

## An Examination of the Coherence of Fourth Amendment Jurisprudence

Nicholas Kahn-Fogel

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# AN EXAMINATION OF THE COHERENCE OF FOURTH AMENDMENT JURISPRUDENCE

*Nicholas Kahn-Fogel\**

*For decades, scholars have routinely attacked the Supreme Court's Fourth Amendment jurisprudence as an incoherent mess, impossible for lower courts to follow. These scholars have based their claims almost entirely on qualitative analysis of the Court's opinions. This Article presents the first systematic evaluation of the consensus view of Fourth Amendment law as incoherent. The primary method I use to evaluate the coherence of the body of law is an assessment of lower court performance on Fourth Amendment issues the Supreme Court would later resolve. Because the Supreme Court's agreement with lower courts likely reflects, at least in part, the clarity of the Supreme Court's previous pronouncements, a high rate of agreement between lower courts and the Supreme Court would tend to suggest the coherence of the field. On the other hand, if the Court concludes most lower courts got the wrong answer to a Fourth Amendment question, that conclusion suggests either a lack of clarity in the Court's precedent or that the Court simply shifted course after having issued seemingly straightforward pronouncements in the past. Either of these possibilities would suggest a kind of incoherence or instability in Fourth Amendment law. I examine lower court decisions dealing with issues the Supreme Court subsequently addressed over the course of twenty Supreme Court terms. Because Supreme Court cases tend to deal with the most difficult, divisive issues, I also compare the frequency with which the Court has felt compelled to review Fourth Amendment questions to the rate at which the Court has dealt with other important constitutional issues.*

*In addition to tracking the performance of lower courts, I track variables that might impact the likelihood of lower courts reaching "right" answers to Fourth Amendment questions. Because the process the Court uses to resolve a case gives clues about the kind of guidance the Court has previously provided on an issue, I account for whether the Supreme Court used open-ended balancing or a more constrained form of analogical reasoning from precedent to resolve each case in the data*

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*set. I also assess whether the directive the Court issued for each case took the form of a bright-line rule or an open-ended standard. Finally, because several scholars have recommended reference to positive law as a means of clarifying Fourth Amendment law, I evaluate the Court's reliance on positive law to resolve Fourth Amendment questions during the twenty-year period.*

*Ultimately, the results show that lower courts have reached the "right" answers to Fourth Amendment questions about as often as lower courts have reached the "right" answers to all questions the Supreme Court later reviews. Furthermore, the Court has not felt compelled to resolve Fourth Amendment questions at a rate that seems disproportionate to other important constitutional matters. These data point toward the plausible conclusion that Fourth Amendment law is not particularly incoherent, as compared with other areas of law. Examination of the Court's use of positive law reveals that the Court has, for the most part, not relied on positive law in ways likely to enhance significantly the coherence of Fourth Amendment law. Thus, a more principled approach to using positive law to resolve Fourth Amendment questions might increase the coherence of the field. Finally, analysis of the data suggests the Court should issue directives in the form of bright-line rules instead of open-ended standards if it hopes further to enhance the clarity of Fourth Amendment law.*

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## INTRODUCTION

For decades, scholars have attacked the Supreme Court's Fourth Amendment jurisprudence as an incoherent mess. In making such claims, these scholars have tended to rely on qualitative analysis of the Court's opinions and of the text and history of the Fourth Amendment. This study subjects these claims to empirical examination. It analyzes the coherence of the Supreme Court's Fourth Amendment decision-making by evaluating the extent to which state high courts and federal courts of appeals reached the "correct" results on Fourth Amendment issues on which the Supreme Court later ruled. I also track the frequency with

which the Supreme Court feels compelled to resolve Fourth Amendment questions, as compared with other categories of cases. The Study includes an analysis of twenty years of the Court's Fourth Amendment jurisprudence.

In addition, the Study tracks variables that might impact the success of lower courts in reaching the "right" results, including the process the Court used to derive its directive for each case and whether, ultimately, the Court's holding requires future courts to apply a bright-line rule or an open-ended standard. Because a number of scholars suggest that reference to positive law to determine questions of Fourth Amendment reasonableness could provide greater clarity in Fourth Amendment jurisprudence, the Study also tracks the extent to which Court opinions have relied on statutes or common law principles to support the Court's determinations.

Ultimately, the results suggest that, in recent decades, lower courts have reached the "right" answers to Fourth Amendment questions most of the time. Additionally, the performance of lower courts on Fourth Amendment issues has been roughly comparable to the performance of lower courts on all issues the Supreme Court addresses, as revealed by comparison to other studies that have analyzed lower court performance for other purposes. The Court also has not felt compelled to address Fourth Amendment questions at a rate that seems disproportionate to its overall criminal procedure docket or to its treatment of other important constitutional matters. These data point toward the plausible notion that the Court has provided better guidance to lower courts on Fourth Amendment questions than the consensus among scholars would suggest. Finally, the results indicate that the Court should formulate its Fourth Amendment directives as bright-line rules rather than leaving lower courts to open-ended balancing on a case-by-case basis if the Court hopes to increase the coherence of Fourth Amendment law.

In Part I of this Article, I will summarize the critiques of the Supreme Court's Fourth Amendment jurisprudence that provided the impetus for this Study. I will also discuss rare efforts to use comprehensive theories to describe and defend past Fourth Amendment decision-making as fitting within a coherent theoretical framework. A close reading of cases in the Study provides an opportunity to assess some of these theories. In Part II, I will explain the methodology of the Study. The measurement of circuit splits, on which this Study's validity depends, is fraught with difficulty. Although I have taken precautions to enhance the accuracy of my findings, I could not eliminate entirely the pitfalls associated with assessing the dispositions of lower courts on issues the Supreme Court eventually resolved. Additionally, even a clear demonstration that most lower courts decided Fourth Amendment issues

“correctly” as determined by the Supreme Court’s ultimate resolution would not necessarily prove that Supreme Court decision-making led those lower courts to reach the “right” result. Rather, it could be the case that the weight of lower court decision-making influenced the Supreme Court’s disposition of Fourth Amendment issues. For reasons I will discuss in Part II, however, I believe that lower court decisions consistent with the Supreme Court’s ultimate resolution are an indication of the coherence and clarity of the Supreme Court’s Fourth Amendment jurisprudence. In Part III, I will describe the results and implications of the Study.

### I. PREVIOUS SCHOLARSHIP

The complaint that the Supreme Court’s Fourth Amendment jurisprudence is incoherent is longstanding and widely accepted by legal scholars. For decades, authors have characterized the Court’s pronouncements on the Fourth Amendment as “illogical, inconsistent with prior holdings, and, generally, hopelessly confusing”;<sup>1</sup> “a mass of contradictions and obscurities”;<sup>2</sup> “an embarrassment”;<sup>3</sup> “arbitrary, unpredictable, and often border[ing] on incoherent”;<sup>4</sup> “lack[ing] a coherent explanation”;<sup>5</sup> and “subjective, unpredictable, and conceptually confused.”<sup>6</sup>

An assertion that the Court’s holdings have been incoherent has at least three possible meanings, and authors often fail to parse out the distinctions among those meanings when critiquing the Court’s rulings. First, a claim of incoherence might mean the Supreme Court’s Fourth Amendment jurisprudence bears no logical relationship to the text of the Fourth Amendment or to the intended functions of the Fourth Amendment at the time it was adopted. Second, the claim might mean the directives the Supreme Court issues to solve Fourth Amendment problems are too unclear for law enforcement officers or courts to understand what kinds of governmental conduct are authorized, even when dealing with situations to which those directives obviously apply. Third, the claim

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<sup>1</sup> Wayne R. LaFare, *Fourth Amendment Vagaries (of Improbable Cause, Imperceptible Plain View, Notorious Privacy, and Balancing Askew)*, 74 J. CRIM. L. & CRIMINOLOGY 1171, 1171 (1983).

<sup>2</sup> Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468 (1985).

<sup>3</sup> Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757 (1994).

<sup>4</sup> David E. Steinberg, *Restoring the Fourth Amendment: The Original Understanding Revisited*, 33 HASTINGS CONST. L.Q. 47, 47 (2005).

<sup>5</sup> Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 478 (2011) (describing critiques others have leveled at Fourth Amendment jurisprudence).

<sup>6</sup> William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1823 (2016).

might mean that, although the individual directives the Court has issued give clear guidance to Courts and law enforcement when dealing with the precise situations governed by those directives, the Court has not articulated a sufficiently clear set of overarching Fourth Amendment principles to guide lower courts when those courts are confronted with novel Fourth Amendment problems.

The second two kinds of incoherence are conceptually distinct from the first; it would be possible to establish clear directives that offer useful guidance for law enforcement officers and courts in recurring factual scenarios even if those directives bear no relationship to any reasonable contemporary interpretation of the Fourth Amendment's text or to original understandings of its meaning, and it would be possible to craft an internally consistent precedential framework for solving new Fourth Amendment problems that offers doctrinal predictability to lower courts even if that framework bears no relationship to the Fourth Amendment's text or history. This Study will examine the second two kinds of claims. Nonetheless, because incoherence in the sense of a lack of clear direction to law enforcement officers about how to behave and to courts about how to evaluate that behavior might result from the first kind of incoherence, and because some authors have argued that is the case, I will summarize scholarly arguments that the Court's interpretation of the Fourth Amendment bears little relationship to the text of the Amendment or to historical understandings of its function.

The Fourth Amendment contains two independent clauses.<sup>7</sup> The first, the Reasonableness Clause, prohibits unreasonable searches and seizures.<sup>8</sup> The second, the Warrant Clause, describes the requirements for obtaining a valid warrant.<sup>9</sup> The relationship between these two clauses is unclear from the text of the Amendment alone. It is possible to construe the requirements of the Warrant Clause as implicitly delineating the conditions for the reasonableness of any search or seizure.<sup>10</sup> Alternatively, one might read reasonableness as the overarching command of the Amendment and interpret the Reasonableness Clause to be not just grammatically, but also conceptually, independent from the Warrant Clause.<sup>11</sup> Under this theory, the Warrant Clause merely sets out requirements for a

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<sup>7</sup> The text of the Fourth Amendment reads as follows: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> See, e.g., *California v. Acevedo*, 500 U.S. 565, 581–82 (1991) (Scalia, J., concurring); Ricardo J. Bascuas, *Property and Probable Cause: The Fourth Amendment's Principled Protection of Privacy*, 60 RUTGERS L. REV. 575, 595–97 (2008).

<sup>11</sup> Bascuas, *supra* note 10, at 596–97.

valid warrant when the government seeks a warrant, but it does not modify the Reasonableness Clause.<sup>12</sup> Nonetheless, by the middle of the twentieth century, the prevailing view on the Supreme Court was that the Warrant Clause does modify the Reasonableness Clause and that, “subject only to a few specifically established and well-delineated exceptions,”<sup>13</sup> a warrant is required to render any search or seizure reasonable.<sup>14</sup> Under this view, warrants issued by neutral judicial officers are necessary to protect citizens against potential abuse by law enforcement officials engaged in the “often competitive enterprise of ferreting out crime.”<sup>15</sup>

Prominent commentators have long argued that not only does the text of the Fourth Amendment not require the government to obtain warrants in all, or almost all, cases to render its searches and seizures reasonable, but that the Amendment’s history also suggests the Framers did not favor the broad use of warrants.<sup>16</sup> Rather, the historical context in which the Amendment was conceived may reveal that the Framers intended the Warrant Clause as a mechanism for ensuring that the use of warrants would be a relative rarity. The chief evil the Framers sought to use the Fourth Amendment to redress was the common use of general warrants and writs of assistance during the colonial period.<sup>17</sup> These warrants, which were often issued by executive officials,<sup>18</sup> permitted colonial officers to search for seditious materials and evidence of customs violations at will, without any need for individualized suspicion.<sup>19</sup> Crucially, possession of a valid warrant provided government officers with absolute protection against civil liability in trespass actions,<sup>20</sup> which were the primary means by which aggrieved citizens contested government searches and seizures during the colonial period and beyond.<sup>21</sup> In the absence of a

<sup>12</sup> See, e.g., *id.*

<sup>13</sup> *Katz v. United States*, 389 U.S. 347, 357 (1967).

<sup>14</sup> See, e.g., *Acevedo*, 500 U.S. at 582 (Scalia, J., concurring) (noting that this view had prevailed “at least rhetorically” by the late 1960s).

<sup>15</sup> *Johnson v. United States*, 333 U.S. 367, 369 (1948).

<sup>16</sup> See, e.g., TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 38–44 (1969); Bradley, *supra* note 2, at 1486; Amar, *supra* note 3, at 759, 774–75.

<sup>17</sup> See, e.g., Sam Kamin & Justin Marceau, *Double Reasonableness and the Fourth Amendment*, 68 U. MIAMI L. REV. 589, 597 (2014).

<sup>18</sup> See Amar, *supra* note 3, at 772–73.

<sup>19</sup> *Stanford v. Texas*, 379 U.S. 476, 481 (1965) (“Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of British tax laws.”); Kamin & Marceau, *supra* note 17, at 597 (“In drafting the Fourth Amendment the founders were reacting in large part against the issuance of general warrants which permitted wide-spread searches for seditious materials.”).

<sup>20</sup> See Amar, *supra* note 3, at 777–78.

<sup>21</sup> See *id.* at 772–74. The Supreme Court developed the exclusionary rule for federal cases only in 1914. *Weeks v. United States*, 232 U.S. 383 (1914).

warrant, however, citizens in the early days of the Republic whose persons, homes, papers, or effects had been subjected to government searches or seizures would have a chance to convince a jury that the government officer's conduct had been unreasonable and to recover damages.<sup>22</sup> Thus, warrants were long seen as instruments by which government officers could escape civil liability, not as a means of protecting individual rights.<sup>23</sup> This context has led some to conclude that the Supreme Court's insistence on a presumptive warrant requirement has "'stood the Fourth Amendment on its head' from a historical standpoint."<sup>24</sup>

What is the effect of the Court's regular insistence on a presumptive warrant requirement? Despite this insistence, the Court's decisions suggest it adheres to its rhetoric only in the breach. Much of the Court's Fourth Amendment decision-making, in fact, has been dedicated to crafting exceptions to the warrant requirement, and it is clear today that government searches conducted without warrants vastly outnumber those conducted with a warrant.<sup>25</sup> In recent years, some of the Court's decisions have frankly acknowledged that the text of the Amendment does not necessarily require a preference for warrants and that the ultimate command of the Amendment is reasonableness,<sup>26</sup> and this may represent the Court's contemporary trajectory.<sup>27</sup> Even in recent cases, though, the

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<sup>22</sup> Amar, *supra* note 3, at 774.

<sup>23</sup> *See id.* at 774–75, 778; *see also* TAYLOR, *supra* note 16, at 43.

<sup>24</sup> *Coolidge v. New Hampshire*, 403 U.S. 443, 492 (1971) (Harlan, J., concurring) (quoting TAYLOR, *supra* note 16, at 23–24). An early proponent of this theory noted that, “[f]ar from looking at the warrant as a protection against unreasonable searches, [the framers] saw it as an authority for unreasonable and oppressive searches, and sought to confine its issuance and execution in line with the stringent requirements . . . .” TAYLOR, *supra* note 16, at 41. The most prominent exposition of the theory has been by Akhil Amar. *See* Amar, *supra* note 3. To be sure, not all scholars agree with the argument that the framers favored limited use of warrants. In response to authors like Taylor and Amar, numerous commentators have offered defenses of a warrant-preference model of Fourth Amendment interpretation, based on their own readings of the historical record. *See, e.g.*, Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1188 (2016); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 577–78, 584–86 (1999).

<sup>25</sup> *See, e.g.*, *California v. Acevedo*, 500 U.S. 565, 582–83 (1991) (Scalia, J., concurring); *see also* Bradley, *supra* note 2, at 1473–75.

<sup>26</sup> *See, e.g.*, *Fernandez v. California*, 134 S. Ct. 1126, 1132–33 (2014) (“The Fourth Amendment prohibits unreasonable searches and seizures and provides that a warrant may not be issued without probable cause, but ‘the text of the Fourth Amendment does not specify when a search warrant must be obtained’ . . . ‘the ultimate touchstone of the Fourth Amendment is reasonableness.’”) (citations omitted).

<sup>27</sup> *See, e.g.*, Cynthia Lee, *Package Bombs, Footlockers, and Laptops: What the Disappearing Container Doctrine Can Tell Us About the Fourth Amendment*, 100 J. CRIM. L. & CRIMINOLOGY 1403, 1407 (2010).



Court sometimes continues to adhere to the mythology that virtually all government searches and seizures require warrants to be reasonable.<sup>28</sup>

The reason for the stark dichotomy between the Court's stated warrant requirement and its actual holdings that government actors do not usually need warrants to justify searches and seizures is fairly straightforward: a broad warrant requirement would be unworkable.<sup>29</sup> Actual enforcement of the Court's rhetoric would prohibit the government from engaging in a great deal of conduct that both society and all Supreme Court Justices regard as essentially reasonable.<sup>30</sup> Some observers have argued that the tension between the Court's regular assertions that all Fourth Amendment searches and seizures must be supported by warrants (subject only to a few well-delineated exceptions) and the Court's widespread abandonment of that principle in practice has produced an incoherent body of law that has generated confusion for police officers regarding the limits of their authority and for lower courts attempting to evaluate those officers' conduct.<sup>31</sup>

In fact, the Court has dealt with that tension in part through a strained definition of the seemingly straightforward concept of what constitutes a search in the first instance. Using the test from *Katz v. United States*, which defines government conduct as constituting a search only when the government infringes on an expectation of privacy that "society is prepared to recognize as 'reasonable,'" <sup>32</sup> the Court has concluded that a wide range of activities that clearly constitute "searches" as the word is commonly used, simply are not Fourth Amendment searches.<sup>33</sup> These

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<sup>28</sup> See, e.g., *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2451–52 (2015) (noting that the Court has repeatedly held that "'searches conducted outside the judicial process, without prior approval by [a] judge or [a] magistrate [judge], are *per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions'" (citing *Katz v. United States*, 389 U.S. 347, 357 (1967))); *City of Ontario v. Quon*, 560 U.S. 746, 760 (2010) (accepting that "as a general matter, warrantless searches 'are *per se* unreasonable under the Fourth Amendment,'" and noting that "there are 'a few specifically established and well-delineated exceptions' to that general rule" (citing *Katz*, 389 U.S. at 357); *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (stating the "basic rule" that "'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions'" (citing *Katz*, 389 U.S. at 357)).

<sup>29</sup> This is true at least in the absence of streamlined procedures for obtaining warrants in every jurisdiction, including twenty-four hour availability of magistrates. See Bradley, *supra* note 2, at 1475, 1492–93.

<sup>30</sup> *Id.*, at 1475.

<sup>31</sup> See, e.g., *California v. Acevedo*, 500 U.S. 565, 582–83 (1991) (Scalia, J., concurring) ("There can be no clarity in this area unless we make up our minds, and unless the principles we express comport with the actions we take."); Bradley, *supra* note 2, at 1475 ("By its continued adherence to the warrant requirement in theory, though not in fact, the Court has sown massive confusion among the police and lower courts.").

<sup>32</sup> *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

<sup>33</sup> Amar, *supra* note 3, at 768–69.

activities include government intrusion into and observation of activities in an open field,<sup>34</sup> scrutiny of a home's curtilage with the naked eye from an airplane or a helicopter,<sup>35</sup> and any other observation of persons or items in "plain view" that government agents make from a lawful vantage point, at least with the naked eye.<sup>36</sup> While designating this kind of conduct a non-search, and thus, not subject to the requirements of the Fourth Amendment, might be a convenient way to avoid the ostensible rule that virtually all searches must be supported by warrants, such word games arguably sow confusion for police officers and lower courts tasked with adhering to and enforcing the Amendment's imperatives.<sup>37</sup>

In sum, according to this line of argument, by misreading text and history to arrive at the conclusion that Fourth Amendment searches and seizures almost always require warrants to be reasonable, the Supreme Court has asserted a rule to which it cannot practically adhere. The disjunction between the Court's rhetoric and its actual holdings, as well as the linguistic distortions in which the Court has engaged to sustain partially an illusion of consistency between theory and practice, has resulted in an incoherent body of jurisprudence impossible for police or lower courts to follow.

Without necessarily tying the asserted confusing state of Fourth Amendment law to the Court's misreading of text and history, other authors have also claimed that the Court's jurisprudence is contradictory and incoherent.<sup>38</sup> Frequently, these authors have based their arguments, at least in part, on the indeterminacy of the *Katz* test for deciding the threshold question of Fourth Amendment applicability—whether government conduct impinges on an expectation of privacy that society is prepared to recognize as reasonable.<sup>39</sup> In short, according to this line of

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<sup>34</sup> *Oliver v. United States*, 466 U.S. 170 (1984).

<sup>35</sup> *Florida v. Riley*, 488 U.S. 445, 450–51 (1989); *California v. Ciraolo*, 476 U.S. 207, 215 (1986).

<sup>36</sup> *Arizona v. Hicks*, 480 U.S. 321 (1987).

<sup>37</sup> See Amar, *supra* note 3, at 768–69 (asserting that the Court's "word games are unconvincing and unworthy").

<sup>38</sup> See, e.g., CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT* 21–22 (2007) (praising the balancing approach the Court prescribed in *Terry v. Ohio*, but asserting that, in practice, the Court has used the process as a "smoke screen for an ad hoc agenda," which has turned Fourth Amendment law into "mess," both "in the sense that police and courts have a hard time mastering it," and "normatively, in the sense that it does not reflect society's core values"); Daniel J. Solove, *Fourth Amendment Pragmatism*, 51 B.C. L. REV. 1511, 1512 (2010).

<sup>39</sup> See, e.g., *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring) (referring to *Katz* as a "notoriously unhelpful test"); ROBERT M. BLOOM, *SEARCHES, SEIZURES, AND WARRANTS* 46 (2003) ("How do we know what society is prepared to accept as reasonable? Because there is no straightforward answer to this question, 'reasonable' has largely come to mean what a majority of the Supreme Court Justices says is reasonable."); Solove, *supra* note 38, at 1512 (citing with approval authors who have attacked the *Katz* test as "unstable," "illogical," and "engendering 'pandemonium'") (citations omitted); Daniel B. Yeager, *Search*,

thought, while the Court claims to use an external referent to gauge the scope of the Amendment's protections, in practice, Supreme Court Justices have simply decided Fourth Amendment cases based on their own conceptions of what constitute reasonable expectations of privacy, and they have done so in an ad hoc, unpredictable manner.<sup>40</sup>

In response to the perceived chaos of Fourth Amendment law, numerous scholars have devised comprehensive interpretive schemes to direct the Court's process in future cases. Frequently, a commentator's goal in constructing such a theory has been broader than mere clarification of the law; authors have often hoped, also, to promote substantive values they believe current doctrine fails to advance sufficiently. For example, several scholars have recommended greater reliance on positive law to determine the contours of Fourth Amendment protection. Writing in 1993, Daniel B. Yeager urged the Court to replace *Katz*'s open-ended privacy inquiry with a framework in which reference, at least as a first resort, to local property, tort, contract, and criminal laws would determine the applicability of the Fourth Amendment.<sup>41</sup> Only if positive law provides no indication of privacy interests in any given case would resort to *Katz*'s indefinite standard be necessary.<sup>42</sup>

Christopher Slobogin has argued that the Court should use objective criteria to assess the intrusiveness of various kinds of government conduct, both in deciding the threshold question of whether government conduct implicates the Fourth Amendment under *Katz* and in evaluating the individual rights side of the balance to determine whether conduct that qualifies as a Fourth Amendment search or seizure is ultimately reasonable.<sup>43</sup> Specifically, Slobogin prescribed the use of positive law to evaluate society's views on privacy and autonomy.<sup>44</sup> In situations in which positive law provides no clear answer, Slobogin recommended the use of public opinion surveys.<sup>45</sup>

Most recently, William Baude and James Y. Stern promoted a positive law model for determining whether government conduct constitutes a search or seizure.<sup>46</sup> Under this rubric, government conduct would implicate the Fourth Amendment whenever government actors engage in investigative activity that would be illegal if performed by "a similarly

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*Seizure, and the Positive Law: Expectations of Privacy Outside the Fourth Amendment*, 84 J. CRIM. L. & CRIMINOLOGY 249, 251 (1993).

<sup>40</sup> *Id.* at 280–81.

<sup>41</sup> *Id.* at 251–52.

<sup>42</sup> *Id.*

<sup>43</sup> SLOBOGIN, *supra* note 38, at 32?35.

<sup>44</sup> *Id.* at 33.

<sup>45</sup> *Id.*

<sup>46</sup> Baude & Stern, *supra* note 6, at 1825–26.

situated private actor.”<sup>47</sup> Like Yeager and Slobogin, Baude and Stern would look to tort law, criminal law, and any other generally applicable law to make this determination.<sup>48</sup> Unlike Yeager or Slobogin, however, Baude and Stern would use a positive law model to replace, rather than to supplement (Yeager) or refine (Slobogin) *Katz*’s privacy inquiry.<sup>49</sup> Unlike Slobogin, Baude and Stern would use positive law to decide only the threshold question of Fourth Amendment applicability, not to assess the reasonableness of conduct already determined to constitute a Fourth Amendment search or seizure.<sup>50</sup>

Despite the variations in their theories, each of these authors advocated reference to positive law at least in part to provide greater clarity to what he perceived as a chaotic field of law. For Yeager, a crucial benefit of a positive law model is that it makes the law more predictable, rectifying *Katz*’s “dismal failure” in that regard.<sup>51</sup> For Slobogin, the use of positive law to measure intrusiveness is part of a scheme to clean up the “mess” of Fourth Amendment law, in the sense that, in its current state, police and courts have difficulty understanding it.<sup>52</sup> Baude and Stern also describe increased clarity and predictability as “a signal advantage” of their positive law model.<sup>53</sup>

To be sure, each of these authors also believed his model would promote important substantive values he believed contemporary doctrine failed to address. For Yeager, a positive law model would not only provide a “concrete inventory of expectations” that would make Fourth Amendment law more predictable, but it would also result in enhanced privacy protection as compared with the “stingy conception of privacy” the Court had developed under *Katz*.<sup>54</sup> Slobogin hoped not only to make Fourth Amendment law easier for police and lower courts to follow, but also to devise a framework that would lead Fourth Amendment law to be better aligned with “society’s core values.”<sup>55</sup> Baude and Stern have promoted their model not only because of its clarifying potential, but also because they believe it has strong support in the history of the Amendment;<sup>56</sup> because it best serves the liberal constitutional value of curbing abuse of government power;<sup>57</sup> because it is more sensitive to the compar-

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<sup>47</sup> *Id.* at 1825.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 1829–31.

<sup>50</sup> *Id.* at 1832.

<sup>51</sup> Yeager, *supra* note 39, at 251–52.

<sup>52</sup> SLOBOGIN, *supra* note 38, at 22.

<sup>53</sup> Baude & Stern, *supra* note 6, at 1850.

<sup>54</sup> Yeager, *supra* note 39, at 251–52.

<sup>55</sup> SLOBOGIN, *supra* note 38, at 22.

<sup>56</sup> Baude & Stern, *supra* note 6, at 1837–41.

<sup>57</sup> *Id.* at 1845–50.

ative institutional strengths of legislatures;<sup>58</sup> and because it is able to protect a range of social values that includes, but is not limited to, privacy.<sup>59</sup> Nonetheless, increasing the coherence of the field was a clear goal of each of these commentators.

To some extent, the Supreme Court embraced a version of the positive law model in 2012 in *United States v. Jones*.<sup>60</sup> In *Jones*, Justice Scalia's majority rehabilitated the property-based approach to determining the applicability of the Fourth Amendment from *Olmstead v. United States*.<sup>61</sup> Although the *Katz* Court had declared that approach to be discredited,<sup>62</sup> the *Jones* Court asserted that *Katz*'s privacy test had been intended to supplement rather than to supplant *Olmstead*.<sup>63</sup> Under this new regime, the Court looks first to a simple formula to determine whether a Fourth Amendment search has occurred: if the government has physically intruded into a constitutionally protected area to gather information, then its conduct constitutes a search.<sup>64</sup> If this formula does not lead to the conclusion that a search has occurred, then the Court will use *Katz*'s expectations-of-privacy test to decide whether the government's conduct implicated the Amendment.<sup>65</sup> Elaborating on the new regime in 2013, the Court stated that part of its motivation for returning to a positive law model was the clarification of Fourth Amendment law. As the Court declared, "One virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy."<sup>66</sup>

Of the three positive law models I have summarized, the *Jones* rubric most closely resembles Yeager's proposal, which would look first to positive law and would use *Katz* in cases in which the positive law provides no clear answer. Nonetheless, the Court's new approach differs from Yeager's framework in important ways. First, the *Jones* model invokes only property law concepts to inform the inquiry, as compared with the much broader array of positive law sources on which Yeager would draw. Second, Scalia's majority opinions explicating the model appear to rely on a sort of idealized conception of property law rather than on the specific trespass laws of the jurisdictions in question.<sup>67</sup>

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<sup>58</sup> *Id.* at 1821.

<sup>59</sup> *Id.* at 1857.

<sup>60</sup> 132 S. Ct. 945 (2012).

<sup>61</sup> 277 U.S. 438 (1928).

<sup>62</sup> *Katz v. United States*, 389 U.S. 347, 353 (1967).

<sup>63</sup> *Jones*, 132 S. Ct. at 949–51.

<sup>64</sup> *Id.* at 950 n.3.

<sup>65</sup> *Id.* at 953.

<sup>66</sup> *Florida v. Jardines*, 133 S. Ct. 1409, 1417 (2013).

<sup>67</sup> See Baude & Stern, *supra* note 6, at 1835 (noting that Scalia's majority opinions in *Jones* and *Jardines* did not cite any statutes or judicial decisions on property law from the relevant jurisdictions and that the majority never even used the word "trespass" in *Jardines*, relying only on the concept of "physical intrusion").

Numerous other scholars motivated at least in part by a desire to increase the coherence of Fourth Amendment decision-making have advanced a wide variety of innovative approaches to interpreting the Amendment's requirements. For example, Christopher Solove has argued the Court should abandon *Katz*'s reasonable-expectations-of-privacy test for determining whether government conduct implicates the Fourth Amendment in favor of a test that would expand Fourth Amendment coverage to any situation in which government conduct implicates any problem of "reasonable significance."<sup>68</sup> By recognizing "all of the problems caused by government information gathering, not just privacy problems," Solove argued, the Court would provide "much clearer results."<sup>69</sup> Because almost all government information gathering would constitute a Fourth Amendment search under this approach,<sup>70</sup> the Court would be freed from having to grapple repeatedly with the inherently indeterminate question of what constitutes a reasonable expectation of privacy.<sup>71</sup> Instead, the Court could move directly in most cases to the question of how the Fourth Amendment should regulate the conduct in question.<sup>72</sup> Solove promoted this approach in part because he believed current doctrine leaves government conduct that implicates important interests entirely unregulated by the Fourth Amendment.<sup>73</sup> He also believed his model would provide coherence to a field currently in a state of "theoretical chaos."<sup>74</sup>

Thomas Clancy catalogued five models the Supreme Court uses to evaluate Fourth Amendment problems: a warrant preference model, an individualized suspicion model, a totality of the circumstances test, a balancing test, and a hybrid that gives conclusive weight to the common law.<sup>75</sup> According to Clancy, because the Court has failed to develop a hierarchy for choosing among these models, its jurisprudence has been inconsistent and internally contradictory.<sup>76</sup> Because Clancy believed the Court had "failed to provide meaningful guidance," he used objective criteria, including the Framers' values,<sup>77</sup> to ensure that Fourth Amendment reasonableness would have a "coherent meaning" across the range of situations to which the Amendment applies.<sup>78</sup> Ultimately, Clancy rec-

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<sup>68</sup> Solove, *supra* note 38, at 1514.

<sup>69</sup> *Id.* at 1534.

<sup>70</sup> *Id.* at 1529, 1534.

<sup>71</sup> *Id.* at 1521.

<sup>72</sup> *Id.* at 1511, 1528–29.

<sup>73</sup> *Id.* at 1514, 1520.

<sup>74</sup> *Id.* at 1512 (citation omitted).

<sup>75</sup> Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 UTAH L. REV. 977, 978 (2004).

<sup>76</sup> *Id.* at 978, 1023.

<sup>77</sup> *Id.* at 978, 1043.

<sup>78</sup> *Id.* at 1043.

ommended that an individualized suspicion model should be at the top of the Fourth Amendment hierarchy, followed by a warrant preference rule for limited classes of cases.<sup>79</sup> Only when necessary to a “strong governmental interest” would departure from these models be permissible.<sup>80</sup> Clancy recommended his approach not only as a means of providing coherence to a field riddled with inconsistency and unpredictability, but also because he believed the current framework had failed to protect citizens against “ever expanding governmental intrusions.”<sup>81</sup>

For some scholars, remedying the incoherence of Fourth Amendment law has been the paramount goal, as opposed to one among many aims in reconstructing Fourth Amendment doctrine. According to Craig Bradley, “the fundamental problem with [F]ourth [A]mendment law is that it is confusing.”<sup>82</sup> In Bradley’s view, the primary reason for the incoherence of contemporary Fourth Amendment law is the dichotomy between the Court’s stated adherence to a warrant requirement and its regular departure from that supposed rule in practice.<sup>83</sup> Bradley argued the Court had only two choices: 1) to totally eschew rhetorical adherence to bright-line rules, including a warrant requirement, and to embrace an open-ended, case-by-case reasonableness test; or 2) to enforce a bright-line warrant requirement except in cases of true emergency.<sup>84</sup> The first model would, according to Bradley, “extract the Court from the [quagmire]” of Fourth Amendment law because the Court would only rarely feel compelled to review lower court decisions applying a broad reasonableness standard to idiosyncratic facts.<sup>85</sup> Furthermore, Bradley believed this approach, which would allow police to use their common sense, would be easier to follow than the current “set of fictitious rules and vague exceptions that the Supreme Court itself, not to mention the cop on the beat, cannot consistently apply or understand.”<sup>86</sup> The second option, a true requirement that warrants are almost always necessary, would provide a simple, bright-line rule for police to follow in most cases.<sup>87</sup> For

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<sup>79</sup> *Id.* at 1028–29.

<sup>80</sup> *Id.* at 1029.

<sup>81</sup> *Id.* at 1043.

<sup>82</sup> Bradley, *supra* note 2, at 1472.

<sup>83</sup> *Id.* at 1475.

<sup>84</sup> *Id.* at 1471.

<sup>85</sup> *Id.* at 1488. Such an approach would, in Bradley’s estimation, provide greater clarity than the Court’s use of numerous, ostensibly bright-line rules of general applicability, which nonetheless require constant refinement when courts confront cases with new facts. *Id.* at 1470.

<sup>86</sup> *Id.* at 1489.

<sup>87</sup> *Id.* at 1492. Writing in 1985, Bradley noted that streamlined procedures would be necessary to make such a warrant requirement workable. He argued that telephonic warrants would be required and observed that, although the federal system and several states already made use of telephonic warrants, the Supreme Court had not explicitly approved their use. *Id.* at 1492 n.111. Today, the Supreme Court has spoken favorably of telephonic warrants and has

Bradley as well, however, in addition to increasing clarity, he hoped his proposals would correct injustices associated with current doctrine.<sup>88</sup>

I do not attempt here to provide an exhaustive catalogue of criticisms of Fourth Amendment doctrine. Rather, I offer the foregoing overview as an illustration of the broad consensus among scholars that Fourth Amendment law is incoherent, unpredictable, and in fundamental need of repair. Authors have devoted a great deal of time not only to critiquing Fourth Amendment doctrine as unprincipled and confusing, but also to devising new interpretive regimes in order to clean up the current mess.

Only rarely has an author offered a defense of current Fourth Amendment doctrine. The most prominent apologist for the Court's contemporary jurisprudence has been Orin Kerr. Kerr has contested charges of incoherence in the Court's decision-making under *Katz* by describing and defending four models the Court has used for determining Fourth Amendment applicability under that test. According to Kerr, the use of each of these models is necessary in different circumstances in order to effectively regulate government conduct to which the Fourth Amendment should apply.<sup>89</sup> In other words, Kerr has argued that the lack of a unified theory for deciding whether a person's expectation of privacy is one society is prepared to recognize as reasonable is the inevitable result of the need to use different concepts to answer that question in different contexts.<sup>90</sup> Moreover, according to Kerr, the Supreme Court's choice of which model to use has corresponded relatively well to the situations in which each model is most effective in determining the kinds of governmental conduct the Amendment should regulate.<sup>91</sup>

Specifically, Kerr described a probabilistic model, a private facts model, a positive law model, and a policy model. Under the probabilistic model, a person has a reasonable expectation of privacy in situations in which social norms suggest there is a low chance that others will "successfully pry into his affairs."<sup>92</sup> Kerr observed that the Court has, on

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noted that "[w]ell over a majority of States" allow police or prosecutors to apply for warrants remotely. *Missouri v. McNeely*, 133 S. Ct. 1552, 1562 (2013). Bradley also observed that to make a true warrant requirement feasible, magistrates would have to be available twenty-four hours a day. Bradley, *supra* note 2, at 1492. This remains an impediment to implementation of such a proposal. See *McNeely*, 133 S. Ct. at 1562 (noting that "improvements in communications technology do not guarantee that a magistrate judge will be available when an officer needs a warrant after making a late-night arrest").

<sup>88</sup> Bradley, *supra* note 2, at 1479 (claiming that current doctrine leads frequently both to intrusions on reasonable expectations of privacy and to exclusion of evidence based on technicalities when police have made reasonable efforts to follow the Court's unclear guidance).

<sup>89</sup> Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 507 (2007).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 508–09.



occasion, embraced the probabilistic model.<sup>93</sup> It has done so, for example, in deciding that an overnight guest has a reasonable expectation of privacy in a host's home because a host would be unlikely to admit people trying to meet with the guest against the guest's wishes.<sup>94</sup> Likewise, the Court has used this model in holding that a person has no reasonable expectation that police will not observe his curtilage with the naked eye from a fixed-wing aircraft at an altitude of 1,000 feet because it is routine for airplanes to fly over residential areas at that altitude.<sup>95</sup> In other situations, the Court has flatly rejected a probabilistic lodestar as a guide to its inquiry. For example, in cases in which a defendant conveyed information to a third-party confidant, the Court has held that no matter how small the actual risk that one's friend might turn out to be an informant, it is a risk one assumes for Fourth Amendment purposes.<sup>96</sup> Yet the Court's apparently haphazard use of the probabilistic model leaves Kerr untroubled. As Kerr argued, the model does not serve as a useful guide in situations in which relatively modest intrusions on privacy are also highly unlikely or in situations in which citizens have no control over whether their private affairs are observed.<sup>97</sup> In such circumstances, according to Kerr, the Court's choice of a different model is a logical decision to use a model that better gauges reasonable expectations of privacy rather than an example of unprincipled decision-making.<sup>98</sup>

Under the private facts model, the Court has sometimes held that reasonable expectations of privacy depend on the character of the information government conduct reveals.<sup>99</sup> For example, the Court has held that a field test of white powder does not constitute a Fourth Amendment search if the test can reveal only whether the powder is cocaine or not and cannot disclose any other "arguably 'private' fact."<sup>100</sup> Yet in other cases, including disclosure of information to confidants, the Court has rejected the private facts model.<sup>101</sup> Again, Kerr found the Court's rejection of a single model for all situations acceptable. As Kerr noted, sometimes the reasonableness of government conduct depends on the character of the conduct rather than the character of the information revealed.<sup>102</sup> Thus, one has a reasonable expectation of privacy against the government learning even a relatively non-private fact by breaking into one's home, while one has no reasonable expectation of privacy against

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<sup>93</sup> *Id.* at 508–12.

<sup>94</sup> *Id.* at 509–10 (citing *Minnesota v. Olson*, 495 U.S. 91 (1990)).

<sup>95</sup> *Id.* at 510 (citing *California v. Ciraolo*, 476 U.S. 207 (1986)).

<sup>96</sup> *Id.* at 511–12 (citations omitted).

<sup>97</sup> *Id.* at 532.

<sup>98</sup> *See id.*

<sup>99</sup> *Id.* at 512–13.

<sup>100</sup> *Id.* at 513 (quoting *United States v. Jacobsen*, 466 U.S. 109 (1984)).

<sup>101</sup> *Id.* at 515.

<sup>102</sup> *Id.* at 534.

the government hearing about a very private fact if the government learns the fact through a television news report.<sup>103</sup> Furthermore, in many situations a private facts model would leave police with no way to know in advance whether their conduct would implicate the Constitution, for they often have no idea what they will find when they initiate information-gathering activity.<sup>104</sup>

At times, the Court has used positive law to guide its inquiry. For example, in some cases, the Court has treated the existence, or lack thereof, of a property interest as relevant to the question of whether a defendant had a reasonable expectation of privacy against government intrusion.<sup>105</sup> In other situations, the Court has stated that positive law was irrelevant to its determination.<sup>106</sup> Kerr supported this apparent inconsistency by noting that, although laws restricting access to information and places often reflect shared social expectations about kinds of conduct that cause significant harms, in some circumstances positive law has no relationship to privacy.<sup>107</sup>

Finally, a policy model answers the question of whether there is a reasonable expectation of privacy against particular government conduct by deciding directly whether the conduct is “particularly troublesome to civil liberties” if left unregulated.<sup>108</sup> Each of the other three models serves as a useful proxy, depending on the circumstances, for answering this question.<sup>109</sup> Despite the more straightforward approach of the policy model, however, Kerr urged that it should not be the exclusive frame-

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<sup>103</sup> *Id.* at 534–35.

<sup>104</sup> *Id.* at 535. One might suggest in response to this problem a combined probabilistic/private facts model in which the reasonableness of one’s expectation of privacy would depend on the ex ante likelihood that government conduct could reveal particularly private information, as opposed to the character of the information the conduct actually reveals in any given case. Such an approach would, for Kerr, have the unfortunate effect of undermining some Fourth Amendment doctrines that Kerr has defended elsewhere, including the current lack of protection for disclosures to confidants. See Orin S. Kerr, *The Case for Third-Party Doctrine*, 107 MICH. L. REV. 561 (2009). Nonetheless, such an approach would address some of the problems Kerr identified with exclusive use of either the probabilistic or private facts models. It would also solve, for example, the problem of using a pure probabilistic model in situations in which citizens have no control over their privacy. If the government announced publicly that it was tapping every single phone in the United States, no one would, thereafter, think the probability of the government hearing phone conversations would be low. Therefore, a pure probabilistic model would fail to capture the severity of the invasion of privacy. Kerr, *Four Models of Fourth Amendment Protection*, *supra* note 89, at 532. However, a model that assessed such a program by evaluating the probability that the conduct would reveal particularly private facts would accurately reflect shared social beliefs about the severity of such an invasion of privacy.

<sup>105</sup> See Kerr, *supra* note 89, at 516.

<sup>106</sup> *Id.* at 518–19 (citing *California v. Greenwood*, 486 U.S. 35 (1988); *Oliver v. United States*, 466 U.S. 170 (1984)).

<sup>107</sup> See *id.* at 532–34.

<sup>108</sup> *Id.* at 519.

<sup>109</sup> See *id.* at 525.

work for deciding whether government conduct implicates the Fourth Amendment because lower courts, which decide the vast majority of Fourth Amendment cases, cannot administer it in a way that will provide consistent results.<sup>110</sup>

Ultimately, Kerr concluded that the Supreme Court has generally chosen the model that best addresses whether government conduct implicates significant civil liberties concerns on the facts of the case at hand.<sup>111</sup> Thus, according to Kerr, the superficial appearance that the Court has chosen among models in a desultory and inconsistent manner belies a deeper, more principled reality.<sup>112</sup> In a more recent article, Kerr moved from a defense of the Court's decisions on the threshold question of Fourth Amendment applicability to a broader defense of the Court's Fourth Amendment decision-making in all contexts.<sup>113</sup> Again responding to claims that the Court's Fourth Amendment jurisprudence has been incoherent, Kerr argued that the myriad and seemingly arbitrary Fourth Amendment rules the Court has devised have served an overarching goal of equilibrium adjustment, by which the Court has reacted consistently to changing technology and social practices to retain the "status quo ante level" of protection under the Amendment.<sup>114</sup>

Both Kerr and the numerous authors who have criticized Fourth Amendment law as incoherent have based their conclusions primarily on qualitative evaluation of past Court decisions. This Study subjects the claims these authors have made to empirical analysis by examining Supreme Court opinions and lower court holdings on issues the Supreme Court would later address over the course of twenty Supreme Court terms. In the next section, I describe the methodology I have used for the Study.

## II. METHODOLOGY

### A. *The Case for Using Supreme Court Agreement with Lower Courts as a Partial Proxy for Coherence in Supreme Court Decision-Making*

The primary method I chose to test the coherence of the Supreme Court's Fourth Amendment decision-making was to examine the performance of federal courts of appeals and state supreme courts on Fourth Amendment questions the Supreme Court would later decide. Specifically, I assessed the extent to which lower courts reached the "right" answers on Fourth Amendment questions by examining the rate at which

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 543.

<sup>112</sup> *See id.* at 507.

<sup>113</sup> *See generally* Kerr, *supra* note 5, at 478.

<sup>114</sup> *Id.* at 480.

the Supreme Court affirmed or reversed the positions those courts had taken before the Supreme Court reached its own conclusions. I used Supreme Court decisions from twenty recent terms, the October 1995 term through the October 2014 term. Because the Supreme Court tends to choose to review the most complex and divisive legal issues, I also tracked the rate at which the Court issued opinions on Fourth Amendment questions, as compared with other important constitutional problems, since the October 1967 term.

Before explaining the process of data collection and the pitfalls that entails in this context, it is worth articulating why I believe an accurate account of lower court performance would provide insight into the clarity of the Supreme Court's decision-making. I began with the assumption that a high rate of Supreme Court rejection of the positions lower courts took on Fourth Amendment issues would suggest the Supreme Court's previous Fourth Amendment pronouncements had provided inadequate guidance to lower courts tasked with solving Fourth Amendment problems. That inadequacy might result from Supreme Court decisions that were confusing or contradictory or that had left lacunae that lower courts were unable to fill by balancing to determine whether government conduct was reasonable or by analogy to rules the Court had crafted to address similar situations in the past. Alternatively, it might result from the Court simply changing its mind about the dictates of the Fourth Amendment after having issued seemingly clear pronouncements in the past.<sup>115</sup> Either possibility would suggest a kind of instability or incoherence in Fourth Amendment law. On the other hand, if the Supreme Court tends to affirm the Fourth Amendment positions of lower courts, that fact would suggest the Supreme Court's earlier Fourth Amendment decisions were sufficiently clear that lower courts could reliably reach conclusions the Supreme Court would later consider correct. In fact, because other studies of lower court performance have shown the Supreme Court generally affirms lower court positions (directly or indirectly) about half the

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<sup>115</sup> This latter phenomenon occurs infrequently in its starkest form—the Court simply overturning clear Fourth Amendment precedent in a straightforward manner. As the Court asserted in *Davis v. United States*, 564 U.S. 229 (2011), “Decisions overruling this Court’s Fourth Amendment precedents are rare. Indeed, it has been more than 40 years since the Court last handed down a decision of the type to which *Davis* refers.” *Id.* at 247. More commonly, however, the Court departs from the seemingly clear implications of its Fourth Amendment precedent while purporting merely to distinguish its prior holdings or to limit their effect. Compare, e.g., *Arizona v. Gant*, 556 U.S. 332, 335 (2009) (purporting to distinguish *New York v. Belton*, 453 U.S. 454 (1981)), with *Gant*, 556 U.S. at 355 (Alito, J., dissenting) (asserting that the majority opinion effectively overruled *Belton*); see also *Riley v. California*, 134 S. Ct. 2473, 2485–86 (2014) (declining to apply the seemingly categorical authority provided by *United States v. Robinson*, 414 U.S. 218 (1973), to conduct a search incident to arrest of property immediately associated with the person of an arrestee to the digital contents of cell phones).

time, even a fifty percent rate of agreement with lower courts would suggest the Supreme Court's Fourth Amendment decision-making is no more incoherent than its overall body of jurisprudence.

Of course, a high rate of affirmation of lower court decisions would not demonstrate definitively that those lower courts reached the "correct" results because previous Supreme Court decisions had provided them with clear guidance. It could be the case that the causal relationship is reversed. One might conclude, that is, that lower court insights on new Fourth Amendment problems influenced the Supreme Court decisions that followed. One could imagine that incisive reasoning by a single lower court might influence the Supreme Court, and that the lower court might have made convincing arguments despite relative incoherence in previous Supreme Court decisions, rather than because of the clarity of Supreme Court precedent. Likewise, when lower court judges have reached something approaching a consensus on a Fourth Amendment problem, Supreme Court Justices might find the existence of that consensus compelling when they address the problem later.

In fact, other studies that have tracked the performance of lower courts on issues the Supreme Court subsequently decided have considered this latter possibility. Stefanie Lindquist and David Klein hypothesized, and ultimately concluded, in a 2006 study that the greater the number of federal courts of appeals that agreed with a petitioner, the more likely the Supreme Court was to side with that position.<sup>116</sup> Lindquist and Klein attributed this tendency in part to the likelihood that the reasoning of lower court decisions directly influences Supreme Court Justices and the idea that a lopsided split might, in and of itself, convince Supreme Court Justices that the majority position is more legally sound.<sup>117</sup> Likewise, Aaron-Andrew Bruhl examined the possibility that lower court decisions might influence the Supreme Court's dispositions by tracking the extent to which the Court agrees with majorities of lower courts and the extent to which Supreme Court opinions invoke lower court determinations.<sup>118</sup> Bruhl noted both that the Supreme Court tended to side with lopsided lower court majorities and that most Supreme Court cases in which a lopsided majority of lower courts had been in agreement

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<sup>116</sup> See Stefanie A. Lindquist & David E. Klein, *The Influence of Jurisprudential Considerations on Supreme Court Decisionmaking: A Study of Conflict Cases*, 40 LAW & SOC'Y REV. 135, 142, 148 (2006).

<sup>117</sup> *Id.* at 142. Lindquist and Klein also attributed this tendency partly to the similar training of lower court judges and Supreme Court justices. Simply by virtue of that similar training, a majority of Supreme Court justices are likely to solve legal problems in the same way as majority of lower court judges. See *id.*

<sup>118</sup> See generally Aaron-Andrew P. Bruhl, *Following Lower-Court Precedent*, 81 U. CHI. L. REV. 851 (2014).

with each other featured at least one Supreme Court opinion claiming support from most lower courts.<sup>119</sup>

Nonetheless, there are compelling reasons to believe the influence of lower court decisions on the Supreme Court is relatively insignificant. First, despite Bruhl's observations, Bruhl himself ultimately characterized the current state of judicial decision-making as involving horizontal coordination among lower courts "while the Supreme Court mostly charts its own course."<sup>120</sup> Bruhl based this conclusion on the fact that the Court often appears unconcerned with exactly how many lower courts lined up on each side of an issue, even when the Court does mention a lower court split<sup>121</sup>; that the Court frequently fails to mention lower court splits at all, even when such splits are well known<sup>122</sup>; that, overall, the Supreme Court opinions in Bruhl's study mentioned lower court decisions in only about one out of six merits decisions<sup>123</sup>; and that many of the references to lower court majorities appeared in dissents, offering further evidence that "lower courts have at best modest influence on the Supreme Court."<sup>124</sup> In the end, Bruhl implicitly accepted an alternative explanation for the correspondence between lopsided lower court majorities and Supreme Court dispositions: that such correspondence suggests the law often supplies a clear answer to the question at issue, which leads most jurists to reach the correct result.<sup>125</sup> Of course, when it comes to constitutional decision-making, the Supreme Court's previous pronouncements on the relevant constitutional provision are crucial to the clarity (or lack thereof) of the state of the law.

Bruhl's empirical conclusions largely confirmed the less systematic observations of scholars and jurists who had previously considered the question of the influence of lower courts on the Supreme Court. Writing in 1970, Judge Henry Friendly noted that, for the Supreme Court, the views of lower courts "count, and should count, for little."<sup>126</sup> Writing a generation later, D.C. Circuit Judge Patricia Wald commented that, although divisions among lower courts seemed to prompt review by the Supreme Court, there was "little indication" that the Supreme Court found the lower court decisions to be "a prolific source of analyses or

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<sup>119</sup> *Id.* at 901.

<sup>120</sup> *See id.* at 923.

<sup>121</sup> *Id.* at 905.

<sup>122</sup> *See id.* at 905–06.

<sup>123</sup> *See id.* at 915.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 894–95.

<sup>126</sup> Henry J. Friendly, *The "Law of the Circuit" and All That: Foreword to the Second Circuit 1970 Term*, 46 ST. JOHN'S L. REV. 406, 407 (1972).

insights.”<sup>127</sup> In 1996, Arthur Hellman described an “Olympian” and “imperial” Supreme Court that had moved toward greater detachment from the work of lower courts, in part by ignoring the efforts of lower court judges to address issues on the Court’s docket.<sup>128</sup> These conclusions represent a rejection not only of the idea that the existence of something like a consensus among lower courts, in and of itself, might influence the Supreme Court, but also of the notion that the Supreme Court frequently draws on the wisdom of individual lower courts in making its own decisions.

In the Fourth Amendment context in particular, there is also evidence the Court has largely disregarded the views of lower courts. In a 2012 article cataloguing over three-dozen contemporary Fourth Amendment circuit splits and critiquing the Court’s failure to resolve them, Wayne Logan considered and rejected the idea that the Court might allow Fourth Amendment problems to percolate among lower courts for extended periods in order to enrich its own decisions by drawing on the wisdom of other jurists and the experiences of actors tasked with implementing differing solutions to similar problems.<sup>129</sup> Examining 138 Fourth Amendment cases the Court decided over a thirty-year period, Logan observed that the Court’s opinions mentioned the existence of a federal circuit split in only seventeen cases.<sup>130</sup> Moreover, even when the Court did mention lower court positions on Fourth Amendment issues, the Court seemed uninterested in assessing the merits of the views of the various circuits; rather, the Court generally noted lower court division only in passing and based its conclusions on its own precedent or the perspectives of individual Justices.<sup>131</sup> For Logan, these data justified the long-held skepticism of the influence of percolation theory on the Court.<sup>132</sup>

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<sup>127</sup> Patricia M. Wald, *Upstairs/Downstairs at the Supreme Court: Implications of the 1991 Term for the Constitutional Work of the Lower Courts*, 61 U. CIN. L. REV. 771, 792 (1993).

<sup>128</sup> Arthur D. Hellman, *The Shrunk Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 435–37.

<sup>129</sup> Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 VAND. L. REV. 1137, 1166–71 (2012).

<sup>130</sup> *Id.* at 1167.

<sup>131</sup> *Id.* at 1167–68. The Court’s lack of reliance on lower court reasoning in the Fourth Amendment context is also consistent with the observation that lower courts facing constitutional questions often eschew direct engagement with the Constitution, instead choosing to base their decisions entirely on parsing of Supreme Court precedent. The Court, of course, is unlikely to believe itself in need of assistance from outsiders in interpreting its own prior cases. See Akhil Reed Amar, *Heller, HLR, and Holistic Legal Reasoning*, 122 HARV. L. REV. 145, 150 (2008).

<sup>132</sup> Logan, *supra* note 129, at 1169; see also Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 57 (1994) (“I doubt that the strength of an inferior court’s conviction that a particular interpretation provides the best reading will—or should—influence the Supreme Court’s independent

Of course, the question of the direction of influence between the Supreme Court and lower courts is not an all-or-nothing proposition. Rather, one can imagine a feedback loop in which the clarity of the Supreme Court's pronouncements impacts the way lower courts line up on future issues, and those subsequent lineups, along with the reasoning of individual lower courts, then influence the Supreme Court when it reaches the newer questions the lower courts have addressed. Nonetheless, for all of the reasons I have articulated, there is good cause to believe the opinions of lower courts generally, and the existence of broad agreement among those lower courts in particular, have at best modest influence on the Supreme Court.

Even that likelihood does not prove that the coherence of previous Supreme Court pronouncements deserves sole credit when there is consensus among lower courts with which the Supreme Court later agrees. For example, federal courts of appeals can and do coordinate among themselves for independent reasons, chiefly related to various interests served by national uniformity.<sup>133</sup> Nonetheless, confusing and contradictory Supreme Court precedent should be expected to be an impediment to such coordination. And, given the above analysis, the Supreme Court's agreement with the conclusions those courts have drawn suggests the Supreme Court believes, based on its own independent analysis, that those lower courts have reached the correct results. In the end, therefore, it is reasonable to conclude that when lower courts, either individually or collectively, get the "right" answers to Fourth Amendment questions, that fact suggests that Supreme Court precedent was coherent enough for those courts to predict the Supreme Court's eventual disposition of the current issue. That coherence might derive either from specific rules that provide straightforward guidance or from broad, overarching principles that offer enough direction that lower courts can reasonably arrive at solutions with which the Court will agree.

While I believe that Supreme Court agreement with lower court decisions is a reasonable, rough proxy for the clarity of the Supreme Court's jurisprudence, there is an important way in which even an accurate count of lower court positions on issues the Supreme Court later

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judgment. It is difficult to see what expertise the inferior court might bring to the problem that would outweigh the general presumption of greater proficiency in the Supreme Court."); Todd J. Tiberi, *Supreme Court Denials of Certiorari in Conflicts Cases: Percolation or Procrastination*, 54 U. PITT. L. REV. 861, 889 (1993) (finding that the Court cited lower courts for ideas important to its holdings in only thirteen of thirty-six percolated cases studied). Although a study using plagiarism software found overlap between the language of lower court opinions and Supreme Court majority opinions, the study did not distinguish between factual recitations and "arguments relating to the substance of the legal questions facing the courts." See Pamela C. Corley et al., *Lower Court Influence on U.S. Supreme Court Opinion Content*, 73 J. POL. 31, 42 (2011).

<sup>133</sup> Bruhl, *supra* note 118, at 922–23.



addressed is likely to undervalue the coherence of Supreme Court decision-making. Although the weight of authority suggests that the Supreme Court does not rely heavily on the reasoning of lower courts and that the Court is relatively unconcerned with exactly how lower courts line up on issues the Court chooses to address, the simple fact that lower courts have disagreed with each other on an issue often influences the Court's decision to review the question. In fact, it is widely accepted that the most important factor, by far, in the Court's decisions to accept certiorari is the existence of a division of authority among lower courts.<sup>134</sup> Thus, although the Supreme Court rarely draws on the wisdom of lower courts, it does place a premium on resolution of lower court conflict in choosing which cases to hear. The Court, that is, is much more likely to accept cases in which the legal issues are difficult and confusing enough that lower courts have reached differing conclusions in deciding how to resolve those issues.

Ultimately, the Court accepts certiorari in only about one percent of the cases it is petitioned to review,<sup>135</sup> taking about eighty cases per year.<sup>136</sup> The handful of Fourth Amendment cases on the Court's docket each term represents only a small fraction of Fourth Amendment cases lower courts decide each year, and only a tiny portion of the Fourth Amendment issues those lower courts address.<sup>137</sup> Because of the Court's priorities, issues in all legal fields that have generated widespread consensus among lower courts are likely to be underrepresented on the Court's docket.<sup>138</sup>

If one accepts that the existence of such consensus likely reflects the clarity of the answer to the legal question at issue (which derives in part from the coherence of the Supreme Court's previous decisions), then it

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<sup>134</sup> See, e.g., H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 246 (1991); Aaron-Andrew P. Bruhl, *Measuring Circuit Splits: A Cautionary Note*, 4 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP 361, 361 (2014); see also Ruth Bader Ginsburg, *Workways of the Supreme Court*, 25 T. JEFFERSON L. REV. 517, 521 (2003) (noting that about seventy percent of the cases the Court agrees to hear "involve deep divisions of opinion among federal courts of appeals or state high courts"); David R. Stras, *The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 85 TEX. L. REV. 947, 981 (2007) (observing that approximately seventy percent of the Court's cases from 2003 to 2005 involved lower court splits).

<sup>135</sup> See, e.g., EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 321 (9th ed. 2007); *The Supreme Court 2014 Term—The Statistics*, 129 HARV. L. REV. 381 (2015); *The Supreme Court 2013 Term—The Statistics*, 128 HARV. L. REV. 401 (2014); *The Supreme Court 2012 Term—The Statistics*, 127 HARV. L. REV. 408, 416 (2013); *The Supreme Court 2011 Term—The Statistics*, 126 HARV. L. REV. 388, 395 (2012).

<sup>136</sup> See, e.g., Bruhl, *supra* note 134, at 381.

<sup>137</sup> See Solove, *supra* note 38, at 1534.

<sup>138</sup> Bruhl, *supra* note 118, at 880; John S. Summers & Michael J. Newman, *Towards a Better Measure and Understanding of U.S. Supreme Court Review of Courts of Appeals Decisions*, 80 U.S.L.W. 393, 3 (2011) (noting that the Supreme Court tends to select "'tough cases,' i.e., circuit splits, where differences of opinion are likely").

follows that examination of lower court positions only on issues the Supreme Court later chose to address would underrepresent the coherence of Supreme Court decision-making. For this reason, it is important that other authors have attempted to track the performance of lower courts generally when the Supreme Court addresses issues those courts have previously attempted to answer. Although the conclusions one draws from assessing such performance within one field are incomplete and likely to undervalue the coherence of Supreme Court decision-making, the existence of similar data outside the Fourth Amendment context provides some basis for comparing the coherence of the Court's Fourth Amendment decision-making to the Court's jurisprudence in other realms.

Finally, an assessment of the performance of lower courts in what are likely the most difficult, divisive cases can provide only partial insight into the clarity of the Court's jurisprudence because such an analysis, by itself, offers no sense of the likelihood that the Court's pronouncements in a given field will produce the kind of uncertainty that divides lower courts and requires Supreme Court intervention. For this reason, it is necessary to supplement evaluation of the performance of lower courts on issues the Supreme Court later addresses with an inquiry into the frequency with which such difficult issues arise in the first place. Even an assessment of the rate at which the Court accepts certiorari in various classes of cases is imperfect. The rate at which the Supreme Court intervenes in a given area of law might not be fully representative of the extent to which lower courts face difficult issues in that field; the Court might decline to resolve divisions of lower court authority more often in some areas than in others. Additionally, even a perfect tally of the numbers of lower court splits in various areas of law would, by itself, be incomplete, for one must also resolve the question of which denominator to use to evaluate the significance of such splits. For example, if government conduct implicates one individual right with greater frequency than another, one would expect a greater amount of litigation over the former right than the latter. The larger number of cases would, consequently, create more opportunities for divisions of authority with regard to the first right, regardless of the clarity of the state of the law in either field. This is particularly salient in the Fourth Amendment context, for routine government conduct likely implicates the Fourth Amendment rights of citizens more than any other constitutional right.<sup>139</sup> Thus, supplementing an evaluation of lower court performance on issues the Supreme Court chooses to resolve with an assessment of the frequency with

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<sup>139</sup> See Clancy, *supra* note 75, at 977 (noting myriad instances in which the government conducts Fourth Amendment searches or seizures, including the thousands of vehicle stops that occur each day).

which such cases arise enriches the conclusions one might draw about the coherence of the Court's decision-making, but the enhanced inquiry is, nonetheless, far from perfect.

### B. *Data Collection*

Accepting the idea that Supreme Court agreement with lower courts might be a useful, partial proxy for assessing the coherence of Supreme Court precedent represents only the first step in a complex process. Collecting the relevant data presents enormous challenges, some of which are inherently insurmountable. The first step in such a process requires identifying the relevant cases to be examined. The most rudimentary approach to assessing the performance of lower courts would be to examine only the Supreme Court's direct reversal rate. In fact, while Craig Bradley's 1985 assertions of Fourth Amendment incoherence depended largely on qualitative analysis, Bradley supported his thesis at the outset with the observation that, in its Fourth Amendment cases, the Supreme Court usually reversed the decision of the highest court below.<sup>140</sup>

A first-level response to this kind of observation would be to point to the Court's reversal rates in other fields; it has long been known that the Supreme Court, in general, reverses the decisions of lower courts much more frequently than it affirms those decisions, and in recent years the Court's direct reversal rate has been between seventy and seventy-five percent.<sup>141</sup> Thus, one might suggest, if direct reversal rates demonstrate the incoherence of the Court's Fourth Amendment jurisprudence, they also suggest the Court's overall body of jurisprudence is incoherent. But a more thorough response would highlight the inadequacy of direct reversal rates as a measure of lower court performance. If the Supreme Court agrees to hear a case from the Fifth Circuit, for example, it is possible that the First, Second, Third, and Fourth Circuits have also considered the issue at hand. If the Court reverses the Fifth Circuit decision, but the other lower courts all agreed with the Supreme Court's eventual disposition, then examination of only the direct reversal rate would fail to account for the fact that eighty percent of lower courts had actually gotten the answer right. If those other courts had been in agreement with the Fifth Circuit, evaluation of only direct review would fail to reflect that five lower courts had gotten the wrong answer, rather than only one.

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<sup>140</sup> Bradley, *supra* note 2, at 1468, 1475 n.47 (noting that the Supreme Court had usually reversed in its Fourth Amendment cases in the previous two years, that in the 1982–83 term, the Court reversed in seven of nine Fourth Amendment cases, and that the lower courts in those cases had been attempting, unsuccessfully it turned out, to apply Supreme Court precedent).

<sup>141</sup> LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM* 271 tbl.3–6 (5th ed. 2012).

Examination of the performance of all lower courts that have addressed issues the Supreme Court later resolved is likely to provide more accurate data on lower court performance than analysis only of direct review for at least two important reasons: sample size and selection bias. First, the Court directly reviews only about one tenth of one percent of circuit court judgments.<sup>142</sup> Given the small number of cases the Court reviews directly each year overall,<sup>143</sup> and the much smaller number still on any specialized topic like Fourth Amendment law, a study focused only on direct review, depending on the topic and time period covered, might produce an inadequately robust sample size for reliable results. Second, even if one is studying multiple years of the Court's entire docket, direct review is a deficient mechanism for examining lower court performance because the Supreme Court's selection of cases to review is systematically biased; a significant body of research shows the court has a tendency to grant certiorari in cases in which it intends to reverse the court directly below.<sup>144</sup>

For these reasons, several recent studies have attempted to measure the performance of lower courts through examination of indirect or "parallel" review by the Supreme Court.<sup>145</sup> These studies repeatedly show that lower courts have gotten the "right" answer about twice as often as examination of only direct review would suggest; studies including parallel review demonstrate that the Court has tended to affirm lower courts about half the time in recent years, with results from various years rang-

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<sup>142</sup> Tom Cummins & Adam Aft, *Appellate Review*, 2 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP 59, 59 (2012) (citing Roy E. Hofer, *Supreme Court Reversal Rates: Evaluating the Federal Courts of Appeals*, LANDSLIDE, Jan.-Feb. 2010, at 8).

<sup>143</sup> See *id.*

<sup>144</sup> See, e.g., RICHARD FALLON ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1469 (6th ed. 2009) (citations omitted); Thomas Baker, *The Eleventh Circuit's First Decade Contribution to the Law of the Nation, 1981-1991*, 19 NOVA L. REV. 323, 327 (1994). This is not to suggest that parallel review provides anything like a perfect measurement of lower court performance. For example, as discussed above, the Court has a propensity to accept certiorari on issues that have divided lower courts. If cases in which lower courts are in agreement are underrepresented on the Court's docket, and if those lower courts tend to agree with each other because the law supplies a fairly clear answer, an answer with which the Supreme Court would also be likely to agree, then parallel review also underrepresents the extent to which lower courts arrive at conclusions the Supreme Court would consider correct. Nonetheless, parallel review supplies at least a marginally better tool for evaluating lower court performance than direct review alone.

<sup>145</sup> See Bruhl, *supra* note 134, at 361-62; Cummins & Aft, *supra* note 142, at 60; Tom Cummins & Adam Aft, *Appellate Review II—October Term 2011*, 3 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP 37, 37 (2013); Tom Cummins, Adam Aft, & Joshua Cumby, *Appellate Review III: October Term 2012 and Counting*, 4 J.L.: PERIODICAL LABORATORY OF LEG. SCHOLARSHIP 385, 386-87 (2014); Eric Hansford, *Measuring the Effects of Specialization with Circuit Split Resolutions*, 63 STAN. L. REV. 1145, 1145 (2011).

ing from forty-four percent to sixty-four percent affirmation of lower court positions.<sup>146</sup>

Once one has chosen to examine parallel review data, further questions arise. Several threshold questions relate to the category of Supreme Court cases to be included in the study and how to identify those cases. Others involve determinations of how to count lower court decisions associated with the Supreme Court cases one has selected for inclusion. With regard to the category of Supreme Court cases that should be included, one must decide whether to focus only on cases with issues on which more than one lower court had weighed in, or to include reversal rates for cases in which only the court being reviewed directly by the Supreme Court had addressed the issue at hand. The latter situation often involves idiosyncratic facts that limit the possibilities that previous guidance of any sort could conclusively resolve the issue or that other courts would be likely to face identical facts in the future. For example, cases in which the ultimate question is whether the totality of the circumstances gave police probable cause to believe a crime had been committed frequently involve such idiosyncratic facts. More importantly, the Court's known bias for selecting cases in which it intends to reverse the court directly below makes these cases likely to be unrepresentative of lower court performance, even within the narrow class of relatively difficult issues the Supreme Court selects for review. For this reason, I believe a focus only on Supreme Court cases in which more than one lower court has previously ruled on the issue is the superior approach.<sup>147</sup> Nonetheless, I collected data for the idiosyncratic "one-off" cases as well to provide a basis for comparison.

Within the category of Supreme Court cases in which more than one lower court had weighed in, one must also decide whether to examine Supreme Court cases in which lower courts were unanimous in their conclusions or to assess only cases in which there was a true split of author-

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<sup>146</sup> See Bruhl, *supra* note 142, at 364; Cummins & Aft, *Appellate Review*, *supra* note 142, at 61 (using parallel review analysis to find that the Court affirmed lower courts sixty-four percent of the time in cases involving circuit splits during the October 2010 term); Cummins & Aft, *Appellate Review II*, *supra* note 145, at 38 (observing that the Supreme Court affirmed lower courts on parallel review, in cases involving circuit splits, forty-four percent of the time for the October 2011 term); Cummins, Aft, & Cumby, *supra* note 145, at 394 (showing that the Court directly or indirectly affirmed fifty-one out of 101 lower court decisions in cases involving circuit splits during the October 2012 term); Hansford, *supra* note 145, at 1165 tbl.1 (using parallel review to show that the Supreme Court affirmed lower court positions in cases involving circuit splits fifty-four percent of the time between 2005 and 2008); Summers & Newman, *supra* note 138, at 4 (revealing that the Supreme Court agreed with lower court positions in cases involving circuit splits 51.7% of the time between 2005 and 2010).

<sup>147</sup> This is consistent with the approach of other studies. See Cummins, Aft, & Cumby, *supra* note 145, at 391; Hansford, note 145, at 1174; Summers & Newman, *supra* note 138, at 3 (including an overall reversal rate for all cases, but also providing a separate rate for cases in which more than one lower court had ruled on the issue).

ity among lower courts. The answer to this question should depend on what one hopes to measure. For one interested in a broad evaluation of lower court performance, as opposed to cases involving divisions of authority as such, analysis of any Supreme Court case in which more than one lower court had weighed in would be the best metric. Other studies have taken this approach,<sup>148</sup> and I chose it as well.<sup>149</sup>

Additionally, one must decide whether to count only Supreme Court cases in which multiple federal courts of appeals had weighed in or to include state court decisions as well when classifying a Supreme Court decision as one in which more than one lower court had ruled. As with the question of whether to include only Supreme Court cases involving true splits of lower court authority or all cases in which more than one lower court had addressed the relevant issue, the answer to this question should depend on what one hopes to measure. If one is concerned primarily with assessing the performance of federal courts of appeals, studying only those courts would make sense.<sup>150</sup> On the other hand, if one is interested, more broadly, in evaluating the rate of agreement between lower courts and the Supreme Court, a more expansive approach that includes state supreme court decisions would provide more complete results.<sup>151</sup> I took the latter approach.

Having chosen the substantive parameters for selection of Supreme Court cases, one must make a further determination of which sources to consult in identifying those cases. Some studies used the Supreme Court Database, founded by Harold Spaeth,<sup>152</sup> to identify relevant Supreme Court cases.<sup>153</sup> The Database includes the reason for granting certiorari,

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<sup>148</sup> Summers & Newman, *supra* note 138, at 2. Although Cummins, Aft, and Cumby described their data set as including only cases in which “the Court both resolves a split and explicitly identifies courts involved in the split,” their study included cases in which they were able to identify only lower courts taking one side of the issue. *See* Cummins, Aft, & Cumby, *supra* note 145, at 391, app. A at 397.

<sup>149</sup> In the present study, this choice had limited consequences. Lower courts were unanimous in two of fifty-one Supreme Court decisions in which more than one lower court had weighed in. There were a total of five lower court decisions associated with these two cases, out of 370 individually counted lower court decisions associated with forty-four Supreme Court cases in which more than one lower court had ruled and 545 lower court decisions when including approximations for seven Supreme Court cases in which lopsided majorities of lower courts were apparent, but for which the precise lineup of lower courts was difficult to calculate with precision using my methodology.

<sup>150</sup> Other studies have taken this approach. *See* Cummins & Aft, *Appellate Review*, *supra* note 142; Cummins & Aft, *Appellate Review II*, *supra* note 145; Cummins, Aft, & Cumby, *supra* note 145, at 390; Hansford, *supra* note 145, at 1146–47; Summers & Newman, *supra* note 138, at 1.

<sup>151</sup> *See* Bruhl, *Measuring Circuit Splits*, *supra* note 134, at 377 n.37.

<sup>152</sup> Harold Spaeth et al., *Supreme Court Database: The Genesis of the Database*, SUP. CT. DATABASE, <http://supremecourtdatabase.org/about.php> (last visited Nov. 1, 2016, 8:40 p.m.).

<sup>153</sup> *See* Cummins & Aft, *Appellate Review*, *supra* note 142, at 64; Cummins & Aft, *Appellate Review II*, *supra* note 145, at 39.

as reported by the Court, among the 247 variables it tracks for each Supreme Court case,<sup>154</sup> and this variable takes account of various kinds of lower court splits, including “federal court conflict,” “state court conflict,” “conflict between federal court and state court,” “federal court uncertainty,” and “state court uncertainty.”<sup>155</sup>

The Database, however, has two important limitations. First, the Database undercounts Supreme Court cases relevant to the study. In the context of this Study, the undercounting results partly from the nature of the cases I have opted to review; although the Database’s variable on the Court’s reason for granting certiorari can take on a variety of values signifying lower court splits, none of the values the Database uses specifically address situations in which several lower courts had evaluated the issue at hand but all agreed with each other.<sup>156</sup> Even among cases involving true splits, reliance only on the Database leads to undercounting, in part as a consequence of the parsimonious way in which the Database accounts for lower court splits. As Professor Bruhl has documented, the Database codes the reason for certiorari as a division of lower court authority only if the lead opinion explicitly describes a lower court split as the reason for reviewing the issue; even when a majority opinion mentions a split of lower court authority very near to its description of the reasons for granting certiorari, the Database will not code the case as one involving a split unless the lead opinion directly describes the split as a certiorari catalyst.<sup>157</sup> The underrepresentation of splits in the Database also derives in part from the Supreme Court’s regular failure to mention lower court divisions of authority at all.<sup>158</sup> Ultimately, examination of the Database tends to suggest the Court’s certiorari decisions depend on lower court splits in about thirty to forty percent of the Court’s cases.<sup>159</sup> Meanwhile, sophisticated observers tend to believe that around seventy percent of Supreme Court cases actually involve divisions of authority among lower courts.<sup>160</sup>

If undercounting were the only limitation of the Database, that limitation might be relatively unimportant if one were interested in assessing long-term trends; a study of enough years of cases could yield an adequate sample size. For a study of a specialized field like Fourth Amendment law, on which the Court accepts no more than a few cases a year, however, insufficient sample size would be likely to be a problem even for a relatively long-term study. Furthermore, the Court’s frequent failure

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<sup>154</sup> Spaeth et al., *supra* note 152.

<sup>155</sup> *See id.*

<sup>156</sup> *Id.*; *see also* Bruhl, *supra* note 134, at 367.

<sup>157</sup> *Id.*

<sup>158</sup> *See* Bruhl, *supra* note 118, at 905; *see also* Bruhl, *supra* note 134, at 371–72.

<sup>159</sup> *See* Bruhl, *supra* note 134, at 367.

<sup>160</sup> Ginsburg, *supra* note 134, at 521; Stras, *supra* note 134, at 981.

to mention lower court splits raises a second potential shortcoming of the Database—the possibility of systematic bias in the cases included in the study.<sup>161</sup>

For one thing, Supreme Court Justices have widely varying tendencies to mention lower court splits in their majority opinions.<sup>162</sup> For example, the Database coded only ten cases in which Justice Thomas wrote the majority opinion as involving splits for the four Terms from 2010 through 2013, while it coded seventeen and eighteen opinions by Justices Kagan and Sotomayor respectively as involving splits during those same years.<sup>163</sup> Although some of this variation might reflect differing rates at which various Justices are assigned cases involving splits, some of it also reflects the dissimilar writing styles of the Justices.<sup>164</sup>

Likewise, the Justices have differing jurisprudential philosophies that can affect the likelihood that lower courts will get the “right” answers. For example, Justice Thomas is known to give relatively little weight to Supreme Court precedent.<sup>165</sup> Because lower courts rely heavily on Supreme Court precedent in answering constitutional questions,<sup>166</sup> one might expect those courts to get the “right” answers less frequently when Justice Thomas writes for the majority. Thus, underrepresentation of lower court splits in Thomas opinions in the Database would tend to overrepresent the extent to which lower courts answer constitutional questions correctly.

Some studies have eschewed reliance on the Database and have, instead, examined Supreme Court opinions directly to identify cases in which more than one lower court had ruled on the issue at hand.<sup>167</sup> Reading Supreme Court opinions, including concurrences and dissents, only partially solves the problems posed by exclusive reliance on the Database. First, reading the opinions does identify cases in which the Database’s stringent coding standards fail to classify the case as involv-

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<sup>161</sup> See Bruhl, *supra* note 134, at 373–74.

<sup>162</sup> *Id.*

<sup>163</sup> See *id.* at 383 tbl.2.

<sup>164</sup> *Id.* at 373–74.

<sup>165</sup> See, e.g., Eric R. Claeys, Raich and *Judicial Conservatism at the Close of the Rehnquist Court*, 9 LEWIS & CLARK L. REV. 791, 797 (2005) (noting that Justice Thomas prioritizes original meaning over precedent); Bradford C. Mank, *Judge Posner’s “Practical” Theory of Standing: Closer to Justice Breyer’s Approach to Standing than to Justice Scalia’s*, 50 HOUSTON L. REV. 71, 105–06 (2012) (observing that Justice Thomas gives more weight to the views of the framers of the Constitution than to Supreme Court precedent); Michael L. Wells, “*Sociological Legitimacy*” in *Supreme Court Opinions*, 64 WASH. & LEE L. REV. 1011, 1042 n.139 (2007) (stating that “[s]ome of Justice Thomas’s opinions suggest that he gives little weight to precedent”).

<sup>166</sup> See Amar, *supra* note 131, at 150.

<sup>167</sup> See Cummins, Aft, & Cumby, *supra* note 145, at 389 (describing a shift from reliance on the Database in previous studies to reliance on Supreme Court opinions themselves, in response to criticisms by Professor Bruhl); Summers & Newman, *supra* note 138, at 2.



ing a split, but in which one or more of the opinions mention the existence of a division of lower court authority or describe multiple lower courts as having agreed on the issue at hand. Additionally, one might expect reading each of the Supreme Court opinions associated with each case to counter, to some extent, the distortions caused by the varying tendencies of individual Justices to mention splits. Nonetheless, reading the opinions cannot counter the likely proclivity of the Court to mention circuit splits when the Court sides with most lower courts but to ignore lower court opinions otherwise, at least in cases in which the Supreme Court decision is unanimous.<sup>168</sup> Overall, the Court's established tendency to ignore known splits among lower courts is likely to lead to significant undercounting, a particular problem for a study such as this one, in which only a few Supreme Court cases per year are initial candidates for the data set. Like studies depending exclusively on the Supreme Court Database, studies that have relied only on reading Supreme Court opinions to classify cases involving lower court splits have, unsurprisingly, arrived at figures significantly lower than one would expect based on conventional wisdom about the Court's priorities in granting certiorari.<sup>169</sup>

Because of the limitations of exclusive reliance on the Supreme Court Database or the Supreme Court's opinions, I chose to begin with the Court's opinions but to look beyond the four corners of those opinions to supplement my research. Initially, I conducted a search for the term "Fourth Amendment" within Westlaw's Supreme Court database. I then arranged the results chronologically and began reading the opinions from the October 1995 term through the October 2014 term. I eliminated cases that mentioned the Fourth Amendment only in passing.<sup>170</sup> I also focused only on cases in which the Court definitively ruled on the merits of a substantive Fourth Amendment claim squarely before the Court. This led me to eliminate cases in which the Court concluded only that a defendant was entitled to qualified immunity from suit, without determining whether the government's conduct in fact violated the Fourth Amendment.<sup>171</sup> For each case that I did not exclude using these criteria, I read each Supreme Court opinion associated with the case for evidence

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<sup>168</sup> See Bruhl, *supra* note 134, at 374.

<sup>169</sup> See Cummins, Aft, & Cumby, *supra* note 145, at 389 (counting twenty-seven of seventy-eight cases from the October 2012 term as involving lower court splits); Summers & Newman, *supra* note 138, at 2 (finding that 176 of 397 cases from the federal courts of appeals between 2005 and 2010 involved issues on which more than one court of appeals had ruled); see also Bruhl, *supra* note 134, at 371 (identifying splits in less than half the Court's docket from the 2010 term by reading Supreme Court opinions).

<sup>170</sup> See, e.g., *Arizona v. United States*, 132 S. Ct. 2492, 2509–10 (2012) (discussing the Fourth Amendment in passing in considering the issue of federal preemption of state law).

<sup>171</sup> See, e.g., *Carroll v. Carman*, 135 S. Ct. 348, 352 (2014); *Tolan v. Cotton*, 134 S. Ct. 1861, 1868 (2014) (deciding only that the district court should not have granted summary

that multiple lower courts had addressed the relevant Fourth Amendment question. If any Supreme Court opinion described a split of lower court authority or otherwise revealed that multiple lower courts had reviewed the Fourth Amendment issue, I accepted the Court's assertions. However, when the Court was silent about whether multiple lower courts had ruled on an issue, I relied on additional materials to answer the question.<sup>172</sup>

Specifically, I read the filings of the parties to the case, including, when available on Westlaw, the petition for certiorari, the respondent's brief in opposition, and amicus briefs. Depending on what the foregoing materials revealed, I also read lower court opinions and secondary source material for some cases. It was important to examine filings from both sides of each case because of the incentives each side has to distort the record of lower court authority. For example, given the Court's known preference for accepting certiorari in cases involving conflict among lower courts, petitioners have an incentive to assert such conflict whenever possible.<sup>173</sup> More broadly, petitioners have an incentive to claim that multiple lower courts have faced the issue in question because the Supreme Court is likely to consider an issue that has required repeated attention to be more important than one so idiosyncratic that only one lower court has faced it. On the other hand, a respondent has an incentive to deemphasize lower court conflict and the importance of the legal issue in question.<sup>174</sup> Therefore, when the parties disagreed about the existence of a split or whether multiple lower courts had addressed the relevant issue, I read additional materials, including the lower court decisions in question.<sup>175</sup>

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judgment on the question of qualified immunity); *Stanton v. Sims*, 134 S. Ct. 3, 4 (2013); *Filarsky v. Delia*, 132 S. Ct. 1657, 1667–68 (2012).

<sup>172</sup> As I will discuss below, even when the Court did acknowledge lower court opinions, I examined extrinsic materials to discern the dispositions of lower courts that had ruled on the matter in question.

<sup>173</sup> Bruhl, *supra* note 134, at 375.

<sup>174</sup> Reading briefs for the Supreme Court cases in my data set showed these incentives at work. *Compare, e.g.*, *Petition for a Writ of Certiorari, Florida v. Jardines*, 2011 WL 5254666 at 18–21 (claiming that the decision of the Florida Supreme Court conflicted with decisions of the Seventh and Eighth Circuit Courts of Appeals), *and* *Petition for a Writ of Certiorari, United States v. Jones*, 2011 WL 1462758 at 20–23 (claiming the existence of a split of authority among lower courts), *with* *Respondent's Amended Brief in Opposition, Florida v. Jardines*, 2011 WL 8865675 at 23–25 (asserting that the Seventh and Eighth Circuit decisions were distinguishable from that of the Florida Supreme Court and, thus, that there was no division of authority among lower courts), *and* *Brief in Opposition, United States v. Jones*, 2011 WL 2263361 at 19–23 (denying the existence of a split among lower courts).

<sup>175</sup> The parties likely have the strongest incentives to assert or deny the existence of multiple lower court decisions on the issue in question at the certiorari stage. *See* Arthur D. Hellman, *Never the Same River Twice: The Empirics and Epistemology of Intercircuit Conflicts*, 63 U. PITT. L. REV. 81, 101 (2001) (stating that the certiorari petition and the petitioner's reply brief are the briefs most likely to assert a conflict among lower courts). If the petition for

Although this relatively comprehensive approach can help identify relevant cases that exclusive reliance on the Supreme Court Database or the Court's opinions would fail to detect,<sup>176</sup> it carries its own costs and risks. Aside from the time-consuming nature of the process,<sup>177</sup> going beyond the four corners of the Supreme Court's opinions adds additional layers of subjectivity to the subjective judgments of the Supreme Court Justices.<sup>178</sup> When the Supreme Court failed to mention the existence of multiple lower court decisions, I relied on the descriptions of the parties if they agreed about the existence of a circuit split or whether multiple lower courts had addressed the issue at stake, and, if the parties disagreed, I independently assessed the question by reading the relevant lower court opinions. If the parties agreed, their competing self-interests provided some indication of the reliability of the agreed upon characterization.<sup>179</sup> If the parties disagreed, I had to make difficult judgment calls about whether more than one lower court had truly addressed the question at hand or, alternatively, whether the proffered cases were distinguishable. If my judgments in this regard were systematically biased, that would, of course, affect the results of the Study.<sup>180</sup>

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certiorari or the respondent's brief in opposition were unavailable on Westlaw, I focused on other available briefs and, at times, lower court opinions. If a petition for certiorari was available and claimed that multiple lower courts had weighed in, but no brief in opposition was available on Westlaw, I examined other briefs and any lower court opinions mentioned in the available briefs to verify the petitioner's claims. For several cases, a petition for certiorari was available and asserted that multiple lower courts had ruled on the issue, but there was no brief in opposition. *See* *Samson v. California*, 547 U.S. 843 (2006); *United States v. Grubbs*, 547 U.S. 90 (2006); *Illinois v. Lidster*, 540 U.S. 419 (2004); *United States v. Drayton*, 536 U.S. 194 (2002); *Penn. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357 (1998); *Maryland v. Wilson*, 519 U.S. 408 (1997). In other cases, neither a certiorari petition nor a brief in opposition was available on Westlaw. *See* *Maryland v. Pringle*, 540 U.S. 366 (2003); *Florida v. J.L.*, 529 U.S. 266 (2000); *Wyoming v. Houghton*, 526 U.S. 295 (1999); *Knowles v. Iowa*, 525 U.S. 113 (1999); *Minnesota v. Carter*, 525 U.S. 83 (1999); *Richards v. Wisconsin*, 520 U.S. 385 (1997); *Whren v. United States*, 517 U.S. 806 (1996); *Ornelas v. United States*, 517 U.S. 690 (1996).

<sup>176</sup> *See* Bruhl, *supra* note 134, at 372–75.

<sup>177</sup> *Id.* at 375. Having conducted the research for this study, I can attest to the enormity of the commitment required for this process.

<sup>178</sup> *Id.* at 375–76; Cummins, Aft, & Cumby, *supra* note 145, at 391.

<sup>179</sup> In some cases, a petition for certiorari asserted a split of lower court authority, and the brief in opposition conceded the existence of the split. *Compare, e.g.,* Petition for a Writ of Certiorari at 7, *Davis v. United States*, 564 U.S. 229 (2011), 2010 WL 2937720, at \*7 (asserting the existence of a lower court split), with Brief for the United States in Opposition at 9, *Davis v. United States*, 564 U.S. 229 (2011), 2010 WL 4278711, at \*9 (accepting the existence of a split among lower courts, but arguing that the case was a poor vehicle for resolving the split).

<sup>180</sup> To some extent, objective truth in such an inquiry is inherently elusive. The existence or non-existence of a split (as well as which lower courts have lined up on either side of an issue) can depend on the level of generality at which one views the question. *See* Bruhl, *supra* note 134, at 378 n.42; Summers & Newman, *supra* note 138, at 2 (describing these tasks as “more art than science”). In an attempt to provide an objective guidepost for these inquiries, I referred to the questions on which the Court accepted certiorari. Nonetheless, this did not entirely eliminate subjectivity from the process.

After choosing a methodology for identifying Supreme Court cases in which more than one lower court had ruled on the issue, one must also select criteria for counting the lower court decisions associated with those Supreme Court cases. As with the question of how to identify relevant Supreme Court cases, one must decide which sources to consult. That choice generates further questions. For reasons similar to those I have described above, some studies have chosen to treat the Supreme Court's opinions as definitive and to eschew reference to extrinsic materials like briefs and lower court opinions.<sup>181</sup> Largely because I hoped to generate a more robust data set, I chose, once again, to consult a broader range of sources, including briefs, the lower court decisions being reviewed by the Court, and other lower court decisions asserted to have addressed the relevant questions. My decision to consult these extrinsic materials, as opposed to simply counting any lower court decisions mentioned in Supreme Court opinions, required that I make additional choices about how to count those decisions. First, one must decide whether to count unpublished opinions.<sup>182</sup> I opted to count unpublished opinions unless the unpublished opinion conflicted with an earlier, published opinion by the same court. One must also determine a method for dealing with intra-jurisdictional conflict.<sup>183</sup> I counted the most recent decision as the position of the jurisdiction in question, unless the most recent decision was unpublished and conflicted with an earlier, published decision by the same court. In assessing the positions of lower courts, one must also decide whether to count statements that might be classified as dicta.<sup>184</sup> I counted any unequivocal statement taking a position on the relevant issue as a position of the lower court, whether or not the statement was essential to the court's holding.

As with my classification of Supreme Court cases as involving more than one lower court decision on the issue, my documentation of how lower courts lined up on those issues required that I make some subjective judgments. Once again, I began with the Supreme Court opinions themselves. However, even when the Court listed some lower court decisions, I supplemented the inquiry with reference to filings associated with the case. When the parties disagreed about the nature of the lower court lineup, I went beyond those filings to read lower court decisions to assess, independently, how lower courts had dealt with the questions at hand. While I hope that my consultation of additional sources served to

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<sup>181</sup> See Cummins, Aft, & Cumby, *supra* note 145, at 391; Summers & Newman, *supra* note 138, at 2. The Supreme Court Database does not attempt to measure the way lower courts lined up on issues the Supreme Court later reviewed, even for cases it codes as involving splits. Bruhl, *supra* note 134, at 377.

<sup>182</sup> Bruhl, *supra* note 134, at 376–77.

<sup>183</sup> *Id.* at 378.

<sup>184</sup> See *id.*

counteract any systematic bias in the Court's opinions, this process, once again, added additional layers of subjectivity. Although I hoped to avoid systematic bias in this process by consulting multiple sources, including the briefs of parties with opposing interests, I ultimately had to make my own judgments when those sources conflicted with each other. If my judgments were systematically biased, that bias would, of course, affect the results.

Although this relatively exhaustive approach should produce more complete results than consultation only of Supreme Court opinions, one cannot count on the method to provide truly comprehensive results. As Professor Bruhl has noted, the Supreme Court often purports to provide only examples of lower court cases, even when it does mention that more than one lower court has addressed the current issue.<sup>185</sup> Likewise, the parties sometimes explicitly offer only examples when they characterize lower court positions.<sup>186</sup> Nonetheless, one would expect this approach to provide a more robust data set than one could obtain with reference only to the Court's opinions.

I departed from this process of tallying lower court decisions in only one significant way. For some cases, it was apparent not only that the Court and the parties had failed to detail comprehensively the lineup of lower courts, but one could also say with confidence that significant numbers of other courts had weighed in on the question, and one could easily identify the position the vast majority of lower courts had taken. This situation arose in seven Supreme Court cases in the data set.<sup>187</sup> In six of those cases, the lower court decision the Supreme Court was reviewing simply disregarded clear Supreme Court precedent.<sup>188</sup> Thus, in

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<sup>185</sup> Bruhl, *supra* note 134, at 377.

<sup>186</sup> See, e.g., Petition for a Writ of Certiorari at 6–7, *Illinois v. Caballes*, 2003 WL 23119168.

<sup>187</sup> *Arizona v. Gant*, 556 U.S. 332 (2009); *Kirk v. Louisiana*, 536 U.S. 635 (2002); *United States v. Arvizu*, 534 U.S. 266 (2002); *United States v. Knights*, 534 U.S. 112 (2001); *Arkansas v. Sullivan*, 532 U.S. 769 (2001); *Flippo v. West Virginia*, 528 U.S. 11 (1999); *Maryland v. Dyson*, 527 U.S. 465 (1999).

<sup>188</sup> *Gant*, 556 U.S. 332 (creating restrictions on search incident to arrest of an automobile and effectively overruling *New York v. Belton*, 453 U.S. 454 (1981), while refusing to acknowledge the Court was doing so); *Kirk*, 536 U.S. 635 (overturning the decision of a Louisiana court that had held probable cause alone sufficient to validate arrest in the home, ignoring *Payton v. New York*, 445 U.S. 573 (1980)); *Arvizu*, 534 U.S. 266 (overturning a Ninth Circuit decision failing to follow the Court's guidance on evaluation of the totality of the circumstances in deciding whether the facts provided the government with reasonable suspicion); *Sullivan*, 532 U.S. 769 (overturning the Arkansas Supreme Court's refusal to follow *Whren v. United States*, 517 U.S. 806 (1996), in part because the Arkansas court believed it had the authority to interpret the United States Constitution as providing greater protection than the United States Supreme Court's interpretation would provide); *Flippo*, 528 U.S. 11 (overturning state court determination that search of a crime scene was authorized without a warrant, in violation of *Mincey v. Arizona*, 437 U.S. 385 (1978)); *Dyson*, 527 U.S. 465 (overturning state court ruling that police may not search an automobile without a separate finding of exigent

these cases, although neither the parties nor the Court attempted anything like a comprehensive account of lower court dispositions on the issue, the outlier status of the lower court whose decision was under review was obvious. In these cases, I attempted a rough approximation of the lineup of lower courts by assuming a total of twenty-five lower courts had ruled on the issue and assigning a ratio of either twenty-four to one or twenty-two to three, depending on whether it appeared that only one lower court had taken the outlying position or, alternatively, that a small handful of lower courts seemed to have taken that position.

While these figures were somewhat arbitrary, I believe they represent conservative estimates for two reasons. First, the issues in question in these cases tended to be routine Fourth Amendment matters that one would expect most lower courts to confront with some regularity. Second, because of the clarity with which the Supreme Court had already spoken in most of the cases in question, there was little doubt that the vast majority of lower courts were already following the Court's precedent without trouble. There is also reason to believe that inclusion of estimates for these cases enriches the data set by making it more representative of the Fourth Amendment issues that lower courts regularly confront. While typical Supreme Court cases tend to involve the most difficult issues, which divide lower courts and thus require Supreme Court intervention, six of these seven cases presented problems that, in theory, should have been easier for lower courts to resolve. Adding estimates of lower court lineups for some of these routine, easier problems makes the data set more representative than one composed entirely of the most difficult and divisive issues. Nonetheless, in recognition of the novelty of this approach, and in order to ensure a closer basis for comparison with previous studies, I also kept a separate tally of cases in which my data collection did not require this kind of approximation.

In addition to tracking the performance of lower courts on Fourth Amendment issues the Court reviewed, I used the Supreme Court Database and Westlaw to estimate the frequency with which the Court resolved Fourth Amendment issues, as compared with other constitutional questions. The frequency with which the Court believes that complex issues that have divided lower courts are important enough to require definitive resolution gives additional information about the coherence of the Court's earlier decisions. As I have discussed, this information still leaves one with an incomplete picture of the coherence of Supreme Court decision-making, but it does enrich the inquiry. Furthermore, authors have relied in the past on superficial examination of the frequency with which the Court intervenes on Fourth Amendment ques-

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circumstances, in addition to probable cause, in disregard of the Court's holding in *Pennsylvania v. Labron*, 518 U.S. 938 (1996)).

tions to marshal support for the argument that the Court's Fourth Amendment jurisprudence is incoherent.<sup>189</sup>

For each Fourth Amendment case, I also kept a tally of the process the Court used to derive its holding. Specifically, I characterized each case either as one in which the Court primarily used an open-ended balancing process, one in which the Court used a more constrained form of analogical reasoning from precedent, or one involving a mixed process.<sup>190</sup> The Court is likely to engage in balancing to determine Fourth Amendment reasonableness when no clear rule from a previous case governs the situation.<sup>191</sup> Such balancing suggests either that the Court has never addressed the issue in question, or, alternatively, that it has expressly decided the problem should be solved through case-by-case adjudication. On the other hand, if the Supreme Court believed its precedent controlled the outcome of a case, or if closely analogous cases at least suggested the correct disposition of the current issue, lower courts, like the Supreme Court, would be likely to have relied on that same precedent. In other words, the process the Court uses to reach its conclusions in any given case gives an indication of the kind of guidance the Court has previously offered on the issue at hand.<sup>192</sup> Thus, accounting

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<sup>189</sup> See Bradley, *supra* note 2, at 1468 (noting that, in the most recent five terms at the time of the article's publication, the Court had decided thirty-five Fourth Amendment cases); Lloyd L. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 49 (1974) (asserting that the fact that the Court had issued sixteen major Fourth Amendment opinions in the previous five terms illustrated that the Court's Fourth Amendment jurisprudence was "unstable and unconvincing").

<sup>190</sup> As with other coding decisions in this study, coding these cases required that I make some subjective determinations with which others might reasonably disagree. For example, in *Florida v. J.L.*, 529 U.S. 266 (2000), the Court considered the question of the existence of reasonable suspicion to be essentially determined by its previous pronouncements on the matter. See *id.* at 269–72 (citing and distinguishing *Terry v. Ohio*, 392 U.S. 1 (1968), *Adams v. Williams*, 407 U.S. 143 (1972), and *Alabama v. White*, 469 U.S. 325 (1990)). However, in response to the state's argument that the Court should modify the *Terry* standard, the Court discussed both the dangers presented by firearms and the ease with which anyone could set in motion embarrassing, intrusive searches of other citizens were the Court to loosen *Terry*'s requirements for establishing reasonable suspicion. See *J.L.*, 529 U.S. at 272–73. Nonetheless, because the Court did not explicitly state that it was engaging in a balancing process, and because the Court had already determined that *Terry*, *Adams*, and *White* decided the outcome of the case, I coded *J.L.* as a case involving analogical reasoning rather than balancing.

<sup>191</sup> See, e.g., *Riley v. California*, 134 S. Ct. 2473, 2484 (2014) (stating that, in the absence of precise guidance from the founding era, the Court will decide whether to exempt a search from the warrant requirement by balancing the degree to which government conduct is necessary to promote legitimate law enforcement interests against the severity of the privacy intrusion); *Wyoming v. Houghton*, 526 U.S. 295, 299–300 (1999) (stating that the Court will engage in balancing to determine Fourth Amendment reasonableness when the common law during the founding era provides no clear answer); *Terry*, 392 U.S. at 21 ("There is no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails.") (citation omitted).

<sup>192</sup> This inquiry is far from a perfect gauge of the character of the Court's previous guidance. For example, the Court might balance in a case in which a previous, seemingly categor-

for the process the Court uses to reach its conclusions provides an opportunity to assess whether attempting to create mechanical rules to govern future situations or leaving Fourth Amendment reasonableness determinations to case-by-case balancing based on the totality of the circumstances best promotes coherence in Fourth Amendment law.<sup>193</sup> If lower courts were more likely to get the “right” answers in cases in which the Supreme Court believed precedent controlled the outcome, that fact would suggest that, if coherence is the Court’s priority, it should attempt to craft bright-line rules when possible.

It is worth distinguishing the foregoing inquiry, which involves the process by which the Court derives the directives it issues in each case, from the nature of those directives themselves. For example, if the Court has never addressed the question of whether police may detain occupants of a residence while executing a search warrant, it might balance to de-

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ical rule appeared to govern facts the Court determines to be distinguishable, rather than because the Court had failed to address the issue entirely or because it deliberately left the issue open to case-by-case balancing. In *Riley v. California*, 134 S. Ct. 2473 (2014), the Court balanced to reach its conclusion that police should not be authorized to search the digital contents of a cell phone incident to arrest, distinguishing *United States v. Robinson*, 414 U.S. 218 (1973). However, before *Riley*, several lower courts had relied on *Robinson* as providing a categorical rule authorizing such searches, without any reason to distinguish the digital contents of cell phones from other items police might discover and seize from a person during an arrest. See *United States v. Murphy*, 552 F.3d 405, 411–12 (4th Cir. 2009); *United States v. Finley*, 477 F.3d 250, 259–60 (5th Cir. 2007); *People v. Diaz*, 244 P.3d 501, 510 (Cal. 2011). Despite the coarse nature of the metric, however, I believe this inquiry provides a reasonable, rough estimate of the character of the Court’s prior pronouncements on an issue. In each case in which the Court relies primarily on balancing, it does so because it believes prior law offered no definitive resolution to the problem under review.

<sup>193</sup> Despite the Court’s periodic insistence that clear rules are necessary to provide adequate guidance to police officers, the question of whether, and under what conditions, such rules promote clarity has been subject to longstanding debate. In 1985, Professor Bradley argued that the Court’s numerous, fact-bound Fourth Amendment rules creating exceptions to the warrant requirement generated confusion because such rules tend to break down, requiring constant qualification and refinement when slightly different facts suggest the governing rule would produce unreasonable results. Bradley, *supra* note 2, at 1484–85. As discussed above, for Bradley the solution lay either in embracing an open-ended, case-by-case reasonableness test for all Fourth Amendment questions or, alternatively, in enforcing a single, bright-line rule that warrants are always required when police conduct Fourth Amendment searches and seizures, except in cases of true emergency. Professor Wayne LaFave suggested the Court should adopt bright-line rules in the Fourth Amendment context when 1) the rule has clear boundaries that obviate the need for case-by-case adjudication; 2) application of the rule produces results that approximate those that would be obtained if case-by-case evaluation were feasible; 3) case-by-case adjudication of the underlying principle the rule effectuates has proved unworkable; 4) the rule is not easily subject to manipulation and abuse. Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing ‘Bright Lines’ and ‘Good Faith,’* 43 U. PITT. L. REV. 307, 325–26 (1982); see also Andrew McLetchie, Note, *The Case for Bright-Line Rules in Fourth Amendment Jurisprudence: Adopting the Tenth Circuit’s Bright-Line Test for Determining the Voluntariness of Consent*, 30 HOFSTRA L. REV. 225, 233–34 (2001) (discussing the Court’s use of bright-line rules in some areas of Fourth Amendment law and its requirement of case-by-case analysis in other areas, and examining factors likely behind the Court’s choices).



cide whether such conduct is reasonable for Fourth Amendment purposes.<sup>194</sup> At the end of that balancing process, however, the Court must issue a directive to govern future cases. That directive might take the form of an open-ended standard, such as a decree that police may detain the occupants of a residence while executing a search warrant when, under the totality of the circumstances, it is reasonable to do so. Alternatively, the Court might determine, through its balancing of interests, that police have categorical authority to detain occupants in these circumstances.<sup>195</sup> While the process the Court uses to derive its directive provides some insight into the sort of instruction the Court had previously offered on the issue in question, the nature of the directive the Court ultimately issues to decide the case is less useful in that regard; for example, the fact of balancing suggests no clear rule governed the issue before the case at hand, but if, through that balancing process, the Court decides to issue a directive in the form of a bright-line rule instead of an open-ended standard, that fact would reveal little about the legal environment in which lower courts operated before the Court took up the present case. I kept a separate tally of the nature of the directive the Court ultimately issued in each of the cases in the data set.<sup>196</sup>

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<sup>194</sup> See *Michigan v. Summers*, 452 U.S. 692 (1981).

<sup>195</sup> See *Bailey v. United States*, 133 S. Ct. 1031, 1043 (2013) (Scalia, J., concurring) (noting that the *Summers* Court balanced to arrive at its decision, but asserting that the holding of *Summers* was a bright-line rule).

<sup>196</sup> Once again, coding these cases required the use of some subjective judgments on my part. In their platonic forms, rules and standards are easily distinguishable. A bright-line rule, in theory, provides a precise, clearly delineated formula that limits the decision-maker's discretion in an attempt to effectuate, indirectly, some underlying policy choice. For example, a rule that one must be at least eighteen years old in order to be eligible to vote provides a straightforward, binary choice to one tasked with deciding the eligibility of an applicant, and the rule is intended to implement the underlying policy judgment that only people who are intellectually mature enough to make informed choices should be permitted to vote. A standard, on the other hand, is an open-ended directive that allows the decision-maker to apply the underlying policy judgment directly. Such a standard in this example would require some government functionary to decide, on a case-by-case basis, whether a citizen applying for voting privileges had attained the requisite level of maturity. In practice, however, directives often fall on a continuum between pure rules and standards, and even a seemingly straightforward rule might leave significant discretionary judgments to be made. In this regard, in cases in which the characterization presented obvious complexities, I attempted to compare the nature of the competing directives under consideration, and I made a judgment about which directive was more rule-like and which was more standard-like. For example, in *Bailey v. United States*, 133 S. Ct. 1031, the Court's determination that police executing a search warrant at a residence may detain occupants as a matter of course only if such occupants are in the "immediate vicinity" of the residence was certainly more rule-like than the dissent's proposed open-ended balancing to determine the reasonableness of such detentions. See *id.* at 1043 (Scalia, J., concurring). Nonetheless, Justice Scalia's characterization of the Court's directive as a "straightforward, binary inquiry" arguably over-stated the rule-like quality of the directive. See *id.* As the Court noted, a multi-factor test would be necessary in close cases to determine whether an occupant was in the immediate vicinity, "including the lawful limits of the premises, whether the occupant was within the line of sight of his dwelling, the ease of reentry

Finally, because several authors have recommended the use of positive law as a guide to Fourth Amendment reasonableness, at least in part as a means of making Fourth Amendment law more coherent, and because the Court has, in recent years, adopted a kind of positive law model for evaluating the applicability of the Fourth Amendment, I kept track of Supreme Court decisions that invoked positive law to support the outcome of the case. I hoped that analysis of the Court's invocations of positive law might provide some basis for evaluation of claims about the manner in which the Court uses positive law to inform its decision-making.

### III. RESULTS

Using the criteria I have described resulted in a data set of seventy-three Supreme Court cases during the twenty-year period under review in which the Court resolved a substantive Fourth Amendment claim.<sup>197</sup> I was able to verify that more than one lower court had ruled on the relevant issue in advance of the Supreme Court in fifty-one of these cases, which represents 69.86% of the data set. Interestingly, this is virtually identical to the estimates by sophisticated observers of the percentage of cases the Court accepts in which the issue had divided lower courts.<sup>198</sup> The remaining twenty-two cases often involved narrow issues that were too intertwined with the idiosyncratic facts of the case for more than one lower court to have been likely to have addressed the specific question before the Court.<sup>199</sup>

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from the occupant's location, and other relevant factors." *Id.* at 1042. Thus, the Court's ostensibly bright-line rule regarding the immediate vicinity nonetheless requires a standard-like inquiry to determine what "immediate vicinity" means in any given case. As the dissent pointed out, "The majority's line invites case-by-case litigation although, divorced as it is from interests that directly motivate the Fourth Amendment, it offers no clear case-by-case guidance." *Id.* at 1047 (Breyer, J., dissenting). Despite this, because the majority's directive was clearly more rule-like than the dissent's proposal, I characterized the directive as a rule.

<sup>197</sup> I counted *Hanlon v. Berger*, 526 U.S. 808 (1999), and *Wilson v. Layne*, 526 U.S. 603 (1999), which addressed the same Fourth Amendment issue, and which the Court decided on the same day, as a single case involving two lower court decisions.

<sup>198</sup> See Ginsburg, *supra* note 134, at 521; Stras, *supra* note 134, at 981.

<sup>199</sup> See, e.g., *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014) (deciding that, under the facts of the case, officers would reasonably have concluded that Respondent's decedent intended to resume dangerous, high-speed chase, and officers were justified in using deadly force); *Michigan v. Fisher*, 558 U.S. 45 (2009) (deciding that, under the facts of the case, exigent circumstances justified a departure from the warrant requirement); *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364 (2009) (deciding that a school strip search of a thirteen-year-old girl in an attempt to find prescription-strength ibuprofen, which the school had no reason to believe the girl was hiding in her underwear, was unreasonable); *Los Angeles Cty. v. Rettele*, 550 U.S. 609 (2007) (deciding that police executing a search warrant acted reasonably when they ordered naked residents out of bed, despite the fact that residents were Caucasian and suspects were African American); *Kaupp v. Texas*, 538 U.S. 626 (2003) (deciding, under the facts of the case, that seventeen-year-old boy had been arrested for Fourth Amendment purposes and that confession was a fruit of the arrest); *Chandler v. Miller*, 520 U.S. 305, 309 (1997) (finding

Of the seventy-three cases, the Court affirmed the substantive Fourth Amendment position of the court or courts directly below only 34.6% of the time.<sup>200</sup> Thus, using this traditional measure of lower court performance would suggest, as has been the case in all fields, that lower courts infrequently answer difficult Fourth Amendment problems correctly. Focusing on cases in which more than one lower court had ruled on the issue, however, presents quite a different picture.

Of the fifty-one cases in which more than one lower court had addressed the question under review, the Court sided with the majority of lower courts twenty-six times. The Court sided with the minority of lower courts twenty times. In five cases, lower courts were evenly divided. I believe the most accurate way to represent cases in which lower courts were evenly split is to count such cases as a half-victory for each side. Thus, using this measure resulted in 28.5 cases in which the Court sided with the majority of lower courts—55.88% of the fifty-one cases. This is very close to the figures derived through evaluation of studies by Tom Cummins and Adam Aft, which examined the full Supreme Court merits docket for the October 2010, October 2011, and October 2012 terms,<sup>201</sup> and of John Summers and Michael Newman, who examined the October 2005 through the October 2010 terms.<sup>202</sup>

Cummins and Aft presented the results of their first two studies as showing that the Court agreed with the majority of lower courts ninety percent of the time and sixty-eight percent of the time for the 2010 and 2011 terms respectively.<sup>203</sup> However, as they acknowledged, Cummins and Aft counted even splits as cases in which the Supreme Court sided with the majority of lower courts, analogizing to the baseball rule that

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Georgia law conditioning candidacy for state office on completion of a drug test unreasonable, and noting that Georgia was the only state to have such a requirement).

<sup>200</sup> This figure includes two lower court decisions under direct review in *California v. Riley*, 134 S. Ct. 2473 (2014), and both lower courts from *Hanlon* and *Wilson*. Additionally, because I focused on whether the Court agreed with the lower courts' substantive Fourth Amendment conclusions and excluded analysis of whether the Court agreed with a lower court position on qualified immunity, I counted *Hanlon* and *Safford Unified School District #1 v. Redding* as affirming the lower court in question, though that was not the Court's formal disposition in either case. In *Hanlon*, the Court vacated the Ninth Circuit's judgment because, although the Court agreed with the Ninth Circuit's determination that police allowing members of the media to accompany them while executing a search warrant at a residence violated the Fourth Amendment, the Court disagreed with the Ninth Circuit's determination that the officers were not entitled to qualified immunity. In *Safford*, the Court affirmed in part and reversed in part; the Court agreed with the Ninth Circuit's determination that the strip search of a thirteen-year-old girl to look for prescription-strength ibuprofen violated the Fourth Amendment, but the Court disagreed with the lower court's determination that defendants were not entitled to qualified immunity.

<sup>201</sup> See Cummins, Aft, & Cumby, *supra* note 145; Cummins & Aft, *Appellate Review II*, *supra* note 145; Cummins & Aft, *supra* note 142.

<sup>202</sup> Summers & Newman, *supra* note 138.

<sup>203</sup> Cummins & Aft, *Appellate Review II*, *supra* note 145, at 38.

ties go to the runner.<sup>204</sup> Reevaluating the data from the first two Cummins and Aft studies using my methodology shows the Court siding with lower court majorities 73.68% of the time for the 2010 term and 56.82% of the time for the 2011 term.<sup>205</sup> For their study of the 2012 term, Cummins and Aft, joined by Joshua Cumby, simply presented the raw data. Evaluation of that data using my methodology shows the Court sided with lower court majorities 51.85% of the time during the 2012 term.<sup>206</sup> Assessment of the data from each of the three Cummins and Aft studies with my methodology reveals that the Court agreed with lower court majorities during the 2010 through 2012 terms in 40.5 out of sixty-eight cases, or 59.56% of the time.<sup>207</sup>

Summers and Newman catalogued 172 Supreme Court cases involving more than one lower court decision between 2005 and 2010.<sup>208</sup> Of those cases, Summers and Newman noted that forty-two involved an even division among lower courts and observed that the Court agreed with the majority approach among lower courts in 51.5% of the remaining 130 cases.<sup>209</sup> Using my methodology to assess this data results in a finding that the Court agreed with lower court majorities 51.2% of the time during those years.

Thus, the 55.88% rate of Supreme Court agreement with lower court majorities for twenty years of Fourth Amendment decisions falls squarely between the Summers and Newman figure and the figure from the Cummins, Aft, and Cumby studies. One cannot draw definitive conclusions from this; as I have described above, my methodology for cataloguing Supreme Court cases and lower court decisions differs from the other studies, and the possibility of systematic bias in my data collection, or in the methods used by other researchers, should lead to circumspection. Additionally, my twenty-year study covers a larger time period than the three years Cummins and Aft evaluated or the six years Summers and Newman examined. Nonetheless, one might draw a tentative conclusion from these comparisons that the likelihood of lower courts getting the right answers in Fourth Amendment cases is about the same as the likelihood that lower courts will get the right answers to questions the Supreme Court chooses to address in general.

Examination of lower court decisions associated with the fifty-one Supreme Court cases yields similar results. For the forty-four cases in

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<sup>204</sup> *Id.* at 38 n.10; Cummins & Aft, *supra* note 142, at 61 n.17.

<sup>205</sup> See Cummins & Aft, *Appellate Review II*, *supra* note 145, at 38 n.10; Cummins & Aft, *supra* note 142, at app. Table 3.

<sup>206</sup> See Cummins, Aft, & Cumby, *supra* note 145, at 397 app. B.

<sup>207</sup> See *id.* at 397 app. B; Cummins & Aft, *Appellate Review II*, *supra* note 145, at 38 n.10; Cummins & Aft, *supra* note 142, at app. Table 3.

<sup>208</sup> Summers & Newman, *supra* note 138, at 4.

<sup>209</sup> *Id.*

which I counted lower court decisions individually, I counted 370 lower court decisions, of which 194 lower courts reached conclusions the Supreme Court would later determine to be correct. This 52.43% rate of agreement is virtually identical to the figure one can extract through analysis of the three studies by Cummins and Aft. Evaluation of each of those studies reveals a total of 338 lower court decisions, of which 178 lower courts got the “right” answers, a 52.66% agreement rate.<sup>210</sup> Likewise, the Summers and Newman research showed the Supreme Court affirmed, directly or indirectly, the decisions of lower courts 51.7% of the time in Supreme Court cases involving more than one lower court decision between 2005 and 2010.<sup>211</sup> Finally, Eric Hansford’s analysis of 385 lower court decisions associated with splits the Supreme Court reviewed between 2005 and 2008 showed a 54% agreement rate.<sup>212</sup>

Including my estimates for the seven cases in which it was clear both that a significant number of courts not listed individually in the Supreme Court opinions or briefs had addressed the issue, and that there was a heavily lopsided majority among those courts, leads to the conclusion that the Supreme Court directly or indirectly affirmed 320 of 545 lower court decisions, a 58.7% rate of agreement. As I have noted, including these estimates provides a more complete picture of lower court performance because it offers a glimpse of the likely universe of more typical cases in which lower courts largely agree with each other and the Supreme Court never intervenes. If I had made more conservative estimates in these cases, the percentage would change somewhat. For example, if I had estimated a total of ten lower court decisions for each of these cases instead of twenty-five lower court decisions, while continuing to treat the minority position as associated with either one or three decisions, depending on whether it appeared that only one or a few courts supported the outlying position, I would have concluded that 245 of 440 lower court decisions got the right answers for all fifty-one Supreme Court cases involving more than one lower court decision, a 55.68% rate of agreement.

Of course, it takes additional inferential leaps to get from a tentative conclusion that lower courts reach the correct results in Fourth Amend-

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<sup>210</sup> See Cummins, Aft, & Cumby, *supra* note 145, at 394 (revealing that, for the 2012 Supreme Court term, the Court directly or indirectly affirmed fifty-one of 101 circuit court decisions in Supreme Court cases involving circuit splits); Cummins & Aft, *Appellate Review II*, *supra* note 145, app. at 46 tbl.1 (revealing that, for the 2011 Supreme Court term, the Court directly or indirectly affirmed fifty-three of 121 circuit court decisions in Supreme Court cases involving circuit splits); Cummins & Aft, *Appellate Review*, *supra* note 142, app. at 74 tbl.1 (revealing that, for the 2010 Supreme Court term, the Court directly or indirectly affirmed seventy-four of 116 circuit court decisions in Supreme Court cases involving circuit splits).

<sup>211</sup> See Summers & Newman, *supra* note 138, at 3.

<sup>212</sup> Hansford, *supra* note 145, at 1165.

ment cases about as often as they do in other realms to a conclusion that Supreme Court decision-making on the Fourth Amendment is as coherent as its decision-making as a whole. As I have discussed above, other factors besides the clarity of previous Supreme Court pronouncements might explain agreement between lower courts and the Supreme Court, though I believe the evidence suggests such agreement largely reflects the coherence of the Court's jurisprudence. Additionally, as I have discussed, given the Court's tendency to grant certiorari to resolve the most difficult, divisive, and important issues, it is worth examining how often the Court feels compelled to review Fourth Amendment issues, as compared with issues in other areas of the law. Even if lower courts perform as well on Fourth Amendment issues the Court reviews as they do in other areas of law, if the Supreme Court decides Fourth Amendment issues more frequently than it decides cases in other realms, that fact might reflect greater confusion among lower courts and, thus, greater incoherence in the Supreme Court's previous opinions in the field. As I have discussed, this is not the only conclusion one might draw from a finding that the Court decides a disproportionate number of Fourth Amendment cases. One might also expect this result if government conduct implicates citizens' Fourth Amendment rights with greater frequency than other rights, thus creating more opportunities for litigation and, consequently, for division among lower courts.<sup>213</sup> Nonetheless, because this inquiry adds additional information, and because other authors have used the frequency of Fourth Amendment litigation in the Supreme Court to assert the incoherence of the Court's jurisprudence in the field,<sup>214</sup> it is worth undertaking.

Setting the October 1967 term, during which the Court decided *Katz*, as the beginning of the modern era of Fourth Amendment law provides a useful benchmark for this analysis, in part because numerous commentators have attributed the incoherence of Fourth Amendment law to the indeterminacy of the *Katz* test.<sup>215</sup> The Supreme Court Database codes 234 Supreme Court decisions as involving Fourth Amendment issues between the beginning of the October 1967 term and the end of the October 2014 term, the last term for which data were available at the time of writing. By way of comparison, using the Westlaw database of Supreme Court cases, I searched for cases during the same time period in which "Fourth Amendment" appeared in the digest. The search resulted in 271 cases.

During this period, the Supreme Court Database lists a total of 5,979 Supreme Court cases, making search and seizure cases just 3.91%

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<sup>213</sup> See *supra* note 139 and accompanying text.

<sup>214</sup> See *supra* note 189 and accompanying text.

<sup>215</sup> See *supra* notes 39–40 and accompanying text.

of the overall docket using the Database's figure for Fourth Amendment cases. The Database counts 1,227 of these cases as involving criminal procedure, other than cases the Database codes as involving statutory construction of criminal laws or sub-constitutional issues. Thus, using either the Database's count of search and seizure cases or the Westlaw figure, Fourth Amendment cases make up only about twenty percent of all non-statutory criminal procedure cases during the forty-eight-year period. A focus on cases involving Sixth Amendment claims shows 182 cases between the 1967 and 2014 terms, using the Supreme Court Database. Similarly, "Sixth Amendment" appears in the Westlaw digest during that period in 177 Supreme Court cases. For Fifth Amendment cases other than those involving the Takings Clause, the Supreme Court database includes 258 cases between October of 1967 and June of 2015.<sup>216</sup> Westlaw's Supreme Court database includes 271 cases during those years in which "Fifth Amendment" appears in the digest. Thus, Fourth Amendment cases are a small percentage not only of the Court's docket, but also of the Court's constitutional criminal procedure cases. Furthermore, the Court seems to review about as many Fifth Amendment criminal procedure cases as Fourth Amendment cases, despite the fact that government conduct implicates the Fourth Amendment with much greater frequency than it implicates the Fifth Amendment.

Examination of cases outside of criminal procedure is also revealing. The Supreme Court Database indicates that 458 cases involved First Amendment issues between the beginning of the 1967 term and the end of the 2014 term. Similarly, the Westlaw Supreme Court database includes 476 cases during that period in which "First Amendment" appears in the digest. The Westlaw database shows 395 Supreme Court cases in which "equal protection" appears in the digest during these years, and the Supreme Court Database codes 239 cases as involving either Fifth or Fourteenth Amendment equal protection claims. The Supreme Court Database also indicates that 283 cases involved federalism issues during the forty-eight terms. Overall, then, the frequency of Supreme Court litigation of Fourth Amendment issues does not seem to lend support to the notion that Fourth Amendment law is particularly incoherent, at least as compared with other major areas of law.

Of course, this modest evidence for the relative parity between the coherence of the Court's Fourth Amendment jurisprudence and its decision-making in other realms does not prove there is no room for im-

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<sup>216</sup> See Spaeth et al., *supra* note 152. Some of the results from this search would include equal protection and due process arguments in non-criminal cases. A search of the Database for criminal procedure sub-issues typically associated with Fifth Amendment claims (including double jeopardy, involuntary confession, *Miranda* warnings, plea bargaining, and self-incrimination) yields 255 results for the 1967 to 2014 terms.

provement in the Court's Fourth Amendment decision-making, or even that Fourth Amendment law is terribly coherent in an absolute sense. Even if one finds this evidence to be a useful indication that Fourth Amendment law is not particularly incoherent, as compared with other areas of law, one might respond that all or most of the Supreme Court's decision-making is incoherent and that all of it should be improved.<sup>217</sup> To the extent that the evidence provides a moderate demonstration of Fourth Amendment coherence, it also cannot validate any particular theory, such as those Professor Kerr has offered, explaining how specific overarching principles consistently explain the Court's Fourth Amendment decision-making. Nonetheless, this attempt at systematic evaluation of the coherence of Fourth Amendment law should provide some additional context for evaluating the near unanimous, long-term, fervent assertions of Fourth Amendment incoherence based almost solely on qualitative analysis of Supreme Court opinions. And if one is unprepared to accept that most or all Supreme Court decision-making in most fields is incoherent, one might begin to be more open, if not to the specific claims of Professor Kerr, at least to the possibility that the Court draws on some overarching set of principles in deciding Fourth Amendment cases that gives lower courts somewhat clearer guidance than the consensus among scholars has previously suggested.

Beyond this, I hope this Study might offer some insight on the kind of decision-making that best promotes clarity in Fourth Amendment law. Because of the longstanding academic discussion of whether open-ended balancing or bright-line rules best promote clarity in Fourth Amendment law,<sup>218</sup> and because the Court has veered back and forth between the two approaches,<sup>219</sup> I chose to investigate the possibility of a correlation be-

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<sup>217</sup> See, e.g., Bradley, *supra* note 2, at 1472–73 (“Confusion in the law is not unique to the fourth amendment [sic], of course, but it is a particularly serious problem in this area because the exclusionary remedy for fourth amendment [sic] violations does not make whole the criminal defendant whose rights have been violated—nothing can ‘unsearch’ his house—and does nothing at all for an innocent victim of an illegal search, who derives no benefit from evidentiary exclusion.”).

<sup>218</sup> See, e.g., Bradley, *supra* note 2.

<sup>219</sup> Compare, e.g., *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) (“We have long held that the ‘touchstone of the Fourth Amendment is reasonableness.’ Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances.”) (citation omitted), and *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (“There is ‘no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails.’”) (citation omitted), with *Atwater v. City of Lago Vista*, 532 U.S. 318, 366 (2001) (O’Connor, J., dissenting) (“The majority insists that a bright-line rule focused on probable cause is necessary to vindicate the State’s interest in easily administrable law enforcement rules.”), and *New York v. Belton*, 453 U.S. 454, 469 (1981) (Brennan, J., dissenting) (“The Court seeks to justify its departure from the principles underlying *Chimel* by proclaiming the need for a new “bright-line” rule to guide the officer in the field.”); see also *Fourth Amendment—Trespass Test—Florida v. Jardines*, 127 HARV. L. REV. 228, 228 (2012) (“The rigidity of the Jones test, which automatically makes physical trespass a de facto-unreasonable search,



tween lower court performance and the kind of directive (a rule or an open-ended standard) the Supreme Court has given those courts in advance of their resolution of the issues in question. As I have described above, I believe the process the Supreme Court uses to resolve a case provides some indication of the kind of guidance the Court has offered before on the question before the Court. If the Court explicitly balances to reach its holding, that is some indication that the Court had previously left the issue to case-by-case balancing, either expressly or implicitly, by failing to address the issue at all. Alternatively, if the Court uses a more constrained form of analogical reasoning from precedent, that fact suggests the Court believes previous rules, on which lower courts would also be likely to have relied, determined the outcome.

In fact, there does appear to be a correlation between the kind of reasoning the Court uses to reach its conclusions in Fourth Amendment cases and the likelihood that lower courts reached the “right” answers in advance of the Court’s decisions. First, among the forty-six Supreme Court cases in which more than one lower court had previously ruled and in which lower courts were not evenly divided, the Supreme Court affirmed the majority position among lower courts in twenty of twenty-nine cases that I coded as involving analogical reasoning by the Court. On the other hand, the Court affirmed the position of the majority of lower courts in only five of thirteen cases I coded as balancing cases. Among cases I coded as involving a mixed process, the Court affirmed the majority lower court position in one case and rejected that position in three cases. Using a logistic regression model to test the significance of the Court’s use of analogical reasoning or balancing as a predictor of whether the Court would side with a lower court majority showed significance at the .10 significance level.<sup>220</sup> Thus, from this analysis alone, one might conclude that a majority of lower courts is more likely to reach the “right” conclusion when the Supreme Court provides bright-line rules to guide judicial decision-making than when the Court leaves such decision-making to open-ended balancing.

A univariate logistic regression also showed significance at the .10 significance level of the percentage of lower courts taking the majority position as a predictor of the Supreme Court siding with that position<sup>221</sup>; the greater the portion of lower courts in a lower court majority, as a percentage of all lower courts that had ruled on the issue, the more likely the Supreme Court was to affirm the majority position. This, of course, is

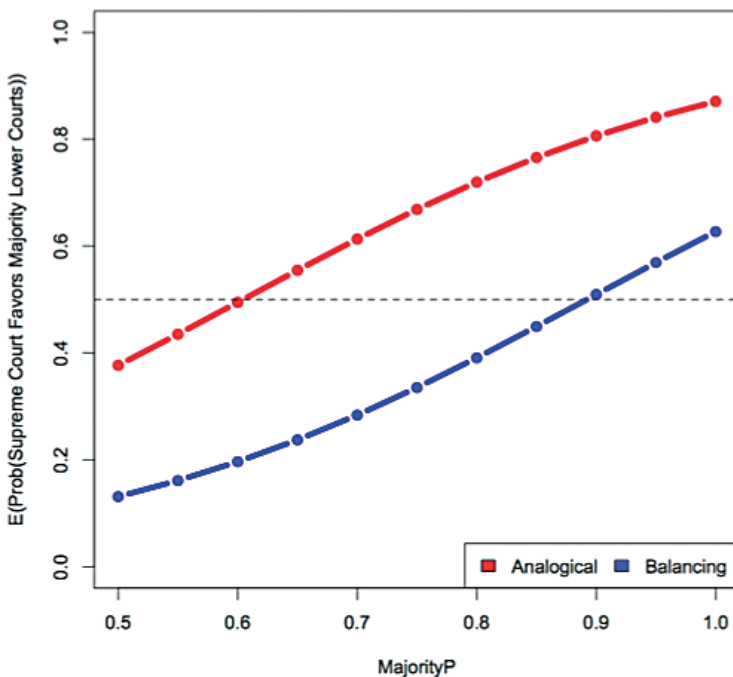
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is in tension with the hallmark of Fourth Amendment inquiry—reasonableness—as well as with the Court’s longstanding use of balancing, rather than bright lines, to effectuate reasonableness inquiry.”).

<sup>220</sup> A logistic regression showed the p-value for this variable was 0.052.

<sup>221</sup> A logistic regression showed a p-value of 0.072 for this variable.

what one would expect if the relative clarity of prior legal pronouncements causes more jurists at all levels to reach the same conclusions. Interestingly, however, this effect was greatly moderated if the case was a balancing case. Using a logistic regression model including both the percentage of lower courts in the lower court majority and the Supreme Court's use of analogical reasoning or balancing to resolve the issue showed both predictors to be statistically significant at the .10 significance level,<sup>222</sup> and the model revealed that, in analogical cases, one could predict a greater than fifty percent chance of the Supreme Court affirming the lower court majority when a much smaller percentage of courts were in the lower court majority than would be necessary for such a prediction if the Supreme Court used balancing to resolve the case, as represented in the figure below. Because the Court's use of balancing suggests the Court had failed to provide bright-line rules governing the issue to lower courts before those courts addressed the issue at hand, these results also suggest the Supreme Court should use bright-line rules when possible if it wishes to foster the development of a legal environment in which lower courts are more likely to get the right answers to Fourth Amendment questions.



<sup>222</sup> In this model, the p-value for the variable represented by the percentage of lower courts in the lower court majority was 0.079, and the p-value for the Court's choice of analogical reasoning or balancing was 0.057.

In fact, in most cases, the Court did ultimately adopt a rule-like directive. In forty-seven of the seventy-three Supreme Court cases in the Study, the Court embraced a rule-like directive to guide future courts and law enforcement officers. In twenty-six cases, the Court selected a standard-like directive. It appears, therefore, that the Court frequently provides the kind of relatively straightforward guidance that can assist lower courts in reaching conclusions the Court will deem correct in future cases.

Finally, among the seventy-three Supreme Court cases, the majority invoked some form of positive law in thirteen decisions to support its ultimate conclusions. In other cases in the data set, the Court ignored relevant positive law or explicitly rejected its use as a guide to the Court's determination of whether government conduct was reasonable. The circumstances in which the Court embraced or rejected the use of positive law reveal four contexts in which the Court has considered the significance of some form of positive law. First, when no Supreme Court precedent clearly governs the issue in question, the Court tends to look to common law and statutes at the time of ratification to determine whether the Framers would have considered the government's conduct to be an unlawful search or seizure.<sup>223</sup> Second, as I have described in some detail above, the Court in 2012 rehabilitated the property-based approach to determining the applicability of the Fourth Amendment.<sup>224</sup> Third, the Court has, on occasion, considered broad patterns of state and local law to inform its analysis. Fourth, the Court has typically judged the positive law of the particular jurisdiction in which challenged government conduct arose to be irrelevant.

The Court's willingness to rely on the first sort of positive law, late eighteenth-century common law and statutes, is likely to increase the coherence of Fourth Amendment law only marginally at best. In the past twenty years, the Court has deeply explored the state of the law at the time of ratification to inform its Fourth Amendment analysis on only a handful of occasions.<sup>225</sup> The Court's decisions suggest it is willing to engage in detailed analysis of the law during the founding era only when it believes that body of law might provide insight on the Framers' disposition on the particular issue before the Court, rather than for guidance on broader principles underlying the adoption of the Fourth Amendment.<sup>226</sup> This alone limits the class of cases in which the Court would be likely to

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<sup>223</sup> *Virginia v. Moore*, 553 U.S. 164, 168 (2008); *Atwater v. City of Lago Vista*, 532 U.S. 318, 326–27 (2001); *Wyoming v. Houghton*, 526 U.S. 295, 299–300 (1999).

<sup>224</sup> See *supra* notes 60–67 and accompanying text.

<sup>225</sup> See *Moore*, 553 U.S. at 168; *Atwater*, 532 U.S. at 326–27; *Houghton*, 526 U.S. at 299–300.

<sup>226</sup> Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895, 897 (2002).

undertake significant analysis of the law at the time of ratification.<sup>227</sup> Additionally, because positive law, even at a particular point in history, is not a monolith, but is likely to be in a state of some conflict,<sup>228</sup> lower courts are unlikely to be able to draw on this body of law to make consistent judgments about the Fourth Amendment's requirements. Ultimately, in each of the cases in which the Court has undertaken extensive examination of eighteenth-century law in the past twenty years, the Court supplemented its historical analysis with open-ended balancing,<sup>229</sup> either because the Court explicitly found the law at the time of ratification provided no clear answer to the issue in question,<sup>230</sup> or because it apparently lacked the courage of its stated conviction that eighteenth century law provided a clear answer.<sup>231</sup>

The second kind of positive law on which the Court relies, the rehabilitated property approach to determining the applicability of the Fourth Amendment, certainly has some potential to enhance the consistency and predictability of Fourth Amendment law. As I have described above, Justice Scalia's majority aptly asserted in *Florida v. Jardines* that a benefit of using property rights as a baseline for determining the contours of Fourth Amendment protection is that it "keeps easy cases easy."<sup>232</sup> That is not to suggest that this approach eliminates all complexity or uncertainty from Fourth Amendment analysis. First, the model relies on property concepts only to determine the threshold question of whether government conduct constitutes a Fourth Amendment search. It does not purport to answer the question of whether such conduct, if it does impli-

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<sup>227</sup> For example, the law at the time of ratification would not have addressed issues related to technologies developed in the twentieth and twenty-first centuries. See, e.g., *Riley v. California*, 134 S. Ct. 2473, 2484 (2014) (noting that the Court balances the government's need to advance legitimate law enforcement interests against the severity of privacy intrusions in cases in which the law at the time of founding provides no clear answer, and moving directly to such balancing in case involving the constitutionality of searching the digital contents of cell phones incident to arrest).

<sup>228</sup> See *Atwater*, 532 U.S. at 332 (noting "disagreement, not unanimity" among jurists and commentators from the founding era on the issue in question).

<sup>229</sup> See *Moore*, 553 U.S. at 171–76; *Atwater*, 532 U.S. at 345–54; *Houghton*, 526 U.S. at 303–07.

<sup>230</sup> *Moore*, 553 U.S. at 170–71.

<sup>231</sup> *Houghton*, 526 U.S. at 311 n.3 (Stevens, J., dissenting) ("To my knowledge, we have never restricted ourselves to a two-step Fourth Amendment approach wherein the privacy and governmental interests at stake must be considered only if 18th-century common law 'yields no answer.' Neither the precedent cited by the Court, nor the majority's opinion in this case, mandate that approach. In a later discussion, the Court does attempt to address the contemporary privacy and governmental interests at issue in cases of this nature. Either the majority is unconvinced by its own recitation of the historical materials, or it has determined that considering additional factors is appropriate in any event.") (citations omitted).

<sup>232</sup> *Florida v. Jardines*, 133 S. Ct. 1409, 1417 (2013).

cate the Fourth Amendment, is reasonable.<sup>233</sup> Second, reference to property concepts does not necessarily mean even the initial inquiry will be easy in every case. As the Court declared in *Jones*, when the government has not physically intruded into a constitutionally protected area to gather information, constituting a per se search under the property approach, reliance on *Katz*'s reasonable expectations of privacy test will still be necessary.<sup>234</sup> Furthermore, the question of whether the government has physically intruded into a constitutionally protected area can itself be difficult to answer. Although the *Jardines* majority declared that the property-based formula for determining whether a Fourth Amendment search has occurred "render[ed] the case a straightforward one,"<sup>235</sup> the Court was divided five to four on the question of whether a police officer with a drug-sniffing dog has an implicit license to enter the curtilage of a home for a brief period of time and, thus, whether such conduct constituted a search. Nonetheless, this approach does seem to have the potential to provide greater clarity to the law than an approach entirely dependent on assessment of what constitutes a reasonable expectation of privacy, more susceptible, in practice, to manipulation based on the subjective preferences of Supreme Court Justices.<sup>236</sup> Overall, the Court has relied on this approach three times since 2012.<sup>237</sup>

The Court has also, on occasion, looked to broad, nationwide patterns in contemporary law to support its conclusions on Fourth Amendment issues. During the twenty-year period I reviewed, the Court relied on significant trends in state or municipal law to bolster its determinations on several occasions. In *Missouri v. McNeely*, in which the Court rejected an argument that the fact of dissipation of alcohol in the blood creates a per se exigency justifying departure from the warrant requirement, the Court asserted that it was "notable" that most states either placed significant restrictions on non-consensual blood testing or prohibited the practice entirely.<sup>238</sup> Likewise, in *Maryland v. King*, the Court, in upholding a law permitting collection of DNA samples from some ar-

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<sup>233</sup> See *U.S. v. Jones*, 132 S. Ct. 945, 954 (2012) (finding that the government had forfeited its alternative argument that the government's conduct was reasonable for Fourth Amendment purposes even if it did constitute a Fourth Amendment search).

<sup>234</sup> *Id.* at 953.

<sup>235</sup> *Jardines*, 133 S. Ct. at 1414.

<sup>236</sup> See *Jones*, 132 S. Ct. at 962 (Alito, J., concurring) (noting that judges applying *Katz* are apt to "confuse their own expectations of privacy with those of the hypothetical reasonable person to which the *Katz* test looks"); *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring).

<sup>237</sup> *Grady v. North Carolina*, 135 S. Ct. 1368, 1370 (2015); *Jardines*, 133 S. Ct. at 1414; *Jones*, 132 S. Ct. at 953. In two other cases, the Court vacated and remanded for reconsideration in light of *Jones*. *Cuevas-Perez v. United States*, 132 S. Ct. 1534 (2012); *Pineda-Moreno v. United States*, 132 S. Ct. 1533 (2012).

<sup>238</sup> *Missouri v. McNeely*, 133 S. Ct. 1552, 1566 n.9 (2013) (listing states that impose such restrictions).

restees, found it significant that most states and the federal government had similar laws.<sup>239</sup> In *Hiibel v. Sixth Judicial District Court of Nevada*, the Court also found it worth observing that many states had stop-and-identify statutes, that the Model Penal Code includes such a provision, and that the laws had roots in early English vagrancy laws.<sup>240</sup> In *Atwater v. City of Lago Vista*, after examining the common law during the founding era, the Court assessed the laws of contemporary American jurisdictions in aid of its determination of whether a rule against misdemeanor arrests other than for breach of the peace had become “woven . . . into the fabric of American law” after the founding era.<sup>241</sup> In rejecting that notion, the Court observed that all fifty states and the District of Columbia allowed warrantless misdemeanor arrests without breach of the peace.<sup>242</sup> Finally, in *Chandler v. Miller*, the Court observed that Georgia was the only state that conditioned candidacy for public office on a drug test.<sup>243</sup> Notably, in each of these cases, the Court interpreted the scope of the Fourth Amendment’s protections as being consistent with the trend it had observed.

Yet the Court has tended to ignore trends in American law when those trends fail to support the Court’s interpretation of the Fourth Amendment. For example, in *Heien v. North Carolina*, the Court mentioned several nineteenth-century cases to reinforce its conclusion that a police officer’s reasonable mistake of law can provide a legitimate basis for a detention.<sup>244</sup> Yet in so doing, the Court neglected to mention the dominant twentieth-century common law position rejecting that notion,<sup>245</sup> despite the petitioner’s having made the Court aware of that fact.<sup>246</sup> In *City of Los Angeles v. Patel*, in finding an ordinance requiring hotel operators to make their registers available for inspection, without an opportunity for pre-compliance review, to be unconstitutional, the Court ignored similar municipal laws in at least forty-one states.<sup>247</sup> In *Samson v. California*,<sup>248</sup> the Court went further. Despite the fact that “with only one or two arguable exceptions,” neither the federal government nor any other state besides California subjected parolees to suspi-

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<sup>239</sup> *Maryland v. King*, 133 S. Ct. 1958, 1968 (2013).

<sup>240</sup> 542 U.S. 177, 182–83 (2004).

<sup>241</sup> 532 U.S. 318, 340 (2001) (citing *Wilson v. Arkansas*, 514 U.S. 927, 933 (1995)).

<sup>242</sup> *Id.* at 344.

<sup>243</sup> 520 U.S. 305, 309 (1997).

<sup>244</sup> 135 S. Ct. 530, 537 (2014).

<sup>245</sup> RESTATEMENT (SECOND) OF TORTS § 121 cmt. i (AM. LAW INST. 1965) (stating that an officer’s mistake of law, other than as to the legitimacy of a statute or ordinance, cannot justify an arrest); RESTATEMENT (FIRST) OF TORTS § 121 cmt. i. (AM. LAW INST. 1934).

<sup>246</sup> Brief for Petitioner at 15, *Heien v. North Carolina*, 135 S. Ct. 530 (2014), 2014 WL2601475.

<sup>247</sup> 135 S. Ct. 2443, 2460 (Scalia, J., dissenting) (2015).

<sup>248</sup> 547 U.S. 843 (2006).

tionless searches,<sup>249</sup> the Court found that near consensus to be of “little relevance.”<sup>250</sup>

Importantly, it is not easy to support all of the Court’s choices with reference to the priorities Professor Kerr outlined for determining whether positive law should be relevant to Fourth Amendment analysis. For example, Kerr observed that a positive law model would be inappropriate in a case in which the law in question was designed to advance an interest unrelated to privacy against intrusions by criminal investigators.<sup>251</sup> Yet laws requiring reasonable suspicion to justify the search of a parolee, which the *Samson* Court deemed irrelevant, were certainly intended to protect privacy interests. It is difficult to escape the conclusion that the Court has, at least to some extent, invoked broad trends in contemporary American law when those trends support the Court’s inclinations, but that it has either ignored those trends or declared them irrelevant when they contradict the Court’s preferences.

Lastly, the Court has fairly consistently rejected the idea that the law of the particular jurisdiction in which challenged conduct occurred should define the contours of Fourth Amendment protection. *Virginia v. Moore*, in which the Court rejected the argument that Virginia’s choice to prohibit arrest for certain misdemeanor offenses rendered arrests in contravention of the law unconstitutional, typifies this approach. As the *Moore* Court asserted, “[W]hether or not a search is reasonable within the meaning of the Fourth Amendment’ . . . has never ‘depend[ed] on the law of the particular State in which the search occurs.’”<sup>252</sup> In *Whren v. United States* as well, the Court dismissed an argument that police officers acted unreasonably for Fourth Amendment purposes when they stopped a car in contravention of local rules restricting the circumstances in which plainclothes officers could conduct traffic stops.<sup>253</sup>

There is one notable exception to the Court’s tendency to disregard the law of the jurisdiction in question; the Court does, of course, consider the jurisdiction’s choice to classify conduct as criminal as relevant to its Fourth Amendment analysis. Thus, in both *Atwater* and *Moore*, the Court ruled arrests valid because police in each case had probable cause to believe a crime had been committed.<sup>254</sup> Likewise, in *Illinois v. McAr-*

<sup>249</sup> *Id.* at 863 (Stevens, J., dissenting).

<sup>250</sup> *Id.* at 855.

<sup>251</sup> See Kerr, *Four Models of Fourth Amendment Protection*, *supra* note 89, at 533. To be sure, Professor Kerr’s analysis applied explicitly only to the threshold question of whether government conduct constitutes a search. Nonetheless, one can reasonably apply the priorities he espoused for determining the relevance of positive law to inquiries into the reasonableness of conduct already determined to implicate the Fourth Amendment as well.

<sup>252</sup> 553 U.S. 164, 172 (2008) (quoting *California v. Greenwood*, 486 U.S. 35, 43 (1988)).

<sup>253</sup> 517 U.S. 806, 815 (1996).

<sup>254</sup> *Moore*, 553 U.S. at 171; *Atwater*, 532 U.S. at 354.

thur, the Court considered the fact that Illinois treated possession of marijuana as a criminal offense in assessing the state's interests in preventing a suspect from entering his home while police sought a warrant.<sup>255</sup> The *McArthur* Court distinguished *Welsh v. Wisconsin*,<sup>256</sup> in which the Court had held Wisconsin lacked sufficient interest to justify warrantless entry into a suspect's home based on the possible loss of evidence, in part because the state treated a first offense for driving under the influence as a civil infraction.

Ultimately, other than the Court's recent use of property concepts to determine what constitutes a Fourth Amendment search, the Court's reliance on positive law has been either haphazard, limited in its potential clarifying effect, or both. A more consistent, principled basis for drawing on positive law to inform the Court's interpretation of the Fourth Amendment might well contribute to a more coherent body of Fourth Amendment law.<sup>257</sup>

#### CONCLUSION

The results of this Study do not suggest that Fourth Amendment law requires no further refinement or reform. Scholars who have attacked the Supreme Court's Fourth Amendment jurisprudence as incoherent have tended also to have substantive critiques of the Court's approach that have been at least partly independent of the clarity, or lack thereof, of the Court's rulings. This Article does not address arguments that contemporary Fourth Amendment law fails, regardless of its coherence, to advance substantive values the Amendment should promote.

Nonetheless, a large portion of critical commentary on Fourth Amendment law has revolved, at least in part, around the notion that Fourth Amendment law is a mess because the Supreme Court's Fourth Amendment jurisprudence gives insufficient guidance for lower courts to be able to figure out what the Supreme Court believes the Fourth Amendment requires. This systematic study gives some additional context for evaluating those assertions. The results show that, in recent decades, lower courts have gotten the "right" answers to Fourth Amendment questions more often than not, even on the kinds of complex, divisive issues the Supreme Court chooses to review. Because

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<sup>255</sup> 531 U.S. 326, 336 (2001).

<sup>256</sup> 466 U.S. 740 (1984).

<sup>257</sup> This is not to suggest that such a model would have no shortcomings. For example, as Christopher Slobogin has conceded, reliance on surveys or, by implication, positive law, "does smack of putting search and seizure law up for a vote, which runs against the constitutional grain." See Christopher Slobogin, *Proportionality, Privacy, and Public Opinion: A Response to Kerr and Swire*, 94 MINN. L. REV. 1588, 1601–02 (2010); see also Richard M. Re, *The Positive Law Floor*, 129 HARV. L. REV. F. 313, 329–30 (2016) (arguing that a positive law model would tend to devalue minority rights).



straightforward issues that lower courts regularly confront are under-represented on the Supreme Court's docket, these results inevitably understate the degree to which clear declarations on the Fourth Amendment's requirements have allowed lower courts routinely to reach uncontroversially correct conclusions.

Moreover, the performance of lower courts on Fourth Amendment issues is roughly equivalent to the performance of lower courts in general, as evidenced by comparison to other studies that have tracked the performance of federal courts of appeals for other purposes. In addition to this, Fourth Amendment cases make up a small portion not only of the Court's overall docket, but also of its criminal procedure docket. The Court also does not appear to feel compelled to review Fourth Amendment issues at a rate dramatically disproportionate to the rate at which it addresses other important, discrete constitutional questions.

For all of the reasons I have described above, this Study can provide only a coarse estimate of the relative coherence of Fourth Amendment law. The results, however, make far more plausible than the scholarly consensus would suggest the notion that the Supreme Court is already giving sufficiently clear direction to lower courts for those courts to reach consistent, correct results most of the time. For those motivated primarily by perceived incoherence in Fourth Amendment law to devise majestic new interpretive schemes, the Study provides a basis for qualified skepticism of the necessity of such theoretical novelties. Finally, for one interested in enhancing the coherence of Fourth Amendment law, the results give some indication that the Court should issue bright-line rules in Fourth Amendment cases if it hopes to increase the odds of lower courts reaching the right answers when they confront Fourth Amendment questions in the future.