Juries can make mistakes, but so can judges. One of the Rehnquist Court's trademark mistakes has been to inflate its own role at the expense of other, more democratic institutions empowered by the Constitution. Article II gives key roles in deciding presidential elections to Congress and state officials, but the Court snatched power to itself in *Bush v. Gore* last December. The Reconstruction amendments explicitly empower "Congress" to enforce them, yet the Rehnquist Court has struck down a slew of congressional civil-rights laws in recent years—every one of these invalidations an unjustified assault on a coequal branch. In its latest decision, the Court similarly gave insufficient thought to the possibility that someone other than itself—in this case, a jury of ordinary Americans—might be trusted to do the right thing.

THE BATTLE OF HUDSON HEIGHTS

Slate, Monday, June 19, 2006, 3:01 p.m. (ET)

Another front in the culture wars heated up last week. The proper scope of the exclusionary rule and the central purposes of the Fourth Amendment were debated anew as the Supreme Court announced its sharply contested decision in the case of *Hudson v. Michigan*.

The immediate battleground—the precise fact pattern at issue in *Hudson*—is but a speck on the vast map of American constitutional law. Yet given the precise location of this battleground and the particular tactics of the justices in struggling over it, *Hudson* may be seen one day as a decisive crossroads. Essentially, the judicial battle of Hudson Heights involved a fierce contest for high conceptual ground, and the victors have now secured a strong base for further action that could broadly reshape the lines of the exclusionary rule.

First the facts. The cops in *Hudson* had a search warrant authorizing them to enter a house and look for drugs and guns. They found both. But the way they entered the house was constitutionally improper. Instead of waiting a reasonable period (say, twenty seconds) after announcing their presence at the front door—as generally required under long-standing Anglo-American tradition and modern Fourth Amendment doctrine—the police simply announced themselves, opened the (unlocked) door, and began searching. They found lots of cocaine, later introduced as evidence to convict the homeowner of drug possession.

Led by Justice Stephen Breyer, four dissenters found this a textbook case for exclusion: The police violated the Fourth Amendment, so the drugs must be suppressed and the guilty man must go free. Next case.

Not so fast, said five justices on the other side, led by Justice Antonin Scalia. Although the Fourth Amendment was violated, this violation made absolutely no difference so far as the drugs were concerned. Had the cops properly waited an extra twenty seconds they still would have found the cocaine.

To this, Breyer responded with an ultrastrict version of "coulda, woulda, shoulda." It is not enough, he said, that the government could have found the drugs in a lawful search. Generally, the government must *in fact* find the drugs in a *perfectly* valid search *wholly independent* of the tainted search.

But as the Scalia opinion emphasized, the *Hudson* cops did in fact have a valid search warrant that authorized the successful drug search—even if the warrant didn't authorize the overhasty entrance. Nothing in law or logic requires that judges must always lump together the improper entrance and the otherwise proper search, rather than treating these as two independent events. For example, if the warrant had authorized only a search of the house, and the cops instead searched both the house and a nearby barn, why should drugs found in the house be excluded just because the barn search was invalid? Why shouldn't only items found in the barn be suppressed in court?

The majority also stressed that the Supreme Court's previous case law, which Breyer claimed was the source of his ultrastrict test, is actually a mixed bag of rules and exceptions. One exception to the exclusionary rule is called "inevitable discovery," and as its very label makes clear, the test is whether a piece of evidence "*would have*" inevitably come to light in a lawful search. Nor have previous Court opinions consistently read this test in the superstrict way Breyer was now urging.

But Breyer was right to observe that, if aggressively applied, the "inevitable discovery" doctrine could outflank the exclusionary rule in a wide range of cases. With *Hudson* on the books, state and federal prosecutors should now try to find the next perfect test case, which would look something like this: The cops have very good reasons (what lawyers call "probable cause") to conduct a given search and thus the police could easily get a warrant from a judge. But they decline to get the warrant because they reasonably—though it turns out erroneously—believe that the facts fall into one of the umpteen categories for which the court has said that warrants are not

required. Armed with probable cause and good faith, but no warrant, the cops search and find a smoking gun or a bloody knife—proof positive of a violent crime.

Similar cases have come before the Court previously, and the justices have at times mindlessly suppressed the evidence. But none of the Court's past cases has squarely addressed the strong argument of inevitable discovery, combined with police good faith. With *Hudson* now on the books clarifying the scope and logic of inevitable discovery, the government can argue in our test case as follows: "The cops *could have* easily gotten a warrant and surely *would have* done so, had they only better understood often-complex Court doctrine. Because the cops acted in good faith and because the evidence would have been found if the cops had strictly complied with the Fourth Amendment—a warrant would inevitably have been issued, had it been sought—the case should be treated just like *Hudson*."

It's not guaranteed that a Court majority would buy this argument. Justice Kennedy, while joining almost all of Scalia's *Hudson* opinion, wrote separately to insist that "the continued operation of the exclusionary rule, *as settled and defined by our precedents*, is not in doubt." Kennedy also took pains to note that in *Hudson* the drugs were discovered "because of a search pursuant to a lawful warrant"—which would not quite be true in the test case.

Yet Kennedy also embraced virtually all of Scalia's opinion, which vigorously cataloged various vices of the exclusionary rule and called for a tighter fit between right and remedy. One big problem with the exclusionary rule, Scalia argued, is that the rule often fits poorly with important Fourth Amendment values. If cops brutalize or humiliate citizens or destroy personal effects within a home—thereby violating core Fourth Amendment principles—there is no real link between these unreasonable intrusions on persons and property and the finding of evidence for use in a criminal case. Indeed, in many situations the cops may find no evidence at all, and they might not even be looking for evidence. If the exclusionary rule were the only remedial game in town, it would be open season on the innocent.

Of course, as Scalia and Kennedy made clear (joined by Justice Thomas and by the Court's two newest members, Chief Justice Roberts and Justice Alito), the exclusionary rule is not the only—and in many cases, not the best—way to vindicate Fourth Amendment values. In fact—though Scalia did not stress this point—no Founding Father ever called for a Fourth Amendment exclusionary rule, and no court in America ever followed such a rule in the entire century after the Declaration of Independence. Instead,

the framers believed that punitive-damage suits brought by aggrieved Americans against overbearing government searchers and seizers would properly protect Fourth Amendment values.

What Scalia did stress is that—in sharp contrast to the situation faced by the early Warren Court, which was the first to use the federal Constitution to apply the exclusionary rule to ordinary state crimes—today a wide range of civil rights laws and regimes offers a superior model for enforcing the Fourth Amendment via damage suits by innocent citizens and other devices rather than suppression motions by the guilty.

Hudson's facts illustrate the point nicely. Why does the Fourth Amendment generally require the cops to knock and wait for a few seconds? Not to give a crook a twenty-second window to destroy evidence, but rather to give an innocent citizen a twenty-second chance to, say, put on a bathrobe. And this right would best be vindicated in a punitive-damage suit brought by, for example, an innocent women in her negligee who was surprised by overbearing cops, rather than by a drug dealer caught red-handed and seeking a get-out-of-jail-free card.

The Founders' Fourth Amendment, in short, was designed to protect the innocent; yet the later, judge-made exclusionary rule perversely springs the guilty. Although the *New York Times* has said that Scalia seemed to trivialize the Fourth Amendment knock-and-announce rule when he emphasized the bathrobe/negligee issue,[5] Scalia was in fact describing part of the amendment's core—a right of privacy and personal dignity. It was largely this core value that led Scalia, writing for the court in 2001, to invalidate freewheeling use of high-tech thermal detection devices aimed at personal residences, since such James Bond–like ray guns would improperly allow the government to learn "at what hour each night the lady of the house takes her daily sauna and bath—a detail that many would consider 'intimate.'"

This is hardly some personal obsession of Scalia's. The Fourth Amendment's framers had a remarkably similar view of the amendment's core rights and core remedies. According to one 1787 pamphlet, if a constable searching "for stolen goods, pulled down the clothes of a bed in which there was a woman and searched under her shift . . . a trial by [civil] jury would be our safest resource, [and] heavy damages would at once punish the [offending constable] and deter others from committing the same."

Although none of the justices in *Hudson* quoted this remarkably apt passage from the Founding Fathers, it strongly supports the *Hudson* Court's shift toward Fourth Amendment remedies that protect the innocent rather

than reward the guilty. In the latest round of the culture wars, score one for Scalia.

PAPER CHASE

New Republic, Monday, December 15, 1997

Dear Diary: It's time to compose the final exam for my criminal procedure class. Better avoid O. J.—I've already ridden that nag hard enough this semester.

Maybe a question from the Unabomber case instead? Federal agents have seized Ted Kaczynski's diaries in a raid on his mountain shack. Now prosecutors have made public these most intimate of Kaczynski's writings and plan to introduce them in court as evidence, not merely of the alleged Unabomber's guilt, but also of his cold-blooded criminal intent. And that, the government hopes, will convince the jury to mete out the death penalty. Kaczynski's diaries create a troubling picture of a man bent on committing murder and frustrated when he failed.

But that only raises the constitutional stakes. Isn't there something unsettling about the state's breaking into a man's house, pawing through his most private writings, and then using them to brand him an enemy of the state and put him to death?

The Unabomber judge has given the government the green light. But there are serious arguments on the other side—arguments rooted in at least three of the ten amendments in the Bill of Rights.

A good student analysis should probably start with opening words of the Fourth Amendment: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Here we see an obvious accent on the notion of privacy—on a citizen's body (his private "person"), on his private abode (his "house" as opposed to other buildings), and on his private "papers" above and beyond all other stuff (his "effects").

And the historical context in which the Fourth Amendment was drafted also suggests that privacy weighed heavily in the Founders' deliberations. They were undoubtedly thinking about the two most famous search-and-seizure cases in the Anglo-American world, *Wilkes v. Wood* and *Entick v. Carrington*. When George III's henchmen broke into John Wilkes's and John