dictated by the Justices' differing visions of the First Amendment; the doctrine did not implement constitutional norms, but only reiterated them. Nevertheless, both the majority and the dissent wrestled with the case's fundamental question: whether and to what degree the matching funds provision burdened political speech.[97] These extensive discussions should dispel scholars' usual concerns about baseline-dependent classifications opening the door for bias by imposing no constraints on judicial decisionmaking[98] or distracting judges from the real issues.[99] Thus, the ineffectiveness of the subsidy-penalty distinction in this case should cause little doctrinal concern.

However, campaign finance reform advocates may have reason to be concerned about the Court's novel recognition that a speech subsidy to one person can be considered a burden on the speech of another.[100] The Court could have reaffirmed the constitutionality of lump sum public financing grants established in *Buckley v. Valeo*,[101] but did not do so.[102] Only a small expansion of the logic of *Arizona Free Enterprise* is needed to argue that a lump sum grant of public funds to one candidate burdens that candidate's privately funded opponent. But despite opening the door for such an expansion, the Court consistently emphasized the importance of the matching funds trigger mechanism.[103] It remains to be seen whether the penalty analysis in this case will expand to impact more traditional public financing systems or whether the trigger mechanism will provide a sufficient distinguishing consideration.

B. Fourth Amendment

1. Exigent Circumstances Exception. — The Fourth Amendment requires police officers to obtain a warrant before they may conduct a

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[97] *See Ariz. Free Enter.*, 131 S. Ct. at 2821–24; *id.* at 2836–41 (Kagan, J., dissenting).

[98] *Cf., e.g.*, Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 824 (1983) ("The theory of neutral principles is initially attractive because it affirms the openness of the courts to all reasonable arguments drawn from decided cases. But if the courts are indeed open to such arguments, the theory allows judges to do whatever they want.").

[99] *See, e.g.*, Sunstein, *supra* note 81, at 43 (noting that the identified problematic doctrines "distract attention from current threats to the system of free expression").

[100] *See* Guy-Uriel Charles, *An Ideological Battle*, N.Y. TIMES ROOM FOR DEBATE (June 27, 2011), http://www.nytimes.com/roomfordebate/2011/06/27/the-court-and-the-future-of-public-financing/the-courts-battle-of-ideology.

[101] 424 U.S. 1, 86 (1965) (per curiam).

[102] *See Ariz. Free Enter.*, 131 S. Ct. at 2828. The Court noted that its decision did not "call into question the wisdom of public financing as a means of funding political candidacy." *Id.* But leaving the wisdom of a policy unchallenged does not establish its constitutionality.

[103] *See, e.g.*, *id.* at 2020 ("Presenting independent expenditures with such a choice — trigger matching funds, change your message, or do not speak — makes the matching funds mechanism particularly burdensome . . . ."); *id.* at 2822 ("But none of those cases — not one — involved a subsidy given in direct response to the political speech of another . . . .").

search or seizure within a private residence.[1] However, law enforcement agents may conduct warrantless searches in emergencies, a rule known as the "exigent circumstances exception to the general warrant requirement."[2] In order to protect the integrity of the warrant requirement, lower courts developed a variety of tests to disqualify "police-created" exigencies from the scope of this exception.[3] Last Term, in *Kentucky v. King*,[4] the Supreme Court held that police officers may not rely on the exigent circumstances exception to justify a warrantless search if the officers created the exigency by violating or threatening to violate the Fourth Amendment.[5] The Court considered six possible tests to identify when the police impermissibly create exigent circumstances.[6] Unfortunately, the Court never mentioned a seventh option: "none of the above." Rather than craft a separate police-created exigency rule, the Court could have improved this area of Fourth Amendment law by simply merging the analysis of police causation into the determination of whether an exigency existed at all.

On October 13, 2005, Lexington–Fayette County police covertly observed a confidential informant purchase crack cocaine from a drug dealer.[7] Following the sale, three narcotics officers hurried after the drug dealer into the breezeway of a nearby apartment building.[8] Just as the officers stepped into the breezeway, they heard a door slam shut.[9] They saw two apartments, one on the left and one on the right, but they did not know which door the suspect had entered.[10] The officers smelled marijuana smoke emanating from the apartment on the left.[11] Reasoning that the left apartment door had just been opened, the officers banged on the door "as loud as [they] could" and declared: "This is the police" or "Police, police, police."[12] They immediately heard movement from inside the apartment, leading them to believe that evidence was about to be destroyed.[13] Because the imminent destruction of evidence is an exigent circumstance that authorizes a war-

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[1] *See* Payton v. New York, 445 U.S. 573, 586 (1980); *see also* U.S. CONST. amend. IV.

[2] Illinois v. McArthur, 531 U.S. 326, 337 (2001) (Souter, J., concurring).

[3] *See, e.g.*, United States v. Gould, 364 F.3d 578, 590 (5th Cir. 2004); United States v. MacDonald, 916 F.2d 766, 772 (2d Cir. 1990) (en banc); United States v. Duchi, 906 F.2d 1278, 1284 (8th Cir. 1990); United States v. Rengifo, 858 F.2d 800, 804 (1st Cir. 1988).

[4] 131 S. Ct. 1849 (2011).

[5] *See id.* at 1858.

[6] *See id.* at 1858–63.

[7] King v. Commonwealth, 302 S.W.3d 649, 651 (Ky. 2010).

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *King*, 131 S. Ct. at 1854 (alteration in original) (quoting testimony of Officer Steven Cobb) (internal quotation marks omitted).

[13] *Id.*

rantless search,[14] the officers announced their intention to make a forced entry, kicked down the door, and rushed into the apartment.[15]

The police did not find their suspect inside.[16] Instead, they discovered Hollis King, along with his girlfriend and another guest, sitting on the couch and smoking marijuana.[17] The officers performed a protective sweep of the apartment and found marijuana, powder cocaine, crack cocaine, cash, and drug paraphernalia.[18] King later moved to suppress the evidence obtained through the warrantless search.[19] The Fayette County Circuit Court denied his motion,[20] finding that the lack of response to the officers' knocks on the door and the sound of movement from inside the apartment established a destruction-of-evidence exigency that overcame the warrant requirement.[21] King then entered a conditional guilty plea, reserving his right to appeal the circuit court's denial of his motion to suppress.[22] The court found him guilty of trafficking in a controlled substance, possession of marijuana, and second-degree persistent felony offender status and sentenced him to eleven years in prison.[23] On appeal, the Kentucky Court of Appeals affirmed the circuit court's judgment.[24]

The Supreme Court of Kentucky reversed.[25] Judge Schroder, writing for the court, held that the police had created the destruction-of-evidence exigency by knocking and announcing their presence, and thus they could not rely on that exigency to justify their warrantless search.[26] The court began by assuming for the sake of argument that the noise the police heard inside the apartment sufficiently established the imminent destruction of evidence.[27] It then announced a two-part test to determine whether the police had impermissibly created the exigency.[28] First, the court held that police may not perform a warrantless search if they caused the exigency with the bad faith intent of avoiding the warrant requirement.[29] Second, even if the officers acted

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[14] *See* Brigham City v. Stuart, 547 U.S. 398, 403 (2006).
[15] *King*, 131 S. Ct. at 1854.
[16] *King*, 302 S.W.3d at 652.
[17] *Id.* The police eventually found their original target in the other apartment. *Id.*
[18] *Id.*
[19] *King*, 131 S. Ct. at 1855.
[20] *Id.*
[21] *See King*, 302 S.W.3d at 652.
[22] *See King*, 131 S. Ct. at 1855.
[23] *See King*, 302 S.W.3d at 652.
[24] *Id.*
[25] *Id.* at 657.
[26] *See id.*
[27] *See id.* at 655.
[28] *Id.* at 656. The court could not base its test solely on actual causation because "in some sense the police *always* create the exigent circumstances." *Id.* at 655 (emphasis added) (quoting United States v. Duchi, 906 F.2d 1278, 1284 (8th Cir. 1990)) (internal quotation marks omitted).
[29] *See id.* at 656.

in good faith, they could not rely on exigent circumstances to justify a warrantless entry if it was reasonably foreseeable that their investigative tactics would cause the exigency.[30] Applying this test to the facts of the case, the court found that although the police had not acted in bad faith, it was reasonably foreseeable that the officers' knocks on the door and announcement of their presence, after they had smelled marijuana smoke coming from the apartment, would provoke the occupants to destroy the evidence of their crime.[31] Therefore, that exigency could not excuse the warrantless search.[32]

The Supreme Court reversed.[33] Writing for the Court, Justice Alito[34] held that police officers may not rely on exigent circumstances to justify a warrantless search if they created the exigency "by engaging or threatening to engage in conduct that violates the Fourth Amendment."[35] Justice Alito noted that the lower courts had devised a "welter of tests" to identify when law enforcement officers impermissibly create exigent circumstances.[36] However, he asserted that the proper test "follows directly and clearly from the principle that permits warrantless searches in the first place."[37] Justice Alito explained that, because the police may bypass the warrant requirement "when the circumstances make it reasonable, within the meaning of the Fourth Amendment," the exigent circumstances rule similarly justifies a warrantless search "when the conduct of the police preceding the exigency is reasonable in the same sense."[38]

Justice Alito argued that the Court's announced rule provided "ample protection" for Fourth Amendment privacy rights.[39] Citizens have no obligation to open their doors to law enforcement officers without a warrant, and therefore they have "only themselves to blame" if they instead invite a warrantless search by destroying evidence.[40] Justice Alito emphasized that the Court had adopted a similar approach in prior decisions addressing warrantless searches.[41] The Court had previously held that the police may seize evidence "in plain view" without a warrant, provided that they did not violate the Fourth Amendment in arriving at the spot from which they could see the evi-

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[30] *See id.*

[31] *See id.*

[32] *See id.* at 657.

[33] *King*, 131 S. Ct. at 1864.

[34] Justice Alito was joined by Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Breyer, Sotomayor, and Kagan.

[35] *King*, 131 S. Ct. at 1858.

[36] *Id.* at 1857.

[37] *Id.* at 1857–58.

[38] *Id.* at 1858.

[39] *Id.* at 1862.

[40] *Id.*

[41] *Id.* at 1858.

dence.[42] Similarly, the Court had held that officers could seek warrantless "consent-based encounters" if they were lawfully present in the location where the encounter took place.[43]

Justice Alito likened the Court's announced test to a similar rule devised by the Second Circuit.[44] He then considered and rejected four alternative tests invented by other lower courts, as well as one suggested by King. First, Justice Alito dismissed a "bad faith" test based on the officers' "intent to avoid the warrant requirement."[45] He explained that the Court's Fourth Amendment jurisprudence had "'repeatedly rejected' a subjective approach."[46] Second, he declined to adopt a test that would disqualify an exigency if "it was reasonably foreseeable that the investigative tactics employed by the police would create the exigent circumstances."[47] Justice Alito regarded this approach as too unpredictable and unclear.[48] Third, he rejected a test based on the officers' "failure to seek a warrant in the face of plentiful probable cause."[49] He observed that police may have "entirely proper reasons" not to seek a search warrant the moment they obtain the necessary amount of evidence.[50] Fourth, Justice Alito dismissed a test that focused on whether the police investigation was "contrary to standard or good law enforcement practices" as an insufficient guideline for police officers and an inappropriate judgment for courts.[51] Finally, Justice Alito rejected King's proposed test: that police illegitimately create an exigency when they "engage in conduct that would cause a reasonable person to believe that entry is imminent and inevitable."[52] Justice Alito noted that officers may have good reason to use a "forceful knock" or "identify themselves loudly" and that it would be too difficult to know when the "threshold had been passed."[53]

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[42] *Id.* (citing Horton v. California, 496 U.S. 128, 136–40 (1990)).

[43] *Id.* (citing INS v. Delgado, 466 U.S. 210, 217 n.5 (1984)).

[44] *See id.* (citing United States v. MacDonald, 916 F.2d 766, 772 (2d Cir. 1990) (en banc) ("[W]hen law enforcement agents act in an entirely lawful manner, they do not impermissibly create exigent circumstances.")). The *King* Court added "a threat to violate the Fourth Amendment," *id.* at 1863, to the Second Circuit's strict "lawfulness" test in order to create its new rule.

[45] *Id.* at 1859 (quoting King v. Commonwealth, 302 S.W.3d 649, 656 (Ky. 2010)) (internal quotation mark omitted).

[46] *Id.* (quoting Brigham City v. Stuart, 547 U.S. 398, 404 (2006)).

[47] *Id.* (quoting *King*, 302 S.W.3d at 656) (internal quotation marks omitted).

[48] *See id.* at 1859–60.

[49] *Id.* at 1860 (quoting United States v. Chambers, 395 F.3d 563, 569 (6th Cir. 2005)) (internal quotation mark omitted).

[50] *Id.*

[51] *Id.* at 1861 (quoting United States v. Gould, 364 F.3d 578, 591 (5th Cir. 2004)) (internal quotation mark omitted).

[52] *Id.* (quoting Brief for Respondent at 24, *King*, 131 S. Ct. 1849 (No. 09-1272)) (internal quotation marks omitted).

[53] *Id.*

Justice Alito then applied the Court's own "violate or threaten to violate the Fourth Amendment" test to the facts of the case.[54] Like the Kentucky Supreme Court, he assumed arguendo that an exigency actually existed.[55] He observed that the officers had banged on King's door and announced their presence — conduct "entirely consistent with the Fourth Amendment."[56] The police declared their intention to make a forced entry only after they heard what they believed to be the imminent destruction of evidence, and thus that announcement could not have created the exigency.[57] Therefore, Justice Alito concluded that the exigent circumstances exception to the warrant requirement justified the officers' warrantless search of King's apartment.[58]

Justice Ginsburg dissented.[59] She warned that the Court had "arm[ed] the police with a way routinely to dishonor the Fourth Amendment's warrant requirement."[60] She emphasized that the Fourth Amendment applies with greatest force in the home, "our most private space which, for centuries, has been regarded as 'entitled to special protection.'"[61] Accordingly, Justice Ginsburg explained that the Court must protect the warrant requirement through an "appropriately reined-in" exigent circumstances exception.[62] As an alternative to the majority's test, she proposed that "[w]asting a clear opportunity to obtain a warrant [should] disentitle[] the officer from relying on subsequent exigent circumstances."[63] In this case, the occupants of the apartment did not know that the police waited outside, and so it "was entirely feasible" for the officers to delay their search in order to obtain a warrant.[64] Because the officers failed to take this opportunity, Justice Ginsburg argued, they should not have been allowed to base their warrantless search on the exigency that followed.[65]

The *King* Court began with the assumption that the presence of exigent circumstances justified the warrantless search of King's apartment and then considered several possible tests to determine whether the police had impermissibly created those circumstances. Unfortunately, the Court's initial assumption prevented it from adopting an al-

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[54] *See id.* at 1862–63.

[55] *See id.* at 1862.

[56] *Id.* at 1863.

[57] *See id.* Justice Alito rejected as unsupported by the record King's claim that the officers had demanded entry into the apartment before the exigency arose. *See id.*

[58] *See id.*

[59] *See id.* at 1864 (Ginsburg, J., dissenting).

[60] *Id.*

[61] *Id.* at 1865 (quoting Georgia v. Randolph, 547 U.S. 103, 115 (2006)).

[62] *Id.*

[63] *Id.* (quoting STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE 376 (8th ed. 2007)) (internal quotation marks omitted).

[64] *Id.* at 1866.

[65] *See id.*

ternative approach. Law enforcement's contribution to an exigency does not require a stand-alone rule. Instead, the analysis of police causation should fall within the "totality of the circumstances" inquiry into whether an exigency existed at all. If the Court had included police causation as part of its exigent circumstances inquiry, it could have prevented manipulation of the rule, avoided interference with law enforcement, protected the privacy of the home, and ensured a more neutral analysis.

Because the Fourth Amendment's "ultimate touchstone . . . is 'reasonableness,'"[66] the Court applies a holistic analysis to decide whether exigent circumstances make a particular situation "so compelling that [a] warrantless search is objectively reasonable."[67] In order to identify such an emergency,[68] the Court first pores over the "special facts" of the specific case.[69] Then, "rather than employ[] a *per se* rule of unreasonableness, [the Court] balance[s] the privacy-related and law enforcement–related concerns to determine if the intrusion was reasonable."[70] The Court has previously considered factors such as the officers' efforts to respect the suspect's privacy,[71] the duration of the search or seizure,[72] the intrusiveness of the search or seizure,[73] the police's fear that the suspect would destroy evidence,[74] the location of potentially dangerous suspects,[75] the danger of delaying the search,[76] and the gravity of the suspected crimes.[77] This variety of factors reflects the universe of circumstances that could potentially comprise an emergency sufficiently urgent to overcome the warrant requirement.

Because the police's role in provoking the urgent circumstances bears directly on the existence of a legitimate emergency, the Court should have included police causation as another factor in the exigent circumstances analysis. The *King* Court followed the lower courts by reasoning that the police may conduct a warrantless search if exigent circumstances were present *and* if the police did not impermissibly

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[66] Brigham City v. Stuart, 547 U.S. 398, 403 (2006).

[67] Mincey v. Arizona, 437 U.S. 385, 394 (1978).

[68] Recognized exigencies include when the occupant of a home requires emergency assistance, *see Stuart*, 547 U.S. at 403, when the police are in "hot pursuit" of a fleeing suspect, *see* United States v. Santana, 427 U.S. 38, 42–43 (1976), and when the evidence of a crime faces imminent destruction, *see* Ker v. California, 374 U.S. 23, 40 (1963) (plurality opinion).

[69] Schmerber v. California, 384 U.S. 757, 771 (1966); *see also* Minnesota v. Olson, 495 U.S. 91, 100 (1990) (describing the exigent circumstances analysis as "fact-specific").

[70] Illinois v. McArthur, 531 U.S. 326, 331 (2001).

[71] *See id.* at 332.

[72] *See id.* at 332–33.

[73] *See id.* at 336.

[74] *See id.* at 332.

[75] *See* Mincey v. Arizona, 437 U.S. 385, 393 (1978).

[76] *See* Warden v. Hayden, 387 U.S. 294, 298–99 (1967).

[77] *See McArthur*, 531 U.S. at 336.

create those circumstances.[78] However, the very justification for the police-created exigency doctrine is that an emergency "manufactured"[79] by law enforcement is either too "anticipated"[80] or "contrived"[81] to constitute "a true exigency."[82] In essence, the police-created exigency doctrine is just another variable in the holistic calculus of whether exigent circumstances existed — only it has been plucked out and sanctified as its own independent rule.[83] Therefore, it would have been perfectly consistent for the Court to simply combine police causation with all the other exigent circumstances factors. According to this approach, the Court should not have begun with the assumption that the noise from inside King's apartment established a destruction-of-evidence exigency. Instead, the Court should have analyzed that evidence *alongside* police causation: a single "totality of the circumstances" inquiry into whether the overall urgency of the situation justified a warrantless search of King's apartment.

The Court could have realized several benefits by absorbing police causation into its exigent circumstances inquiry. First, this approach would more effectively prevent law enforcement from manipulating the doctrine. The *King* Court clearly worried that police might deliberately leverage the exigency exception in order to evade the warrant requirement.[84] Yet it declined to adopt a bad faith test, a reasonable foreseeability test, or an opportunity to obtain a warrant test due to the demands of Fourth Amendment jurisprudence and the fear of hindering legitimate law enforcement.[85] If the Court had expanded the fact-specific exigent circumstances analysis to include police causation, it could determine on a case-by-case basis whether the police had inappropriately taken advantage of the exception. Moreover, the Court could avoid announcing a bright-line rule that the police might exploit by intentionally provoking exigencies without technically triggering the

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[78] *King*, 131 S. Ct. at 1862–63; *see, e.g.*, United States v. Gould, 364 F.3d 578, 590 (5th Cir. 2004).

[79] *Gould*, 364 F.3d at 590.

[80] United States v. Chambers, 395 F.3d 563, 565 (6th Cir. 2005).

[81] United States v. Duchi, 906 F.2d 1278, 1284 (8th Cir. 1990).

[82] *Chambers*, 395 F.3d at 566.

[83] Justice Ginsburg implicitly recognized this point. *See King*, 131 S. Ct. at 1865 (Ginsburg, J., dissenting) ("The existence of a genuine emergency depends not only on the state of necessity at the time of the warrantless search; it depends, first and foremost, on 'actions taken by the police *preceding* the warrantless search.'" (quoting United States v. Coles, 437 F.3d 361, 367 (3d Cir. 2006))).

[84] *See, e.g.*, Transcript of Oral Argument at 24, *King*, 131 S. Ct. 1849 (No. 09-1272) (Justice Breyer: "[W]hat we're trying to rule out is . . . they get this bright idea, the police: We'll go knock at every door."); *id.* at 13 (Justice Sotomayor: "[H]ow does this holding by us not become a simple warrantless entry in any drug case?"); *id.* at 52 (Justice Kagan, voicing a similar concern).

[85] *See King*, 131 S. Ct. at 1859–60.

doctrine[86] — a tactic that "creative investigat[ors]" have successfully employed in jurisdictions with per se police-created exigency rules.[87]

Second, a holistic analysis would help courts avoid interference with legitimate police work. Courts could occasionally permit warrantless searches based on police-created exigencies in light of other extenuating circumstances that exacerbated the emergency, such as if the police needed to prevent an especially heinous crime or capture an exceptionally dangerous criminal.[88] Moreover, an innocent or minor mistake by the police preceding an exigency would not automatically invalidate evidence from a subsequent warrantless search. As Justice Alito noted, *sometimes* it is entirely legitimate for the police to bang on the door and loudly announce their presence or to delay obtaining a warrant in order to pursue a different investigative strategy.[89] And, as Justice Ginsburg replied, the police *might also* use these techniques to violate private rights.[90] By considering police causation within the exigent circumstances analysis, courts could examine the particular context of each situation in order to distinguish between genuine law enforcement tactics and deliberate evasion of the warrant requirement.

Third, this approach would maintain the Fourth Amendment's "special protection" for the sanctity of private residences.[91] Although Justice Alito compared the Court's decision to "other cases involving warrantless searches,"[92] neither of the cases he invoked involved warrantless intrusions *within the home* — "the chief evil against which . . . the Fourth Amendment is directed."[93] A general rule like the *King* Court's "violate or threaten to violate the Fourth Amendment" test is inevitably "imperfect," with "a few corners that do not quite fit."[94] Yet the Court traditionally applies a case-by-case exigent circumstances analysis precisely to provide the broadest possible shield for the home — to ensure that all the "corners" of Fourth Amendment privacy protections "fit."[95] Because police causation may determine

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[86] *Compare* Kathleen M. Sullivan, *The Supreme Court, 1991 Term — Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 66 (1992) ("[B]right-line rules create incentives for exploitation . . . ."), *with King*, 131 S. Ct. at 1864 (Ginsburg, J., dissenting) ("[P]olice officers may now knock, listen, then break the door down . . . .").

[87] United States v. Rengifo, 858 F.2d 800, 803 (1st Cir. 1988).

[88] *But cf.* United States v. Anderson, 154 F.3d 1225, 1234 (10th Cir. 1998) (suggesting that a police-created exigency could not justify the warrantless search of a child pornographer's office).

[89] *See King*, 131 S. Ct. at 1861.

[90] *See id.* at 1864 (Ginsburg, J., dissenting).

[91] *See* Minnesota v. Carter, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring).

[92] *King*, 131 S. Ct. at 1858.

[93] United States v. U.S. Dist. Court, 407 U.S. 297, 313 (1972).

[94] *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177 (1989).

[95] Only a "grave emergency," McDonald v. United States, 335 U.S. 451, 455 (1948), in which "the exigencies of the situation [make a warrantless search] imperative," *id.* at 456, can justify a suspension of "the right to privacy[,] . . . one of the unique values of our civilization," *id.* at 453.

the validity of a warrantless entry into the home, it requires this same kind of tailored analysis. A context-specific "totality of the circumstances" inquiry that includes law enforcement's role in causing the exigency would ensure that the right to privacy is never "sacrificed on the altar of rules."[96]

Finally, a single-step analysis would avoid the structural bias introduced against criminal defendants through the application of a separate rule for police causation. Criminal prosecutors may not ordinarily use evidence obtained in violation of the Fourth Amendment.[97] Therefore, "the Court is loathe to declare searches unconstitutional . . . [and] strives to justify such police behavior by stretching existing doctrine to accommodate it."[98] An isolated analysis of police causation will produce a similar problem in relation to the exigent circumstances inquiry. If a judge finds or assumes that exigent circumstances justified a warrantless search, it becomes much more difficult for her to invalidate that exigency based on the police's role in creating it. As a result, the judge may feel pressured to stretch the police-created exigency doctrine in order to excuse law enforcement's contribution to the otherwise legitimate emergency. If the Court instead combined the analysis of police causation with the identification of the exigency, it would be easier to decide that all the relevant factors failed to constitute an emergency sufficient to justify a warrantless search.[99]

The exigent circumstances inquiry is perfectly capable of incorporating police causation. First, in contrast to Justice Alito's claim that a search's validity should not "turn on [the] subtleties" that enter into a context-specific analysis — for instance, how hard the officers banged on the door or how loudly they shouted[100] — the Court's exigent circumstances analyses routinely include *exactly* these details of police conduct.[101] Second, although police causation may play a decisive role in determining an exigency's validity, the exigent circumstances in-

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[96] Sullivan, *supra* note 86, at 66.

[97] *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961); Weeks v. United States, 232 U.S. 383, 393–94 (1914).

[98] Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1470 (1985).

[99] A judge might feel the same pressure to justify a warrantless search when applying the exigent circumstances analysis. Nevertheless, an independent police-created exigency rule exacerbates this difficulty. First, it forces a judge into the uncomfortable position of pinning the blame squarely on law enforcement for the invalidation of the evidence, rather than on the murkier "totality of the circumstances." Second, whereas the exigent circumstances exception to the warrant requirement allows a judge to authorize a presumptively *illegal* intrusion on the home, a separate police-created exigency doctrine requires her to invalidate an otherwise *permissible* search.

[100] *King*, 131 S. Ct. at 1861.

[101] *See, e.g.*, Brigham City v. Stuart, 547 U.S. 398, 406–07 (2006) (considering the time of the officers' entry, the manner of their entry, and the volume at which they announced their presence); *see also* McDonald v. United States, 335 U.S. 451, 454–55 (1948) (considering the existence of probable cause and the officers' opportunity to obtain a warrant).

quiry already includes similarly dispositive elements, such as the gravity of the underlying criminal offense.[102] Finally, despite the concern that a "case-by-case definition of Fourth Amendment standards . . . creates a danger that constitutional rights will be arbitrarily and inequitably enforced,"[103] the addition of police causation to the exigency inquiry would not place Fourth Amendment rights in greater danger, because these cases already involve an ad hoc analysis.

Much of this argument reflects the familiar distinction between legal directives that operate as "rules" and those that function as "standards."[104] A formal rule for police-created exigencies will necessarily "produce[] errors of over- or under-inclusiveness,"[105] whereas a discretionary analysis of police causation through the exigent circumstances standard would more consistently prevent manipulation, minimize interference with law enforcement, protect privacy, and ensure a fair analysis. Yet this classic dichotomy does not exhaust the important distinction between an independent police-created exigency rule and an expanded exigent circumstances inquiry. The *King* Court considered a variety of tests across the rule/standard spectrum,[106] but it never asked the more fundamental question: is a new stand-alone legal directive the best way to address this issue in the first place? Instead, the *King* Court exclusively focused on "choosing the rule for police-created exigencies"[107] and therefore never looked back to its own previously established doctrine. If the Court had *declined* to choose a new rule, it would have found the exigent circumstances analysis already best suited to the task of "translat[ing] constitutional principles into rules."[108] The invention of an additional test to resolve a difficult legal problem does not always improve judicial decisionmaking. Sometimes, the existing doctrine suffices.

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[102] The Court has held that the gravity of the underlying criminal offense is "an important factor to be considered when determining whether any exigency exists" and noted that "it is difficult to conceive of a warrantless home arrest that would not be unreasonable under the Fourth Amendment when the underlying offense is extremely minor." Welsh v. Wisconsin, 466 U.S. 740, 753 (1984). Nevertheless, the Court still balances this factor along with the many other elements that may determine the presence of exigent circumstances. *See id.* at 753–55.

[103] Oliver v. United States, 466 U.S. 170, 181–82 (1984); *cf.* Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 854 (1994) (arguing that per se rules "both guide courts in their ex post adjudication of Fourth Amendment rights and constrain police in their ex ante decisions about when and whether to search and seize").

[104] Rules "bind[] a decisionmaker to respond in a determinate way to the presence of delimited triggering facts," Sullivan, *supra* note 86, at 58, whereas "[s]tandards allow the decisionmaker to take into account all relevant factors or the totality of the circumstances," *id.* at 59.

[105] *See id.* at 58.

[106] *See id.* at 99 n.514.

[107] Orin Kerr, *Choosing the Rule for Police-Created Exigencies in* Kentucky v. King, SCOTUSBLOG (May 17, 2011, 7:52 PM), http://www.scotusblog.com/?p=119645.

[108] *Id.*