 1782, ch. 317, § 18, in Acts of the General Assembly of New-Jersey (1784) (reprinted in The First Laws of the State of New Jersey 293–294 (J. Cushing comp. 1981)); Act of Dec.

changed little after the American Revolution,[32] and ten of the thirteen states embraced the knock and announce rule in statute prior to the ratification of the Constitution.[33] Throughout the 18th and 19th centuries, while no states held a search pursuant to a warrant illegal because of a failure to knock and announce,[34] courts acknowledged the existence of the rule[35] and considered the knock and announce rule in cases of forced entry pursuant to a warrant.[36] In *McLennon v. Richardson*, the Massachusetts Supreme Court held that a warrantless entry was illegal in part because the police failed to knock and announce before entering.[37] The Court held that even if the officer possessed a warrant, "he could not break open the door without first demanding entrance."[38]

Aside from Kentucky, the only exceptions to the knock and announce rule that were upheld in other state courts included several cases of exigent circumstances ruling announcement inapplicable.[39] In *Hawkins v. Commonwealth*, the Kentucky Court of Appeals rejected the knock and announce requirement in criminal cases, but it maintained the announcement rule in civil process.[40]

In 1917, the federal government adopted the knock and announce rule by statute as part of the Espionage Act of 1917, later condensed into 18 U.S.C. § 3109 ("§ 3109"), stating that:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.[41]

23, 1780, ch. 925, § 5, in 10 Statutes at Large of Pennsylvania 255 (J. Mitchell & H. Flanders comp. 1904).").

[32] *See Id.*; *see also, e.g.,* Walker v. Fox, 32 Ky. (2 Dana) 404, 405 (1834); Burton v. Wilkinson, 18 Vt. 186, 189 (1846); Howe v. Butterfield, 58 Mass. (4 Cush) 302, 305 (1849).

[33] Josephson, *supra* note 10, at 1237.

[34] *See* Accarino v. United States, 179 F.2d 456, 464 (D.C. Cir. 1949) (discussing the English and American history of warrantless searches). *But see Accarino*, 179 F.2d at 464–65 (noting that the court is reluctant to suppress evidence gained in a *lawful* manner and that the effect of such a rule must preclude admission of evidence gained illegally).

[35] *See* Jacobs v. Measures, 79 Mass. (13 Gray) 74, 75 (1859); Barnard v. Bartlett, 64 Mass. (10 Cush) 501, 501 (1852); State v. Shaw, 1 Root 134, 134 (Conn. 1789).

[36] *See* Chipman v. Bates, 15 Vt. 51 (1843); Bell v. Clapp, 10 Johns. 263 (N.Y. Sup. Ct. 1813); Kelsy v. Wright, 1 Root 83 (Conn. 1783).

[37] 81 Mass. (15 Gray) 74, 77 – 78 (1860).

[38] *Id.* (internal quotation marks omitted).

[39] *Id.* at 77.

[40] 53 Ky. (14 B.Mon.) 318, 319 (1854).

[41] 18 U.S.C. § 3109.

State courts developed three exceptions to knock and announce rules from either common law or statutory backgrounds: (1) danger to the officer or innocent bystanders;[42] (2) useless gesture;[43] or (3) destruction of evidence or escape.[44] The first exception was rooted in an English common law case, which provided an exception to the knock and announce rule when the sheriff broke down a plaintiff's door after the sheriff's bailiffs were kidnapped and imprisoned by the plaintiff in his home after they announced their intent.[45] The first American case to address this exception was *Read v. Case*,[46] where unannounced entry was justified because of Read's repeated threats to resist arrest with a gun. This exception was also codified in the Espionage Act of 1917 and the later § 3109.[47] The useless gesture exception was created after several state courts acknowledged that police may not need to announce their authority and intent if the police could be "virtually certain" that the suspect knows the reason the police are there,[48] if the building is devoid of occupants,[49] or if there are clear indicators that the occupants know the police are there.[50] The third exception to the knock and announce rule, that announcement would provide the suspect the opportunity to escape or destroy evidence, was first addressed in the 1956 case of *People v. Maddox*,[51] over a century after the other two exceptions were initially considered.

The first United States Supreme Court case to rule on the knock and announce requirement was *Miller v. United States*, decided in 1958. When District of Columbia police officers went to arrest Miller without a warrant at 3:45 a.m. in his apartment, officers knocked on Miller's front door.[52] Miller asked the officers, "[w]ho's there?" and one of the officers replied "in a low voice, 'police.'"[53] Miller opened the door and asked what they

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[42] Davis v. State, 525 P.2d 541, 544–545 (Alaska, 1974) (citing Miller v. United States, 357 U.S. 301, 313, n.12; State v. Valentine, 504 P.2d 84, 87 (Or. 1972)); Read v. Case, 4 Conn. 166, 170 (1822).

[43] *See* State v. Yates, 243 N.W. 2d 645, 648 (Ia. 1976); State v. Bennett, 493 P.2d 1077, 1078 – 79 (Mont. 1972); People v. Martin, 290 P.2d 855, 858 (Cal. 1955); Allen v. Martin, 10 Wend. 300, 303 (N.Y. Sup. Ct. 1833); Horace L. Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 541 (1924).

[44] *See* People v. Maddox, 294 P.2d 6, 9 (Cal. 1956); *Bennett*, 493 P.2d at 1078 (applying Mont. Code Ann. § 95-606 (1947)).

[45] White & Wiltsheire, 81 Eng. Rep. 709 (K.B. 1049).

[46] 4 Conn. 166 (1822).

[47] 18 U.S.C. § 3109.

[48] *See* People v. Martin,290 P.2d 855, 858 (Cal. 1955). *See also* Allen v. Martin, 10 Wend. 300, 303 (N.Y. Sup. Ct. 1833); Wilgus, *supra* note 45, at 802.

[49] *See* Androscoggin R.R. Co. v. Richards, 41 Me. 233, 238 (1856); Howe v. Butterfield, 58 Mass. (4 Cush) 302, 305 (1849).

[50] *See Howe*, 58 Mass. at 305.

[51] 294 P.2d 6, 9 (Cal. 1956).

[52] Miller v. United States, 357 U.S. 301, 303 (1958).

[53] *Id.*

were doing at his door but tried to close it before an answer was given.[54] Police officers then broke the door down, arrested Miller, and seized marked bills, which the prosecution used as evidence at trial, during which a jury convicted Miller of violating narcotics laws.[55] When granted *certiorari* by the Supreme Court, Miller provided three contentions in his attempt to suppress the marked bills as evidence: (1) officers had no probable cause to arrest him without a warrant; (2) the search was "not justified as being an incident of a lawful arrest;" and (3) the arrest and subsequent search was unlawful because officers broke the door without first announcing their authority and intent.[56]

In the plurality decision, Justice Brennan considered only the knock and announce contention, holding that the officers violated the knock and announce rule.[57] His reasoning was based not on the Fourth Amendment, but on § 3109 and *Accarino v. United States*.[58] The Court held that the federal statute and the D.C. appellate court ruling were "substantially identical."[59] Additionally, Justice Brennan addressed the common law history of the knock and announce rule, finding that the knock and announce requirement stated in *Semayne's Case*, "is reflected in 18 U.S.C. § 3109, in the statutes of a large number of states, and in the American Law Institute's proposed Code of Criminal Procedure."[60] Justice Brennan's plurality opinion noted that some states allow for noncompliance with the rule in exigent circumstances, but refused to address the issue.[61]

In 1963, the same year as *Wong Sun v. United States*,[62] the U.S. Supreme Court granted *certiorari* to a state case in light of its holding in *Mapp v. Ohio*.[63] In *Ker v. California*, the Court held that the knock and announce rule was not expressly included in the Fourth Amendment, but that failure to knock and announce would only be acceptable in certain circumstances, which would be judged based on the Reasonableness Clause of the Fourth Amendment.[64] The Court, however, was deeply split on what circumstances justified violating the knock and announce rule. The Court agreed 8-1 that the Fourth Amendment's Reasonableness Clause

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[54] *Id.*

[55] *Id.* at 302.

[56] *Id.* at 305.

[57] *Id.* at 313–14.

[58] Accarino v. United States, 179 F.2d 456 (1949); *see Miller*, 357 U.S. at 306, 307 n.6, 310 n.10, 311.

[59] *Miller*, 357 U.S. at 306.

[60] *Id.* at 308–09.

[61] *Id.* at 309.

[62] 371 U.S. 471 (1963).

[63] 367 U.S. 643, 654–55 (1961) (declaring that all evidence obtained by searches and seizures in violation of the Federal Constitution is inadmissible in a criminal trial in a state court).

[64] Ker v. California, 374 U.S. 23, 40–41 (1963). *See* Craig Hemmens, *I Hear You Knocking: The Supreme Court Revisits the Knock and Announce Rule*, 66 UMKC L. REV. 559, 571–73 (1998).

extends to the states through the Fourteenth Amendment, but disagreed 4-4-1 on whether the reasonableness standard was violated.[65] Justice Clark's opinion, in which three other justices joined, would have held that police were justified in evading the knock and announce rule whenever exigent circumstances exist.[66] Justice Brennan's opinion, in which three other justices joined, would have held that unannounced entries violated the Fourth Amendment except in the three limited exceptions set forth by earlier American courts: danger to the officer or innocent bystanders, useless gesture, or strong possibility of the destruction of evidence or escape.[67]

In *Sabbath v. United States*,[68] the Court held that § 3109 is a codification of the common law rule of announcement, and the "validity of . . . an entry of a federal officer to effect a warrantless arrest 'must be tested by criteria identical to those embodied in' [18 U.S.C. § 3109]," which deals with an entry to execute a search warrant.[69] The Court also held that officers must have a substantial basis for believing that following the knock and announce rule would put their lives in jeopardy.[70] Since the case was decided on the grounds of § 3109 rather than the Fourth Amendment, the Court did not hold that state police officers must meet the substantial basis requirement, and the decisions in *Miller*, *Wong Sun*, *Ker*, and *Sabbath* did not specifically mandate the knock and announce rule as part of the Fourth Amendment.[71]

After *Sabbath*, the Supreme Court did not hand down an opinion on knock and announce cases despite the discontinuity among the states in regards to interpreting the knock and announce requirement, until 1995 in *Wilson*.[72] By 1996, a majority of states adopted the knock and announce rule by statute, nine states left the rule as common law, and six states had no knock and announce requirement at all.[73] Additionally, some states prohibited the issuing of "no-knock warrants," while other states passed statutes allowing special search warrants that authorized unannounced entry, and some states had blanket exceptions to the knock and announce rule in certain types of cases, such as narcotics.[74] To address this issue, the Supreme Court finally granted *certiorari* to Sharlene Wilson, whose motion to suppress had been denied by the Arkansas Supreme Court,

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[65] 374 U.S. 23 (1963).
[66] *Id.* at 38–41.
[67] *Id.* at 47.
[68] 391 U.S. 585 (1968).
[69] *Id.* at 588–89.
[70] Hemmens, *supra* note 66, at 573–74.
[71] *Id.* at 574.
[72] Wilson v. Arkansas, 514 U.S. 927 (1995).
[73] Wilson v. Arkansas *and the Knock and Announce Rule: Giving Content to the Fourth Amendment*, 13 N.Y.L. SCH. J. HUM. RTS 663, 678–79 (1997).
[74] *Id.* at 679–80.

which held explicitly that the Fourth Amendment does not require police officers to knock and announce their authority and intent before entering a dwelling.[75] In *Wilson v. Arkansas*, Justice Thomas held for a unanimous Court that the common-law knock and announce principle forms a part of the Fourth Amendment reasonableness inquiry.[76] Justice Thomas stated that "the common-law principle of announcement is embedded in Anglo-American law,"[77] and applied English common law existing at the time of the framing of the Bill of Rights to find that the framers adopted the knock and announce rule as a part of the reasonableness clause of the Fourth Amendment.[78] Justice Thomas listed common law exceptions to the knock and announce rule.[79] The Court, however, ruled that the reasonableness clause "should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests," and remanded the case back to the Arkansas Supreme Court to, "allow the state courts to make any necessary findings of fact and to make the determination of reasonableness in the first instance."[80]

To address the constitutionality of the blanket exception, the Supreme Court granted *certiorari* in *Richards v. Wisconsin* in 1997, unanimously holding that although in this particular case officers did not violate the Fourth Amendment by their forced entry, the Fourth Amendment "does not permit a blanket exception to the knock and announce requirement for felony drug investigations."[81] In *United States v. Ramirez*, another unanimous Court found that a no-knock entry is justified if police have a "reasonable suspicion" that obeying the knock and announce rule will endanger police or innocent bystanders, lead to the destruction of evidence or the suspect's escape, or if following the rule would be a useless gesture.[82] The Court also explicitly stated in *Ramirez* that, in addition to the *Miller* and *Sabbath* Court's finding that § 3109 is the codification of the common-law knock and announce rule, § 3109 also codified the exceptions to the common-law announcement requirement.[83] Another unanimous Court held in *United States v. Banks* that the standards bearing on whether officers can legitimately enter after knocking are the same as those for requiring or dispensing with knock and announce altogether.[84]

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[75] Wilson v. State, 317 Ark. 548, 554 (1995); Hemmens *supra* note 66, at 575–78.

[76] 514 U.S. 927 (1995).

[77] *Id.* at 934 (internal quotation marks omitted).

[78] *Id.* at 933–34 (Justice Thomas notes the development of the knock and announce statutes and codification).

[79] *Id.* at 934–35.

[80] *Id.* at 934, 937.

[81] Richards v. Wisconsin, 520 U.S. 385, 396 (1997).

[82] United States v. Ramirez, 523 U.S. 65, 67, 70 (1998).

[83] *Id.* at 72–73.

[84] United States v. Bank, 540 U.S. 31, 37 (2003).

Only the facts known to the police count in judging a reasonable waiting time between announcement and forced entry and they should be deciding on a case-by-case basis.[85]

Following this series of unanimous decisions regarding the knock and announce rule, the Court split in *Hudson* over whether a violation of the knock and announce rule requires suppression of evidence under the exclusionary rule provided to federal courts in *Weeks v. United States*[86] and to the state courts in *Mapp*.[87] In *Hudson*, the Supreme Court decided solely whether a violation of the knock and announce rule requires suppression of evidence found during the ensuing search.[88] Justice Scalia delivered the opinion of the Court in which three other justices joined, with Justice Kennedy concurring in part, that a violation of the knock and announce rule does not require suppression of the evidence found in a search.[89] In assessing the rationale for suppressing evidence obtained following a violation of the knock and announce rule, Justice Scalia found that the common law interests of the knock and announce rule were in the protections of "human life and limb," property, and "those elements of privacy and dignity that can be destroyed by a sudden entrance."[90] Aside from these protections, Scalia found that "the knock and announce rule has never protected one's interest in preventing the government from seeing or taking evidence described in a warrant," and the only remedy for violations would be a civil suit. [91]

III. *HUDSON V. MICHIGAN* AS A PRODUCT OF *WILSON V. ARKANSAS* AND *UNITED STATES V. LEON*

The cases before *Wilson* were decided based on statute and precedent at both the national and state level.[92] *Wilson* marks a departure from this trend by relying more on the common law than any of the previous cases. In order to understand the transformation that occurred in *Hudson*, it is necessary to unpack the reasoning of *Wilson*.

A. Wilson v. Arkansas

Wilson saw the meteoric rise of use of the common law in interpreting the Fourth Amendment. Although previous cases incorporated common

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[85] *Id.* at 37, 39.
[86] 232 U.S. 383, 398 (1914).
[87] Mapp v. Ohio, 367 U.S. 643, 655–56 (1961).
[88] Hudson v. Michigan, 126B S.Ct. 2159, 2163 (2006).
[89] *Id.* at 2168.
[90] *Id.* at 2165.
[91] *Id.* at 2165, 2168.
[92] *See supra* notes 7, 44–46.

law principles into the analysis, none went so far as to say that the common law principles formed part of the reasonableness inquiry.[93] *Wilson*, then, represented a large step towards carving out a common law exception to the knock and announce rule, while couching the decision in Fourth Amendment originalism.

In November and December of 1992, Sharlene Wilson initiated narcotics sales to an informant of the Arkansas State Police.[94] Towards the end of November, the informant made a series of purchases of marijuana and methamphetamine at the home that Ms. Wilson shared with Bryson Jacobs.[95] On December 30, the informant called Wilson and arranged to meet her at a local store to buy a quantity of marijuana.[96] According to the informant, Wilson "produced a semiautomatic pistol at this meeting and waved it in the informant's face, threatening to kill her if she turned out to be working for the police. Petitioner then sold the informant a bag of marijuana."[97]

The following day, officers applied for, and received, warrants to search Wilson's home and arrest Wilson and Jacobs.[98] In filing the request for the warrant, the police affixed affidavits stating that Jacobs had previously been convicted of arson and firebombing.[99] The search was conducted that same afternoon: "Police officers found the main door to petitioner's home open. While opening an unlocked screen door and entering the residence, they identified themselves as police officers and stated that they had a warrant. Once inside the home, the officers seized marijuana, methamphetamine, valium, narcotics paraphernalia, a gun, and ammunition."[100]

Officers also found Wilson trying to flush marijuana down the toilet.[101] Police arrested both Wilson and Jacobs, charging each with delivery of marijuana, delivery of methamphetamine, possession of drug paraphernalia and possession of marijuana.[102]

Before the trial began, Wilson moved to suppress the evidence on the grounds that the search was invalid because the police failed to "knock and announce" before entering the home.[103] The trial court summarily denied

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[93] *See* Richards v. Wisconsin, 520 U.S. 385 (1997); Ker v. California, 374 U.S. 23 (1963); Miller v. United States, 357 U.S. 301 (1958); Olmstead v. United States, 277 U.S. 438 (1928).

[94] Wilson v. Arkansas, 514 U.S. 927, 929 (1995).

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.* at 929–30.

[103] *Id.* at 930.

her motion.[104] At trial, a jury convicted Wilson, who received a sentence of thirty-two years in prison.[105] On appeal, the Arkansas Supreme Court affirmed her conviction, noting that "officers entered the home *while they were identifying themselves,*"[106] rejecting Wilson's argument that the Fourth Amendment requires officers to knock prior to entering the home.[107] In upholding Wilson's conviction, the Arkansas Supreme Court found no authority for Wilson's argument that the Fourth Amendment requires officers to knock and announce, concluding that neither Arkansas law nor the Fourth Amendment required suppression of the evidence.[108]

Speaking for a unanimous Court, Justice Thomas began his analysis with the observation that the Court has long "looked to the traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing."[109] In so looking at the Fourth Amendment, the Court inquired as to the meaning ascribed to it by the framers of the amendment.[110] By examining the common law of search and seizure, the Court concluded that "the reasonableness of a search of a dwelling may depend in part on whether law enforcement officers announced their presence and authority prior to entering."[111] Even though the Court protected a person's house as a castle, common law courts had long held that "when the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the King's process, if otherwise he cannot enter."[112] Nevertheless, common law courts appended a qualification:

> But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors . . ., for the law without a default in the owner abhors the destruction or breaking of any house (which is the habitation and safety of man) by which great damage and inconvenience might ensue to the party, when no defaults is in him; for perhaps he did not know of the process, of which, if he had notice, it is to be presumed that he would obey it.[113]

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[104] *Id.*

[105] *Id.*

[106] *Id.* (quoting Wilson v. State, 317 Ark. 548, 553 (Ark. 1994)).

[107] Wilson v. State, 317 Ark. 548, 554 (Ark. 1994).

[108] *Id.*

[109] *Wilson*, 514 U.S. at 931. *See also* California v. Hodari D., 499 U.S. 621, 624 (1991); United States v. Watson, 423 U.S. 411, 418–20 (1976); Carroll v. United States, 267 U.S. 132, 149 (1925).

[110] *Wilson*, 514 U.S. at 932–34.

[111] *Id.* at 931.

[112] *Id.* (quoting *Semayne's Case*, 77 Eng. Rep. 194, 195 (K.B. 1603)).

[113] *Id.* at 931–32 (quoting *Semayne's Case*, 77 Eng. Rep. 194, 195–96 (K.B. 1603)).

The Court went on to note that its own historical interpretation acknowledged the common law principles of announcement as "embedded in Anglo-American law."[114] Yet up to this point, the Court had never held that the principle formed a part of the reasonableness inquiry.[115] With *Wilson*, the Court had its opportunity to do so:

> Given the longstanding common-law endorsement of the practice of announcement, we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure. Contrary to the decision below, we hold that in some circumstances an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment.[116]

The Court did leave one very important caveat — the rule is not absolute.[117] Rather, the rule is flexible enough to allow for the possibility of other overriding or prevailing interests.[118] Even from the time of *Semayne's Case*, it was obvious that the rule, if applied inflexibly, would present serious shortcomings.[119] Because "the common-law rule was justified in part by the belief that announcement generally would avoid 'the destruction or breaking of any house' by which great damage and inconvenience might ensue,"[120] courts were willing to acknowledge that the rule would yield under circumstances presenting a threat of physical violence.[121] Additionally, "courts have indicated that unannounced entry may be justified where police officers have reason to believe that evidence would likely be destroyed if advance notice were given."[122]

The rule is necessarily flexible because of its intentions. Since destruction was the ill to be avoided, actions or situations in which the damage resulting from announcing an officer's presence were greater than the damage resulting from not announcing would be better served by not

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[114] *Id.* at 934 (quoting Miller v. United States, 357 U.S. at 313).

[115] *Id.* at 934 n.3.

[116] *Id.* at 934.

[117] *Id.*

[118] *Id.* at 935–36.

[119] *Id.* at 935.

[120] *Id.* at 935–36 (quoting *Semayne's Case*, 77 Eng. Rep. 194, 195 (K.B. 1603)).

[121] *See* Read v. Case, 4 Conn. 166, 170 (Conn. 1822); Mahomed v. R., 13 Eng. Rep. 293, 296 (P.C. 1843) (appeal taken from Sup. Ct. Calcutta).

[122] *Wilson*, 514 U.S. at 936; *see also* Ker v. California, 374 U.S. 23, 40–41 (1963); People v. Maddox, 294 P.2d 6, 9 (Cal. 1956).

announcing.[123] Consequently, not only is the rule pragmatic, but it is also the origin of the balancing test of interests when the Fourth Amendment is involved.[124] After reversing the Arkansas Supreme Court's decision, the Court refused to rule on whether or not the Arkansas State Police's actions constituted a violation of the new rule.[125] Rather, the Court left it to the Arkansas Supreme Court to make findings of fact and determine the reasonableness in the first instance.[126] Nevertheless, the Court's work in strengthening the common-law interpretation of the Fourth Amendment was already done.

The *Wilson* court did not make a final determination on the case, opting instead to remand it to the Arkansas Supreme Court.[127] Even so, the nature of the decision handcuffed the Arkansas Supreme Court in that it could only make its decision on common law grounds, as there was no statute in Arkansas that spoke to the issue.[128] As will be discussed in Part IV A, this decision's heavy reliance on the common law is peculiar. While *Wilson* does not represent a departure as large as *Hudson* does, the seeds were being sewn for that decision. As will be discussed in Part IV A, the *Wilson* decision incorrectly applied *Ker* and *Miller*. These two cases relied on local laws for their decisions, and those local laws were grounded in the common law tradition.[129] The *Wilson* Court ignored the move from common law to local law and went on to say that the common law can be applied to Fourth Amendment interpretation.[130] The *Ker* and *Miller* Courts said no such thing. Moreover, by ignoring § 3109 the Court questionably did not rely on a federal statute in *Wilson* when there was no state law that spoke to the issue. While the decisions in *Ker* and *Miller* did not rest exclusively on § 3109, they did not do so because a local law spoke to the issue, and the court decided to let the local law stand as it did not conflict with the national statute.[131] If this logic had been applied in *Wilson*, then the Court would have relied on the federal statute, not the common law.[132]

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[123] *Wilson*, 514 U.S. at 936 (citing *Read*, 4 Conn. at 170).

[124] *Id.*

[125] *Id.* at 937.

[126] *Id.*

[127] *Id.*

[128] *Id.* at 931.

[129] Ker v. California, 374 U.S. 23, 37–38 (1963) (applying Cal. Penal Code §844); Miller v. U.S., 357 U.S. 301, 306 (1958) (applying D.C. Code § 4-141).

[130] *Wilson*, 514 U.S. at 936.

[131] Although 18 U.S.C. § 3109 only facially applies to federal agents, the *Wilson* Court's decision to make knock and announce part of the Fourth Amendment "reasonableness inquiry" has the effect of making § 3109 applicable to every state. *See, e.g.*, United States v. Price, 441 F. Supp. 814, 816–17 (E.D. Ark. 1977). This is because of 42 U.S.C. § 1983 (and case progeny) and the incorporation of the Fourth Amendment upon the States through Mapp v. Ohio, 367 U.S. 643, 655–56 (1961).

[132] While not addressed directly in Part V, the criticisms levied in that section also extend to *Ker*, 374 U.S. 23, and *Miller*, 357 U.S. 301.

B. Leon *and the Limitations of the Exclusionary Rule*

In 1984, the Court held in *Leon* that application of the exclusionary rule should not be the necessary consequence of a constitutional violation.[133] After a "confidential informant of unproven reliability"[134] informed an officer of the Burbank Police Department that two people were selling cocaine and methaqualone from their residence at 620 Price Drive in Burbank, police began an investigation into the allegations.[135] Based on observations made during their investigation of the original complaint and information acquired from Glendale police, respondent Leon emerged as a suspect as well.[136] From these observations, and additional information, officers prepared an application for a warrant to search various addresses and automobiles tied to the suspects.[137] After thorough review by several Deputy District Attorneys, a facially valid search warrant was issued in September 1981 by a State Superior Court Judge.[138] The ensuing searches produced massive quantities of drugs at two of the locations as well as a smaller quantity at another.[139] Respondents were indicted by a Grand Jury for the Central District of California and charged with conspiracy to possess and distribute cocaine and a variety of substantive counts.[140]

Respondents filed a motion to suppress the evidence on the grounds that the affidavit was insufficient to establish probable cause.[141] The District Court agreed and granted the motion in part.[142] However, the District Court refused to suppress all of the evidence, because none of the respondents had standing to challenge all of the searches.[143] The District Court acknowledged that the officers were acting in good faith, but rejected the Government's contention that the exclusionary rule should not apply "where evidence is seized in reasonable, good-faith reliance on a search warrant."[144] On appeal, the Ninth Circuit affirmed, concluding that "the information provided by the informant was inadequate under both prongs of the two-part test established in *Aguilar v. Texas* and *Spinelli v.*

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[133] United States v. Leon, 468 U.S. 897, 905 (1984).
[134] *Id.* at 901.
[135] *Id.*
[136] *Id.*
[137] *Id.* at 902.
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.* at 903.
[142] *Id.*
[143] *Id.*
[144] *Id.* at 904.

United States."[145] Thus, the question for the Court was whether the exclusionary rule should have a good-faith exception.[146]

In answering the question in the affirmative, the majority argued for a balancing test. Since "the exclusionary rule is neither intended nor able to 'cure the invasion of the defendant's rights which he has already suffered'"[147] and " [t]he rule thus operates as 'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect,'"[148] the Court held that it is not an absolute prohibitive bar to the introduction of evidence seized as the result of "reasonable, good-faith reliance"[149] on what officers perceive to be a facially valid search warrant.[150] Such a balancing test, the Court stated, resolves the issues by "weighing the costs and benefits of preventing the use in the prosecution's case in chief of inherently trustworthy tangible evidence obtained in reliance on a search warrant issued by a detached and neutral magistrate that ultimately is found to be defective."[151] Since the majority found that "the additional benefits of such an extension of the exclusionary rule would not outweigh its costs,"[152] the Court recognized the good-faith exception to the exclusionary rule.[153]

More significantly, the Court explained that:

> [W]e have declined to adopt a *per se* or 'but for' rule that would render inadmissible any evidence that came to light through a chain of causation that began with an illegal arrest. We also have held that a witness' testimony may be admitted even when his identity was discovered in an unconstitutional search.[154]

Furthermore, the Court wrote, "the exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates."[155] Since the conduct by the police in Burbank was done in good faith, the deterrence rationale loses much of its intent. Building on

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[145] *Id.* (citations omitted).
[146] *Id.* at 905.
[147] Id. at 906 (quoting Stone v. Powell, 428 U.S. 465, 540 (1976) (White, J., dissenting)).
[148] *Id.* (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)).
[149] *Id.* at 904.
[150] *Id.*
[151] *Id.* at 907.
[152] *Id.* at 910.
[153] *Id.* at 913.
[154] *Id.* at 910–11 (citations omitted).
[155] *Id.* at 916.

previous exceptions, the *Leon* Court laid the foundation for Justice Scalia to add another brick.

C. Justice Scalia's Reasoning in Hudson

In *Hudson*, police officers from Detroit, Michigan executed a duly authorized and facially valid search warrant for narcotics and weapons.[156] In executing the warrant, officers entered petitioner Booker Hudson's home without first knocking and announcing their presence.[157] "When police arrived to execute the warrant, they announced their presence, but waited only a short time—perhaps 'three to five seconds'—before turning the knob of the unlocked front door and entering Hudson's home."[158] In executing their search, officers found large quantities of drugs, including cocaine on Hudson's person, and a loaded gun lodged between the cushion and armrest of the chair on which Hudson was sitting.[159] As a result, Hudson was charged, and convicted, under Michigan law with unlawful drug and firearm possession.[160] After extensive appeals and review by the Michigan Court of Appeals, a denied review by the Michigan Supreme Court, renewed challenge to the Michigan Court of Appeals and another denied review by the Michigan Supreme Court, the United States Supreme Court issued *certiorari*.[161]

Even though the Supreme Court had a history of dealing in absolutes with regard to the exclusionary rule, Justice Scalia noted in *Hudson*, "we have long since rejected that approach."[162] Since the expansive dicta of *Mapp* and the Court's holding in *Whiteley v. Warden, Wyoming State Penitentiary*,[163] the Court had reigned in its excessive rhetoric surrounding the exclusionary rule and its application. As Justice Scalia wrote in *Hudson*, the Court had been aware of the "substantial social costs"[164] associated with the exclusionary rule "which sometimes include setting the guilty free and the dangerous at large."[165] As a result, the Court has only applied the exclusionary rule "where its deterrence benefits outweigh its substantial social costs."[166]

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[156] Hudson v. Michigan, 126B S.Ct. 2159, 2162 (2006).
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] *Id.* at 2163–64.
[163] 401 U.S. 560 (1971).
[164] *Hudson*, 126B S.Ct. at 2165 (quoting United States v. Leon, 468 U.S. 897, 907 (1984)).
[165] *Id.* at 2163.
[166] *Id.* (internal quotations and citations omitted).

A second, related consideration is the "but-for"[167] causality of the constitutional violation. Justice Scalia and the majority distinguished the "illegal *manner* of entry"[168] from an illegal search or seizure.[169] "Whether that preliminary misstep had occurred *or not*, the police would have executed the warrant they had obtained, and would have discovered the gun and the drugs inside the house."[170] Justice Scalia for the majority:

> What the knock-and-announce rule has never protected, however, is one's interest in preventing the government from seeing or taking evidence described in a warrant. Since the interests that *were* violated in this case have nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable.[171]

Since the government's premature intrusion into Hudson's home bore no relation to the evidence or purpose of the intrusion, the majority refused to assent to the exclusionary rule in this instance.[172]

Using something similar to the logic of inevitable discovery,[173] the majority stated that because the warrant was valid and the evidence would have been discovered regardless of the preliminary constitutional violation, the exclusionary rule was unnecessary.[174] Such a move, the majority stated, would be too much of a penalty for the constitutional ill.[175] As noted, the Court applied the exclusionary rule through a balancing test. In applying that test, the majority found that "[t]he costs here are considerable."[176]

The majority in *Hudson* also found that other means of deterrence prevented widespread abuse of the knock-and-announce requirement.[177] Justice Scalia wrote that, "Dollree Mapp could not turn to 42 U.S.C. § 1983 for meaningful relief; *Monroe* which began the slow but steady expansion of that remedy, was decided the same Term as *Mapp*."[178] The Court went on to note the expansion of 42 U.S.C. § 1983's reach to federal

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[167] *Id.* at 2164.
[168] *Id.* (emphasis in original).
[169] *Id.* at 2165.
[170] *Id.* at 2164 (emphasis in original).
[171] *Id.* at 2165 (emphasis in original).
[172] *Id.*
[173] *See* Nix v. Williams, 467 U.S. 431, 446 (1984).
[174] *Hudson*, 126B S.Ct. at 2165.
[175] *Id.* at 2165–66.
[176] *Id.* at 2165.
[177] *Id.* at 2166–67.
[178] *Id.* at 2167.

officers[179] in 1971 and then to municipalities in 1978.[180] Here, because the Court assumed that §1983 is an effective deterrent while also believing that police forces have become increasingly professional because of evidence that police forces across the country take the constitutional rights of citizens seriously, the Court held that the exclusionary rule is not necessary to preserve the integrity of the warranted search and seizure.[181] In short, because the social costs of applying the exclusionary rule are high and the incentive by the government to violate is low, the "resort to the massive remedy of suppressing evidence of guilt is unjustified."[182]

As Justice Kennedy put it in his concurring opinion, "[i]t bears repeating that it is a serious matter if law enforcement officers violate the sanctity of the home by ignoring the requisites of lawful entry. Security must not be subject to erosion by indifference or contempt."[183] But as even Justice Kennedy acknowledged, "[s]uppression is another matter."[184] In terms of evaluating the rule, Kennedy and the majority took a practical approach. "When, for example, a violation results from want of a 20-second pause but an ensuing, lawful search lasting five hours discloses evidence of criminality, the failure to wait at the door cannot properly be described as having caused the discovery of evidence."[185] Furthermore, Justice Kennedy's concurring opinion goes to great lengths to distinguish the decision in *Hudson* from other cases.[186] Explicitly, Justice Kennedy remarked at the end of his opinion that he did not support the incorporation of either *Segura v. U.S.*[187] or *New York v. Harris*[188] into the opinion.[189]

Justice Breyer's dissent in *Hudson*, which Justices Stevens, Souter and Ginsburg joined, uses highly inflammatory language.[190] "The Court

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[179] *Id.*; *see* Bivens v. Six Unknown Named Agents of Federal Bureau of Nacotics, 403 U.S. 388 (1971).

[180] *Hudson*, 126B S.Ct. at 2167; *see* Monell v. Dep't of Soc. Serv., 436 U.S. 658 (1978).

[181] *Hudson*, 126B S.Ct. at 2168 (*citing* SAMUEL WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950–1990, 51 (1993)).

[182] *Id.*

[183] *Id.* at 2170 (Kennedy, J., concurring).

[184] *Id.*

[185] *Id.* at 2171.

[186] *Id.* (Kennedy, J. concurring).

[187] Segura v. United States, 468 U.S. 796 (1984).

[188] New York v. Harris, 495 U.S. 14 (1990).

[189] *Hudson*, 126B S.Ct. at 2171 (Kennedy, J., concurring).

[190] *Id.* at 2171 (Breyer, J., dissenting).

> [T]he Court *destroys* the strongest legal incentive to comply with the Constitution's knock-and-announce requirement. And the Court does so without significant support in precedent. At least I can find no such support in the many Fourth Amendment cases the Court has decided in the near century since it first set forth the exclusionary principle in *Weeks v. United States* . . . . Today's opinion is thus *doubly troubling*. It represents a *significant departure* from the Court's precedents. And it *weakens, perhaps destroys*, much of the practical value of the Constitution's knock-and-announce protection.

Id.

destroys the strongest legal incentive to comply with the Constitution's knock-and-announce requirement. And the Court does so without significant support in precedent."[191] Following a hearty discussion of its review of both the exclusionary rule and knock-and-announce case law, Justice Breyer concluded that, "it is clear that the exclusionary rule should apply."[192]

While the Court's opinion dealt extensively with the exclusionary rule, and the Court said that it did not need to consider the knock and announce rule, the majority in fact did discuss the knock and announce rule in order to justify its decision on the question of the exclusionary rule.[193] The Court stated at the outset that because the Michigan Supreme Court had decided that there had been a knock and announce violation, the Supreme Court had only to consider if the exclusionary rule applied in a situation where there was a knock and announce violation.[194] In order to reach its conclusion the Court had to define the purpose of the knock and announce rule, and did so in common law terms.[195] Moreover, unlike *Wilson*, the *Hudson* Court made the final determination on the issue and did not remand it back down to the Michigan Supreme Court.[196]

IV. MOVING AWAY FROM TRADITIONAL COMMON LAW

In the knock and announce cases decided since *Wilson*, the Court could have relied on one of at least three other sources of law: state statute, state case law, or federal statute.[197] This section demonstrates that the trend at

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[191] *Id.*

[192] *Id.* at 2173 (Breyer, J., dissenting).

[193] *Id.* at 2162–63.

[194] *Id.* at 2162.

[195] *Id.* at 2162–63.

[196] *Id.* at 2170. This is because the Court affirmed the Michigan Supreme Court and remanding of the issue for implementation was unnecessary. *Id.*

[197] There has been a debate developing in public law scholarship about the current condition of the common law. Scholars such as Morton Horwitz, William Nelson, James Stoner, and Kyle Scott contend that the common law has morphed into something that is completely different from the original conception of the common law. Kyle Scott writes:

> Common law exists wherever precedents are used to identify law. This is quite different from Oliver Wendell Holmes' formulation. Holmes considers common law to be judge-made law. So, therefore, precedents create common law . . . . Precedents are used as a guide to indicate to judges what the previous path has been, as justice demands similar cases be treated in similar ways. Judges in the common law tradition do not make law; they discover it through a systematic search and application of precedent.

KYLE SCOTT, *Dismantling the Common Law: Liberty and Justice in our Transformed Courts*, 16 (Lexington Books 2007). *See generally* JAMES R. STONER, JR., COMMON-LAW LIBERTY: RETHINKING

the national level has been a move away from the original conception of common law. This conclusion is drawn from an examination of the Court's decisions in *Martin v. Hunter's Lessee* and *Erie Railroad Co. v. Tompkins*.[198] Additionally, historical evidence indicates that the political climate outside of the Court also supported a limited reliance on the common law.[199] Thus, the common law appears an odd authority to call upon given this trend. In Section IV C we argue that the Court should have rested the *Hudson* opinion on federal statute.

A. Early Treatment of the Common Law in America

In its first year, Congress enacted the Federal Judiciary Act of 1789 ("Judiciary Act").[200] In that act, the common law is mentioned only six times and only in four sections.[201] In Section 9 and Section 11, the federal judiciary is granted only a small jurisdiction in matters of common law.[202] Moreover, that jurisdiction is restricted to civil matters only. Section 30 of the Judiciary Act is silent on the subject of common law jurisdiction.[203] Section 30 only says that witnesses in open court will be treated in a similar manner as they were in courts at common law.[204] Section 34 recognizes state common law, stating that the federal judiciary must respect state common law only in instances where that state common law does not come into conflict with a federal statute or Constitution.[205] The Judiciary Act's treatment of the common law is indicative of the way common law would develop. America looked for a way to move beyond the common law in the early 19th century and the country was able to do so under Thomas Jefferson's administration and the codification movement that shortly followed his presidency.

Even after the creation of the new government, the state of the common law was still in flux. The new debate centered over the questions

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AMERICAN CONSTITUTIONALISM (The University Press of Kansas 2003); WILLIAM NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830 (The University of Georgia Press 1994); MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1780–1860 (Harvard University Press 1977). We contend that this transformation in the common law has rendered the reliance on old common law maxims inconsistent with the American conception of the common law and is therefore cherry-picking from a large set of texts and decisions in order to make one's argument without paying attention to context or tradition.

[198] Martin v. Hunter's Lessee, 1 U.S. 304 (1816); Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

[199] Although this article makes no representations regarding judicial decision-making models, this information is included to complete the picture.

[200] An Act to Establish the Judicial Courts of the United States, ch. 20, 1 Stat. 73 (1978).

[201] *Id.* at §§ 9, 11, 30, 34.

[202] *Id.* at §§ 9, 11.

[203] *Id.* at § 30.

[204] *Id.*

[205] *Id.* at § 34.

of whether the common law was integrated into the Constitution, especially with respect to crime, and whether the federal judiciary had jurisdiction in matters of common law.[206] Even before the end of the decade, the Democratic–Republicans feared that the judiciary had begun to consider themselves on par with the legislature in terms of governing and promoting law.[207] They attributed this to the practice of hearing cases of common law by the federal judiciary and the resulting decisions which tended to carry as much weight as national legislation.[208] The Federalist position was that the judiciary was acting just as it should, which should not be surprising given the high number of Federalist judges that populated the courts.[209] The issue first came to a head through open debate of the Alien and Sedition Acts.[210] Despite the obvious objections to the Alien and Sedition Acts[211] as a violation of the Bill of Rights, the Democratic-Republicans were angered at the expansive power they gave to the courts.[212]

A debate ensued over whether the language of Article III is restrictive or expansive, and whether common law falls under the jurisdiction of the federal courts.[213] Thomas Jefferson, a Democratic–Republican, argued that to deduce that the common law was a part of the Constitution was logically flawed.[214] He argued that the Constitution laid the foundation for all laws that followed, and therefore no law in the United States could precede it in time.[215] The only laws that were valid were those that became law through the system established by the United States Constitution.[216] Since common law existed prior to the Constitution through custom and precedent and not through the Constitution, it use could not be considered constitutional. For Jefferson and other Democratic–Republicans, the only hope for preserving liberty was a strict adherence to the letter of the law.[217] In their interpretation, the common law was uncertain and open to influence by the

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[206] SCOTT, *supra* note 199, at 22.

[207] HORWITZ, *supra* note 199, at 30.

[208] SCOTT, *supra* note 199, at 22–23.

[209] *Id.* at 22–23.

[210] *Id.* at 22; GARY MCDOWELL, *Equity and the Constitution*, 84 (The University of Chicago Press 1992).

[211] Alien Enemies Act, 50 U.S.C. §§21-24 (1798).

[212] "Beyond the more obvious problems the Alien and Sedition Acts presented to the Bill of Rights, they were being justified by the Federalists on the basis of common law, which they held had been carried over even after the constitution had been ratified." MCDOWELL, *supra* note 212, at 56.

[213] *Id.* at 56. *See also* SCOTT, *supra* note 199, at 23; James Stoner, *Is There a Political Philosophy in the Declaration of Independence?*, 40 INTERCOLLEGIATE REV. 3–12 (2005). It should be recognized that Article III of the US Constitution makes no mention of the common law. U.S. CONST. art. III.

[214] SCOTT, *supra* note 199, at 23; MCDOWELL, *supra* note 212, at 59.

[215] MCDOWELL, *supra* note 212, at 59.

[216] *Id.*

[217] *Id.*

national legislature and a court system that could, through manipulation of the common law, create a system of government that would take away state's rights and consolidate power at the national level.[218]

The Federalists on the other hand read more broadly the language of the Constitution and the implications of Article III.[219] They inferred from the necessary and proper clause[220] that Congress could enact laws based on common law thus preserving the authority of common law as it was assumed that if some of the common law was found acceptable by Congress then all must be found acceptable, particularly in cases of sedition and libel.[221] They further inferred that if this were true, then Article III, which states that the court has authority "arising under the Constitution," would grant the federal courts jurisdiction in sedition and libel cases.[222] The Federalists were accused of expanding the sphere of the national government beyond the bounds that a strict construction of the Constitution would allow.[223] The Federalist's defense was that in order to follow the Constitution, one must read into it the intentions and reasoning of the founders.[224] Since at this time the Federalists had a strong foothold in the national government, it served their interests to expand its authority.[225] The impasse ended with a Democratic-Republican victory, but the common law had taken a blow.[226]

Law, as it was discussed in this context, was a power struggle between political elites.[227] Laws passed were detrimental to one party but beneficial to another,[228] and it was for this reason the parties brought the issue to the forefront, not out of a concern for justice.[229] Second, both sides had seemingly abandoned common law as a part of the federal government. While the Democratic–Republicans argued that the common law had no place in the federal structure, the Federalists supported its transformation

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[218] *Id.*

[219] Scott, *supra* note 199 at 23.

[220] U.S. CONST., art.I, § 8, cl. 18.

[221] Scott, *supra* note 199, at 22–24. The reader should recognize the inverted logic of this position to be the same as that employed by the majority in *United States v. Ramirez*. 523 U.S. 25, 72–73 (1998). It seems more plausible to suggest that Congress only codified those areas of the common law they found applicable and decided that the remaining portions of the common law should not be employed. Had they wanted the whole of the common law incorporated it seems like they would have said so.

[222] U.S. CONST. art. III, § 2, cl. 1.

[223] MCDOWELL, *supra* note 212, at 52; Scott, *supra* note 199, at 23.

[224] SCOTT, *supra* note 199, at 23.

[225] *Id.* What should be noted is that the Federalists made no claim of federal common law jurisdiction in the courts. *Id.* at 24.

[226] *Id.* at 23.

[227] *Id.* at 12–16.

[228] *Id.* at 18, 23.

[229] *Id.* at 20.

into statutes.[230] While the Federalists may have seemingly approved of the common law through its codification in statute,[231] this process is destructive of the common law. The measures taken by each side damaged the common law, for even those who sought to preserve common law wanted to do so only through revising it.[232] By integrating it into the system through statute, or by relegating it to the states where it could be overruled by federal courts, the common law was at risk of being lost entirely, especially after its natural law foundation had been stripped away.[233] After the debate ended over the Alien and Sedition Acts, the debate over the common law receded into the background until the 1820's when a codification movement swept through America.[234]

While Jefferson had the federal judiciary in mind, his support of codification helped spur the codification movement at the state level, specifically in New York with the efforts of David Dudley Field.[235] The result of Jefferson's push for codification and legislative supremacy amounted to a miscalculation, as it led to a dismantling of the common law at the state level, a more politicized system of law and a more centralized legal structure.[236] This is not to suggest that Jefferson was the sole driving force behind the codification movement, but his opposition to the federal common law helped spur the movement along.[237] Jefferson, like those who supported codification, wanted a system of law that was less political and less subjective than the common law as they understood it.[238] Perhaps he was unconcerned with these contradictions because his judgment was clouded by his great opposition to the Federalist judiciary and his fear of what their decisions would bring.[239] Unfortunately for Jefferson and the Democratic–Republicans, their actions helped bring about what they feared more quickly than any of the Federalist's actions.

David Dudley Field was the first to take positive action in an effort to codify common law.[240] He began his movement in New York, seeking to pass reforms at the state level.[241] While he did not achieve his goal of

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[230] *Id.* at 23; MCDOWELL, *supra* note 212, at 51–55.

[231] SCOTT, *supra* note 199, at 24.

[232] *Id.* at 155–56.

[233] *Id.* at 27.

[234] CHARLES M. COOK, THE AMERICAN CODIFICATION MOVEMENT: A STUDY OF ANTEBELLUM LEGAL REFORM 46–47 (Greenwood Press 1981).

[235] COOK, *supra* note 236, at 24–25, 33; SCOTT, *supra* note 199, at 14 n.4, 25.

[236] SCOTT, *supra* note 199, at 22–23. Legal structure in this sense means the entire system of making, administering, and deciding law.

[237] *Id.* at 23.

[238] *Id.*

[239] DANIEL J. BOORSTIN, The Lost World of Thomas Jefferson 201–03 (University of Chicago Press 1981) (1948).

[240] SCOTT, *supra* note 199, at 25.

[241] *Id.*

bringing about complete codification, he was successful in laying the groundwork for future efforts.[242] The states that had been around the longest resisted his reforms,[243] and those states that came into the Union later and did not have a strong English settlement rapidly adopted Field's reforms, otherwise known as the Field Code.[244]

As was seen with Field, this debate was not relegated to a strictly theoretical forum; this debate was played out in the political arena. When Andrew Jackson assumed the Office of the President in 1829, he continued the Democratic–Republican tradition and sought to limit national government and increase the democratic features of the American system.[245] Jackson feared the nationalizing influence of the judiciary and sought to limit its authority.[246] The nationalism of Justice Story and the grass roots democracy of Jackson were the source of conflict between the two men.[247] Their disagreement over the role of government can be seen in the debate over common law and the judiciary.[248] Jackson looked at the judiciary and judicial discretion with great disregard.[249] Judicial discretion is at the heart of common law.[250] Jackson sought the passage of laws through the legislature which were in accord with a strict construction of the Constitution.[251] Jackson also sought the codification of laws that had previously been considered unreliable and subjective since they were part of a system that did not adhere solely to written law.[252] By codifying laws, through the creation of a more statute-oriented system of law, Jackson sought to reign in the powers of the judiciary by limiting its discretion, which was the source of much of its power.[253] This, according to Jackson's calculations, would place more power in the hands of the democratically elected legislature, thus giving more power to the people.[254]

Jackson, like Jefferson, was weary of the nationalizing tendency of the judiciary, in that he saw judges molding the common law to suit their political ends.[255] In order to counteract this perceived political maneuvering, he sought to restrict the judges by limiting common law

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[242] *Id.*

[243] *Id.* This chapter operationalizes the common law and codification in order to track its transformation through event-history analysis.

[244] *Id.*

[245] *Id.*

[246] *Id.*

[247] *Id.*

[248] *Id.*

[249] *Id.*

[250] *Id.*

[251] *Id.*

[252] *Id.*

[253] *Id.*

[254] *Id.*

[255] *Id.* at 26–27.

jurisdiction at the national level.[256] What Jackson did not see, much like Jefferson, was that his efforts moved to nationalize power more than the common law perhaps would have. That is, a codified law passed by the federal legislature would carry authority over state laws.

Justice Story was opposed to codification, and the reason was not that he was concerned with his own shrinking authority as a judge.[257] Justice Story's understanding of the law was that it was something more, something more deeply rooted and sincere, than mere positive decrees of the public will.[258] Law, for Justice Story, has a transcendent property that is impervious to superficial swings in public sentiment.[259] He did not believe that democratic principles should be ignored; only that law should not be susceptible to changes that were only temporary or reactive.[260] "Laws are the very soul of a people; not merely those which are contained in the letter of their ordinances and statute books, but still more those which have grown up of themselves from their manners, and religion and history."[261] In the same text, Justice Story further developed this point, stating that law is "founded, not upon any will, but on the discovery of a right already existing, which is to be drawn either from the internal legislation of human reason, or from the historical development of a nation."[262] Story harks back to the original understanding of common law in these quotes; he interjects human reason and natural law understanding back into a theory of law. Justice Story interjects principles which were abandoned by other Federalists.[263] Gary L. McDowell summarizes Justice Story's position on law and his place in the development of United States jurisprudence most aptly:

> Story was, in sum, the last major defender of the original understanding of equity as transmitted from Aristotle to Blackstone. He saw equity not as a mere set of procedural remedies but as a system of jurisprudence, an auxiliary to the strict law, which aimed at an understanding of justice that transcended the fluctuating decrees of popular consent. More than any other man of his time, Story sought to recover and preserve the ethical and moral basis of the law. He attempted this recovery and preservation through the scientific

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[256] *Id.* at 27.
[257] *Id.* at 25.
[258] *Id.*
[259] *Id.*
[260] *Id.*
[261] *Id.*
[262] *Id.* at 25–26.
[263] *Id.* at 26.

> elaboration of the vast tradition of the common law, of which equity was a part.[264]

Unfortunately for Justice Story, he saw the only way to protect this form of law was to develop a new science of equity; unfortunate because he failed to see the link between codification and the destruction of the common law he sought to preserve.[265] The only way he saw that there could be an exact science of equity was through written law, and written law is inimical to common law, which is what Justice Story was trying to preserve.[266]

Justice Story, it seems, fell into a trap. He wanted to preserve equity so much that he was willing to compromise it in order to preserve it. He recognized that he could only sell the concept of equity if it were bounded from becoming too expansive and allowing for too much judicial discretion.[267] In recognizing the connection between natural law and the principles of equity, he also recognized the dangers of leaving too much authority in the hands of the courts.[268] These factors combined to give him the motivation for creating a new science of equity. This science sought to develop a system of equity which respected its foundations while limiting the possibility of tyranny from the bench.[269] His focus was on procedural reforms of equity pleading as well as substantive equity.[270] His intention was to make these principles certain, so that they could be followed by practitioners of the law, and thus preserved.[271] Ultimately, Justice Story's efforts were, in many ways, self-defeating.[272]

Justice Story was not the only one who miscalculated the output of the system he supported. While Jackson feared nationalism,[273] the movement that he oversaw spawned a movement *towards* nationalism, if only through uniform adoption and application of the law by the states.[274] Furthermore, it became unclear how destroying the common law system would help preserve democratic principles. Before Jackson and the codification movement, the people's influence was felt directly by the legislature

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[264] *Id.*
[265] *Id.*
[266] *Id.*
[267] *Id.*
[268] *Id.*
[269] *Id.*
[270] *Id.*
[271] *Id.*
[272] *Id.*
[273] *Id.*
[274] *Id.*

through elections.[275] In a more subtle manner, the courts felt the will of the people.[276] By eliminating, or seeking to eliminate, many of the common law attributes within the judiciary, Jackson and the codification movement limited the people to expressing their will only through elections and being represented by the ensuing legislature. The more statute-oriented, and thus restricted, the judiciary becomes, the less it can represent the express needs of the community—one of the perceived benefits of a common law system.[277]

By the time the debate reached Justice Story and President Jackson, the natural law foundation had been stripped from the common law.[278] Natural law rested on the idea of a force greater than the state that could be relied upon as a guide for justice.[279] It was law independent of the state. Common law too was independent of the state, as it was shaped by history, custom and belief.[280] While common law judges were agents of the state, they traditionally served as advocates of the community.[281] By taking away the natural law foundation, the debate turned into one over how much power the national government should have with respect to the state governments.[282] There was also a debate over how law-making duties should be split between the legislature and the judiciary.[283] These debates do share a common thread with common law debates—the central concern was with the government's authority, and how best to manage it without compromising stability or liberty.[284] The debate over local versus national government, and legislative versus judiciary, was a direct derivative of the common law debate.[285]

Jefferson and Jackson shared the same concerns, but the miscalculations of Jefferson were not realized until Jackson took office under the same party flag as Jefferson.[286] Justice Story was not opposed to the common law, but his understanding of common law was distorted by

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[275] *Id.* at 26–27.

[276] *Id.* at 27. Again, in no way does this essay assert that the court reflected the attitudinal, legalist or any other judicial decision-making model. Rather, it is only asserted that people demonstrate their will primarily through the legislature rather than the courts.

[277] *Id.*

[278] *Id.*

[279] *Id.*

[280] *Id.*

[281] *Id.*

[282] *Id.*

[283] *Id.*

[284] *Id.*

[285] *Id.*

[286] MCDOWELL, *supra* note 212, at 72.

other influences.[287] For Justice Story, however, those influences were from the Enlightenment.[288]

As mentioned at the beginning of Section IV A, in 1789 the nation was already moving away from a federal common law as evidenced by the Judiciary Act of 1789.[289] In one of the First Congress' first acts, the early republic limited federal common law jurisdiction to only a few instances arising in civil matters.[290] This tradition was carried on by both the Democratic–Republicans and Federalists, primarily in the debates between Jefferson and the Federalists and between Story and Jackson. And in 1816, when the Court set down its jurisdiction and hierarchy of laws, it left out any discussion of the common law.[291] In *Martin v. Hunter's Lessee* there is no mention of the common law, but in its decision the Court clearly stated that the order of the laws descended from the Constitution at the top, to federal statute, to state constitutions, and finally to state law; the U.S. Supreme Court had jurisdiction in each of these areas.[292] This Court's categorization of laws was consistent with the Judiciary Act of 1789.[293] *Martin* was silent on the common law and the Judiciary Act makes only limited mention of it, thus indicating that the early Court and Congress did not recognize a federal common law; at least in these two instances.

Section IV B turns to a discussion of the Court's treatment of the common law in 1938 in order to complete our argument that the authority of the common law has decreased since the ratification of the constitution therefore making it an erroneous source of authority to rely on in *Hudson*.

B. Erie Railroad and Federal Common Law

In 1938, the Court was asked in *Erie Railroad Co. v. Thompkins* to consider application of federal common law.[294] Under diversity jurisdiction, a citizen of a state who presented a case or controversy involving a citizen of another state could file suit against the second person

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[287] *Id.* at 70.

[288] *Id.* The connection between Justice Story and the Enlightenment is not part of the relevant scope of this article, and thus is not fully explicated in this essay.

[289] Judiciary Act of 1789, 1 Stat. 73.

[290] *Id.*

[291] Martin v. Hunter's Lessee, 14 U.S. 304, 334–35 (1816).

[292] Setting aside the obvious cases of *Swift v. Tyson*, 41 U.S. 1 (1842) and *Erie R. R. v. Tompkins*, 304 U.S. 64 (1938), the Court did not articulate a position on the federal common law and its hierarchical position in relation to other forms of law. For this reason *Martin*, 14 U.S. 304, takes on even greater importance because the Court, had it recognized the common law as legitimate source of law under the Constitution, should have included it in its discussion of the legal hierarchy. See *Martin*, 14 U.S. at 334–35, 342–43.

[293] *Compare Martin*, 14 U.S. at 334–35, 342–43 *with* the Judiciary Act of 1789, ch. 20, 1 Stat. 73.

[294] *Erie*, 304 U.S. at 78–79.

in federal court.[295] Under Article III, § 2, Congress is empowered to grant diversity jurisdiction to United States District Courts.[296] Congress did just that in 28 U.S.C. § 1332.[297]

In Section 34 of the Judiciary Act, Congress provided that, "[t]he laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."[298] The question in *Erie*, however, was which jurisdiction's law should apply.[299]

However, in 1842, the Court had held in *Swift v. Tyson*[300] that federal courts exercising diversity jurisdiction need not apply the unwritten law of the state as declared by the State Supreme Court.[301] The *Swift* decision, therefore, limited the federal courts' interpretive ability to include only the positive statutes and construction thereof by state courts.[302] As the Court noted in *Erie*, the rule of *Swift* allowed for forum-shopping and the rendering of equal protection impossible.[303] Justice Brandeis wrote for the Court in *Erie*:

> *Swift v. Tyson* introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under the unwritten "general law" vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the noncitizen. Thus, the doctrine rendered impossible equal protection of the law.[304]

This discrimination became heavily prevalent.[305] Not only were people of one state relocating to another state in order to sue under diversity

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[295] 28 U.S.C. § 1332.
[296] U.S. CONST. art. III, § 2.
[297] 28 U.S.C. § 1332.
[298] Judiciary Act of 1789, ch. 20, 1 Stat. 73.
[299] *Erie*, 304 U.S. at 71.
[300] Swift v. Tyson, 41 U.S. 1 (1842).
[301] *Id.* at 19.
[302] *Id.* at 16
[303] *Erie,* 304 U.S. at 74.
[304] *Id.* at 74–75 (footnote omitted).
[305] *Id.* at 76; Note, Swift v. Tyson *Overruled*, 24 VA. L. REV. 895, 897 (1938).

jurisdiction, corporations reincorporated under the laws of another state to seek protection from civil suits.[306]

In overturning *Swift*, the Court made one recognition that was important to the present discussion: "There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,'"[307] For the Court, this was a state's rights issue. Justice Brandeis for the Court:

> [T]here stands as a perpetual protest against its repetition, the Constitution of the United States, which recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the state, and, to that extent, a denial of its independence.[308]

Read in light of *Erie*, *Hudson's* and *Wilson's* reliance on the common law makes even less sense. The objection can be made that there is a federal common law independent of the English common law and therefore we have incorrectly conflated the two. However, in *Hudson*, it is the English common law that is referred to and therefore it is necessary to show that the development of the American common law has been a move away from English common law which then makes *Hudson's* reliance on English common law erroneous.[309]

After tracing the nation's early history, and referencing the Court's direct refusal to grant a federal common law, the discussion is ready to move to what this means for the Court's claims of federalism and originalism. The majority opinions in *Wilson*, *Richards* and *Hudson* rely on a common law to inform their understanding of the Constitution and

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[306] *Erie*, 304 U.S. at 73–75 (discussing the practical effect which Swift had on potential plaintiffs and defendants). *See, e.g.*, Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 523 (1928) (noting that Brown & Yellow, originally a Kentucky corporation, re-incorporated in Tennessee for the express purpose of establishing diversity jurisdiction in a United States court).

[307] *Erie*, 304 U.S. at 78.

[308] *Id.* at 78–79.

[309] Hudson v. Michigan, 126B S.Ct. 2159, 2162 (2006) (where Scalia writes "[t]racing its origins in our English legal heritage").

statute, which creates the functional equivalent of a new statute and a new reading of the Constitution.

But this is only problematic if there is another legal source on which the Court could have based its opinion that had more legitimacy than the common law. The next section demonstrates how the Court could have employed statute instead of the common law.

C. Federal Statute as a Legitimate Option

As noted above, Congress passed as part of the Espionage Act of 1917 what is now § 3109. In addition to being a general codification of the general common law principles announced in *Semayne's Case*, § 3109 provides a uniform standard, which presumably pre-empts state statutory law as well as state case law.[310]

Section 3109, however, contains no explicit exceptions to the common law rule from *Semayne's Case*.[311] Although the Court has made explicit mention of this fact in attempts to explain away apparent discrepancies,[312] the Court has noted that, "[e]xceptions to any possible constitutional rule relating to announcement and entry have been recognized . . . and there is little reason why those limited exceptions might not also apply to § 3109."[313] What the Court does not address is the location of the exceptions to the rules recognized — state statutory law and state common law.

In *Ramirez*, Chief Justice Rehnquist noted that the question of whether § 3109, in its codification of the common law doctrine, includes the exceptions recognized in prior common law cases had not been decided previously.[314] That question was at the heart of the Court's decision in *Ramirez*, with the Court deciding in the affirmative.[315] Since the Court has stated in no uncertain terms that neither *Miller* nor *Sabbath* speak to the issue at hand, *Ramirez* is the only case which need be cited.[316] Subsequent cases have overlooked § 3109 as an available remedy in favor of state-based common law solutions.[317]

Given that the Court's decision in *Ramirez* recognized the exceptions to § 3109,[318] but did so based largely on state exceptions, it is appropriate to ask whether or not the Court is subverting federal statutory law to state

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[310] The doctrine of pre-emption is a subject explored semi-recently in Egelhoff v. Egelhoff, 532 U.S. 141 (2001); Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000).

[311] United States v. Ramirez, 523 U.S. 65, 72–73 (1998).

[312] *Id.* at 72–73 (noting that neither *Miller* nor *Sabbath* recognized exceptions to the common law requirements of notice before entry).

[313] *Id.* at 65, 73.

[314] *Id.* at 73.

[315] *Id.*

[316] *Id.* at 72–73.

[317] *See, e.g.*, Atwater v. City of Lago Vista, 532 U.S. 318 (2001).

[318] *Ramirez*, 523 U.S. at 73.

common law, and thereby reversing the order of reliance indicated by § 34 of the Federal Judiciary Act of 1789.[319] The reasoning offered by the Court in *Ramirez* is similar to the other four knock and announce cases. Moreover, the same options available to the court in *Ramirez* were available to the Court in the other decisions as well.

V. IMPLICATIONS FOR FEDERALISM AND ORIGINALISM

The above sections have shown how in the most recent knock and announce cases the Supreme Court has relied on the common law to provide exceptions. The above sections have also demonstrated that the common law has traditionally had a weak legal grounding in the federal arena, beginning with the Judiciary Act of 1789, progressing through *Martin v. Hunter's Lessee*, to debates between Hamilton and Jefferson, and finally to *Erie*. The above sections have also shown that the Court had other options in making its decision, moreover, its refusal to recognize these other options raises questions about the Court's method of interpretation, its New Federalism doctrine,[320] and its commitment to originalism. Part V will progress through each of these questions and end with a brief statement about the implications these decisions have on the Court's authority to make law.

A. Statutory Interpretation, Originalism, and an Upside Down Hierarchy

The interpretative approach taken by the Court in the five knock and announce cases under consideration raises a number of questions. Each of these cases asked the Court if there are any exceptions to the knock and announce rule, with the Court deciding in the affirmative. In making its decisions the Court interpreted § 3109 to say that since it codified the knock and announce rule at common law, that it also included the exceptions found at common law.[321]

The Court's logic here seems to be flawed. If Congress took the effort in 1917 to codify a part of the common law, then the proper conclusion would be that since it did not codify the exceptions, it excluded the exceptions intentionally. It makes little sense to codify one aspect and leave the other unchanged unless the intention was to eliminate the other or at least give it a lower stature. This reasoning would have to assume that

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[319] Judiciary Act of 1789, ch. 20 § 34, 1 Stat. 73 (1789).

[320] The Court announced in Michigan v. Long that if a state court decision appears to rest on adequate and independent state grounds, the Supreme Court will not review the decision. 463 U.S. 1032, 1040–41 (1983).

[321] *Ramirez*, 523 U.S. at 73. In United States v. Banks, Justice Souter wrote for a unanimous Court that, based upon the reasoning provided in *Richards* and *Wilson*, § 3109 implicates the exceptions that are found at the common law since the statute is based upon the common law. 540 U.S. 31, 42–43 (2003).

Congress thought that the exceptions to the knock and announce rule did not need to be codified, while codification was required for remainder of the rule. Also, if Congress was aware of the rule at common law, then it should have been equally aware of the exceptions that the common law provided. Thus, the exclusion of the exceptions was likely intentional. The most accurate and consistent interpretation of the statute is one in which interprets Congress's action as a move away from the common law, rather than towards it.

The rejoinder to his argument is that Congress knew that it would not be able to enumerate all of the necessary exceptions and therefore left those exceptions to be provided by the states and the Courts. However, if that was the Congressional intent, there is certainly no textual or historical evidence on record to suggest such an intention. If that had been the Congressional intent then they could have very easily added two sentences to the statute stating as much.

To interpret the statute the way that the Court chose to, the Justices must have inferred legislative intent, and considered legislative history. In no way is such an interpretation strategy intrinsically problematic, but questions arise when one finds that professed originalists applied this methodology.[322] Justice Scalia wrote the majority opinion in *Hudson*, Justice Thomas in *Wilson*, Justice Rehnquist wrote *Ramirez*, and all three joined in the majority opinion in *Banks* and *Richards*. While it is understandable that the Justices' positions on the exclusionary rule would lead them to decide the way they did in these cases, their jurisprudence runs contrary to what was practiced in these cases.

Aside from logically flawed interpretation and jurisprudential inconsistency, there is another problem with using the common law to inform the interpretation of the statute in the manner it was applied here.

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[322] ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW AN ESSAY 74 (1997); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN L. REV. 849, 851–52 (1989).

> In [Scalia's] view originalism is a species of textualism . . . . Article III judges have no authority to pursue abstract principles of right or the advancement of social justice . . . . According to Scalia, ours is a system of law, not men; pursuing legislative intent rather than interpreting the law as written would elevate men above the law. Pursuit of legislative intent may also veil judicial legislation.

David C. Gray, *Why Justice Scalia Should Be a Constitutional Comparativist . . . Sometimes*, 59 STAN. L. REV. 1249, 1256–57 (2007) (footnotes omitted). However, this is not to say that Scalia, Thomas and Rehnquist all share the same view on originalism. While Rehnquist sometimes sides with the originalists, he is most commonly characterized as a pragmatist. Jeffrey Rosen, *Rehnquist the Great?*, ATLANTIC MONTHLY. Apr. 1, 2005 at 79, 88. Thomas on the other hand is closer to Scalia's model, but allows for historical contexts to inform his understanding of a particular law. SCOTT DOUGLAS GERBER, FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS 46–47 (1999). Given their differences in jurisprudence, we find it shocking that each, particularly Thomas and Scalia, would use the common law and congressional intent—in which they assume the intention was an indication of Congress's understanding of the common law and therefore Congress must have meant to include the exceptions rather than Congress's awareness of the common law and intentionally excluded the exceptions—in *Hudson* in particular.

As charted above, the legal history of the United States has been a consistent move away from the common law. Beginning in 1789 and culminating in 1938, the common law was largely abandoned or at the very least changed from its 13th Century English roots in favor of statutory and constitutional law.[323] More importantly, however, is the place in the legal hierarchy within which the common law falls. The foregoing sections show that the common law is inferior to federal law and should, in no instance preempt it. Yet that is effectively what has been done in the five knock and announce cases from *Wilson* through *Hudson*.

By codifying a law, the law is removed from the common law and placed into the realm of statutory law. In the American system, federal statutory law was historically given preference over common law, with the exception of these five cases.[324]

B. Implications for New Federalism

In the face of growing national power, the Rehnquist Court sought to return power to the states in order to help reinstitute a proper balance between the national and state powers.[325] There are many examples of these cases,[326] and numerous studies[327] dedicated to this topic, which makes a comprehensive rehearsal of the New Federalism principles unnecessary in this article.[328] It is suggested, however, that in deciding these cases in this way, the Court went beyond the doctrine of New Federalism and has tipped the balance too far in the direction of state's rights.

As shown in the previous sections, in order to provide exceptions to the knock and announce rule of § 3109, the Court looked to—in addition to

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[323] *See* WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830, 8–10, 165–77 (Harv. Univ. Press 1975).

[324] *See* David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739 (2000) (a recent article providing a nice example of the Court's reliance on the common law to interpret the Fourth Amendment). The present article agrees with Sklansky's central point, that common law originalism is not really originalism but merely a method used by the Court to grant itself latitude in interpretation.

[325] *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995). Although these cases are admittedly the focus of a great deal of literature on the subject of interstate commerce, they exemplify the point that the Rehnquist Court sought to devolve power to the States.

[326] *See Morrison*, 529 U.S. 598; *Lopez*, 514 U.S. 549; Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985); Michigan v. Long, 463 U.S. 1032 (1983).

[327] *See* Shirley Abrahamson & Diane Gutman, *The New Federalism: State Constitutions and State Courts*, 71 JUDICATURE 88, 90 (1987). *See generally* SUSAN P. FINO, THE ROLE OF STATE SUPREME COURTS IN NEW JUDICIAL FEDERALISM (Greenwood Press 1987); Timothy J. Conlan & Francois Vergniolle De Chantal, *The Rehnquist Court and Contemporary American Federalism* 116 POL. SCI. Q. (2001).

[328] *See Morrison*, 529 U.S. at 644–45 (Souter, J., concurring); *Lopez*, 514 U.S. 549, 568–71, 574–78, 583 (Kennedy, J., concurring).

the common law—the states for help in understanding what exceptions to the knock and announce rule should be allowed. In four of the five cases this article focuses on, the state in which the suit originally arose allowed for exceptions to the knock and announce rule at the time the Court handed down its decision, and the Court used the state law—in addition to the common law—to define the exceptions.[329] While on the surface this may not appear problematic, but when the implications are considered, the Court's methodology is troubling. There is no Constitutional justification for defining a federal statute through state law, and the Court does not provide one. The Court, throughout its history, has stated that state law is inferior to the national law.[330] Nevertheless, in these four knock and announce cases the Court uses state law to preempt federal law.

As discussed in Part V(A), under the Court's plain meaning interpretative strategy, and the methodology employed in *FDA v. Brown and Williamson Tobacco*,[331] the Court has asserted that the statute must be interpreted in its most literal form, and when there is confusion other statutes within the same area must be consulted.[332] Under this formula the Court's interpretation of § 3109 is flawed with substantial deviation from the formula previously developed. If one assumes, as the Court does, that § 3109 is codification of previous common law, then one must also assume that omissions of the exceptions to the knock and announce rule found at common law must have been intentional. In order to side-step this interpretation—which they subsequently return to—the Court resorts to reliance on state law.[333] In looking to avoid one error, the Court creates another, much greater, logical error. By relying on the state law, instead of wholly on federal law, the Court tacitly admitted that it needed some other justification for providing exceptions to § 3109 beyond federal law, as federal law provided no adequate exceptions.[334]

In *Richards*, *Hudson*, *Wilson*, and *Ramirez*, state law was relied on to provide the exception. The Court has consistently held, since the passage of the Judiciary Act, that the state law can stand so long as it does not

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[329] *United States v. Banks* is the only case in which the state had no case law or statutory law speaking on the matter. *See* 540 U.S. 31, 42–43 (2003). Since the Court decided *Banks* in 2003, the Court relied extensively on *Richards* and *Ramirez*. *Id.* at 36–38.

[330] *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372–73 (2000) (tracing the lineage of preemption by Congress of state statutes). *See also* McCullough v. Maryland, 17 U.S. 316 (1819); Martin v. Hunter's Lesee, 14 U.S. 304 (1816).

[331] FDA v. Brown & Williamson Tobacco, 529 U.S. 120 (2000).

[332] *Id.* at 132–33.

[333] *See supra* Part III.

[334] While the Court eventually finds federal common law to provide a source of exceptions, in looking to state law they treat the federal common law exceptions as insufficient, or at least, in need of support from other sources. Thus, they are running two simultaneous arguments whose logical deductions allow them to only make one.

come into conflict with a federal law or the Constitution.[335] However, in these four cases, the state law conflicts with the federal statute, and thus should have been set aside as pre-empted by the federal statute.

In a direct sense, the Court, in these four cases, has substituted state law for a federal statute, which represented a resurgence of the doctrine of New Federalism.[336] Indeed, these decisions effectively brought about a new era of state control over the application of the Fourth Amendment to the states. At a minimum, the Court was saying that in Fourth Amendment cases, state law can be used to supplement the understanding of federal law. At a maximum, the Court was saying that a state law can preempt a federal statute. Either interpretation cedes an enormous amount of authority to the states.

By relying on state law the Court avoids the initial problem associated with interpreting § 3109 as codified common law, which would then exclude any exceptions. But in doing so they fell into another trap.[337]

C. Originalism

Originalism, as noted an earlier section,[338] is a more specific application of textualism.[339] Originalism's application is limited to interpretation of the Constitution and statutes based on a clear meaning of the text.[340] In order to make the case against the Court's interpretation—of *Hudson* in particular—in a more forceful manner, an exploration into the remaining defense the Court might levy on its own behalf for its knock and announce decisions is warranted. When completed, this analysis will demonstrate that one who consistently applies the originalism logic of the Court could not have reached a decision granting exceptions in these knock and announce cases and remain consistent with the tenets of originalism.

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[335] *See Crosby*, 530 U.S. at 372–73.

[336] If a state court decision appears to rest on adequate and independent state grounds, the Supreme Court will not review the decision. Michigan v. Long, 463 U.S. 1032, 1040–41 (1983).

[337] It is suggested that the precedents in these cases are inconsistent with the traditional approach of reading federal law superior to state law.

[338] *See infra* Part V.A.

[339] Gray, *supra* note 324, at 1256–58

> There is no more influential defender of originalism than Justice Scalia. In his view, originalism is a species of textualism. . . . Pursuit of legislative intent may also veil judicial legislation. As a matter of fact, the many legislators who join to pass a law seldom share a single, unified intent. Moreover, the sources most cited as evidence of legislative intent sometimes reflect the opinions of very few legislators, or even not at all. Originalists worry that attempts to find legislative intent therefore impose little actual discipline on judges.

Id.

[340] Scalia, *supra* note 324, at 851–52.

In a recent discussion at Harvard Law School, Justice Scalia said,

> The choice that you're confronted with is simple whether [the Constitution] is a legal document, like all other legal documents. We don't think that a statute changes its meaning. But if you think that all these provisions—due process of laws, equal protection of the law, cruel and unusual punishment—are just empty bottles which each successive generation of Americans should fill up with whatever content they think is desirable, then why in the world should the content of those bottles be determined by nine lawyers? If you want an evolving Constitution, you should be honest about it and say whatever Congress says is what reflects the current, most deeply held beliefs of the American people.[341]

The previous section[342] demonstrated that Scalia and the others in the majority did change the meaning of a statute, despite statements to the contrary. But the previous sections did not conclude that the Court has made the Constitution an "empty bottle." While this article does not pretend to go so far as to say that the Court's treatment of a single issue is sufficient to negatively impact the entire Constitution, it is suggested that in this, specific area of law, the Court has read something into the Constitution that is not there.

If the reading of the Constitution is not confined to the four corners of the document, the low status of the common law must be recognized.[343] An originalist cannot rely on the common law to interpret the Constitution or a statute because the common law was taken out of the Constitution early in its development.[344] Even while the majority in *Banks* held that the common law informs our understanding of the Fourth Amendment, it cannot, for the same reasons, inform our understanding of § 3109. If the framers of the amendment were codifying the common law, then it must be assumed they codified those aspects of the common law they desired to be

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[341] Antonin Scalia, A Conversation with Justice Scalia, Harvard Law School, Feb. 2007, *available at* http://www.law.harvard.edu/news/today/hlt_feb07_scalia.php (last visited May 22, 2008).

[342] *See supra* Parts V.A–B.

[343] This argument has been made in the above sections, but to recount for clarity's sake, under the Supremacy Clause—and its subsequent interpretation and application by the Court—the common law is not mentioned, the Judiciary Act of 1789 relegates it to a procedural and state matter, as argued in Parts IV.A–C.

[344] *See supra* Parts IV.A–C.

maintained.[345] The legislative history of the Fourth Amendment does not provide support for the exclusionary rule or its exceptions, and even if it did, Scalia, and perhaps even Thomas, would discount those affirmative findings as meaningless given their allegiance to statutory interpretation apart from legislative history.[346]

Originalism suggests that the real issue that should be discussed is the relationship between § 3109 and the Fourth Amendment, which would force a reconsideration of the exclusionary rule in light of these new considerations, independent of what the common law or state law says.[347] As an originalist, Scalia—and to some degree Thomas—should have first determined whether the Fourth Amendment allows for an exception to the knock and announce rule. If the answer to that question is in the affirmative, then §3109 should have been struck down on its merits in *Wilson*, which would have led the Court to interpret the state law in direct comparison with the Fourth Amendment.[348] However, it is unclear how an originalist would find exceptions to the knock and announce rule in the Fourth Amendment if he or she only considers what is written in the document. The only way to get an exception to the knock and announce rule into the Fourth Amendment is to read the common law into the amendment, or read into the legislative history, both processes which the Scalia version of the originalist school traditionally deplores, yet in these cases embraces.

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[345] It is fully recognize that this has implications for the arguments at the time of the ratification. It is well-known that many who opposed the Bill of Rights did so because they felt their inclusion would lead some to believe that all other rights are to be excluded. This is not asserted, but what is stated is that the rights not included are not necessarily for the Court to insert itself.

[346] It should now be obvious that this article is in direct opposition to those scholars who think common law reasoning is a reasonable alternative to textualism and originalism. *See* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996). Furthermore, central to the common law tradition is a divide between courts of law and equity, which makes the common law method impossible in the U.S. Supreme Court for the very reasons put forth over two hundred years ago by the Anti-Federalist Brutus. THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 335–38 (Cecelia M. Kenyon ed., The Bobbs-Merrill Company 1966). Furthermore, one should be wary of those studies that ask us to congratulate the Court for resorting to a study of legislative history and common law originalism. *See* Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1 (1998). Professor Schacter would likely not be in favor of the sort of judicial law-making in the knock and announce cases. The common law was intended to be a buffer between the people and the government, and placed restraints while providing latitude. Edward L. Glaeser & Andrei Shleifer, *Legal Origins*, 117 Q.J. Econ. 1193, 1195 (2002). The knock and announce cases demonstrate that without the proper historical context and institutions, common law reasoning does not work. This article does not depart from Sklansky who says that the common law is primarily grounded in its method and its rules. Sklansky, *supra* note 326, at 1813–14. It is suggested that the common law is molecular and therefore separating the rules and the method changes its composition entirely. Both must be in place.

[347] U.S. CONST. amend. IV.

[348] Section 3109 should have been struck down because it does not allow for exceptions when the Constitution does, thus the statute would be in tension with the Constitution.

Therefore, by a logical deduction confined by the rules of originalist interpretation, exceptions to the knock and announce rule cannot be found in a federal statute or the Fourth Amendment. Thus, state exceptions to this rule should have been struck down.

VI. CONCLUSION

This article examined the Court's reasoning in the most recent knock and announce cases, and questioned the application of the common law to statutory and constitutional interpretation. In sum, the Court's application of the common law in this matter has lead to a preemption of federal statute and the Constitution by the common law and state law. It is suggested that these cases represent a departure from the Court's New Federalism doctrine as well as its professed reliance on originalism and textualism as a method of interpretation.