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I. INTRODUCTION

Historically, courts have struggled to balance the needs of law enforcement with individuals' rights of privacy. Increasingly in today's society, courts are willing to promote law enforcement interests in pursuing crime investigation and prevention, particularly with the war on drugs and, more recently, the war on terror. On the other hand, the Fourth Amendment to the United States Constitution provides protection for citizens against unreasonable searches and seizures. Since mid-century, when the first knock and announce case came before the Court, the United States Supreme Court, as well as lower courts everywhere, have struggled to balance law enforcement interests with individuals' rights of privacy. The Court began by using 18 U.S.C. § 3109 to require officers to knock and announce their presence before entering a person's home. Over the years, the Court continued to rule on the issue, deciding that the Reasonableness Clause of the Fourth Amendment determined whether an entry was constitutionally permissible. Although the Court eventually settled on a standard, it used several different standards before choosing, at least for now, "reasonable suspicion" as the standard that police must meet before entering a residence without consent.

3. The Fourth Amendment of the United States Constitution states:

   The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

   U.S. CONST. amend. IV.
4. See infra Part III.
5. The federal statute, which is typical of most state statutes, states:

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

6. See infra Part III.A.
7. See infra Part III.C, E.
8. See infra Part III.
As courts struggle to interpret the Supreme Court's rulings, situations arise daily that present new circumstances and new applications of the "reasonable suspicion" standard.\(^9\) *United States v. Banks* is the most recent case to come before the United States Supreme Court involving the knock and announce requirement.\(^{10}\) In *Banks*, the Supreme Court addressed when officers can legitimately have a reasonable suspicion of necessity to enter a home after a knock and announcement but without a refusal of admittance.\(^{11}\) *Banks* attempts to answer the complex question of how long officers must wait after announcing their presence before forcibly entering a residence.\(^{12}\) While the Court continued to require a case-by-case analysis in determining the reasonableness of a search, *Banks* illustrates the amount of time that the Constitution may require under certain circumstances.\(^{13}\)

This note explores the Supreme Court's application of the knock and announce rule through the case of *United States v. Banks*, a decision that attempts to clarify the waiting time necessary for police entry.\(^{14}\) First, the note gives a brief overview of the facts involved in *Banks*.\(^{15}\) Then, in the background section, the note traces the origin of the knock and announce rule and the benefits derived from the rule.\(^{16}\) The note then focuses on the prior knock and announce cases reviewed by the United States Supreme Court dating back to 1958 and how each case helped to classify and define the rule.\(^{17}\) Next, the note explains the reasoning of the Court in deciding *Banks* and then explores the practical effect of *Banks* on the application of the knock and announce rule.\(^{18}\) In the significance section, the note discusses the difficulty that police officers, lower courts, and citizens will have applying *Banks* to each particular situation and suggests that the Arkansas Supreme Court may extend state constitutional standards to provide more protection of the home than the United States Constitution provides.\(^{19}\)

II. FACTS

On July 8, 1998, officers from the North Las Vegas Police Department obtained a warrant to search an apartment in Las Vegas, Nevada for sus-
pected drug activity.20 The officers had received information from an informant that a person named “Shakes” was selling drugs at his apartment.21 The informant offered to attempt a controlled buy at Shakes’ apartment,22 which police knew to be a small, two-bedroom unit.23 The officers searched the informant for money and drugs and then provided him with the necessary money to make the purchase.24 The informant entered the apartment and returned with two large off-white rocks of cocaine, which he said he had purchased from Shakes.25

On July 15, 1998 around 2 p.m.,26 a state and federal drug task force27 executed a search warrant28 for cocaine and drug paraphernalia at the home of Lashawn Lowell Banks in North Las Vegas, Nevada.29 A SWAT team was located at the entrance to the apartment,30 while other officers were positioned at the rear of the apartment.31 The entry team knocked on the door and loudly announced “police search warrant” in compliance with the statutory knock and announce requirement.32 The officers in the back of the apartment could hear the team located at the entrance to the apartment.33 Hearing no response from inside the apartment, the officers waited fifteen to twenty seconds and then forcibly entered the apartment.34

21. Id. at 3.
22. Id.
24. Respondent’s Brief at 3, Banks (No. 02-473). The North Las Vegas Police Department gave the informant $200 from the narcotics buy fund and then drove him to the address he had provided. Id.
25. Id.
26. Brief for the United States at 3, Banks (No. 02-473).
28. The state court issued the warrant. Brief for the United States at 3, Banks (No. 02-473).
29. Id. Banks was the sole occupant of the apartment at the time of the execution of the warrant. Respondent’s Brief at 5, Banks (No. 02-473).
30. Respondent’s Brief at 4, Banks (No. 02-473). The team at the front door was armed with fully automatic weaponry, and members of the SWAT team were wearing “tactical assault garb,” including hoods or masks. Id.
32. Id.
33. Id. at 705.
34. United States v. Banks, 540 U.S. 31, 33 (2003). The officers used a battering ram on the front door to force their way into the apartment. Id. Respondent’s Brief asserts that the officer stated that he waited “at least 15 seconds” before ramming open the door while the other officer located at the rear of the apartment said “I think twenty seconds, maybe.” Re-
The officers entered the apartment to find Banks "wet, soapy and naked" in the hallway a few steps from the bathroom.\textsuperscript{35} He was forced to the floor, handcuffed and taken to the kitchen table for questioning.\textsuperscript{36} Banks stated that he had not heard the announcement because he was in the shower, but that he heard a loud boom that prompted him to step out of the shower where he was thrown to the floor by an unidentified, armed man.\textsuperscript{37} During his interrogation,\textsuperscript{38} the SWAT team searched his apartment where they found evidence, including drugs and weapons.\textsuperscript{39}

Banks' defense counsel filed a pre-trial motion to suppress evidence, including the statements made during the interrogation.\textsuperscript{40} His arguments included that the police obtained the statements (1) in violation of the federal knock and announce statute because the officers did not wait a reasonable time before forcing their way into his apartment; (2) "in violation of the [F]ifth [A]mendment because he did not make a knowing and voluntary waiver of his rights during the interrogation;" and (3) in violation of the Fifth Amendment because the questioning continued after he requested an attorney.\textsuperscript{41} The district court denied the suppression motion, and Banks plead guilty while reserving his right to appeal the district court's denial of his motion to suppress.\textsuperscript{42}

\textsuperscript{35} Respondent's Brief at 4, Banks (No. 02-473).
\textsuperscript{36} Respondent's Brief at 4, Banks (No. 02-473).
\textsuperscript{37} Respondent's Brief at 4, Banks (No. 02-473). Banks stated that he did not know whether the man who threw him to the floor was a police officer or a robber. \textit{Id.}
\textsuperscript{38} Respondent's Brief at 4, Banks (No. 02-473). Banks stated that he did not know whether the man who threw him to the floor was a police officer or a robber. \textit{Id.}
\textsuperscript{39} Respondent's Brief at 4, Banks (No. 02-473). Banks stated that he did not know whether the man who threw him to the floor was a police officer or a robber. \textit{Id.}
\textsuperscript{40} Respondent's Brief at 4, Banks (No. 02-473). Banks stated that he did not know whether the man who threw him to the floor was a police officer or a robber. \textit{Id.}

Banks claimed that he was under the influence of alcohol and drugs during the interrogation and that he was "nervous and intimidated" by the police officers during the questioning. \textit{Id.} 282 F.3d at 702. He attributed this nervousness in part to the "good-cop" versus "bad-cop" routine used by the officers as well as to the SWAT officers searching the apartment. \textit{Id.} The officers, however, said that there were no indications that he was under the influence of anything or that he was nervous during the interview. \textit{Id.} Instead, they said he appeared calm and "was able to reason" throughout the questioning. \textit{Id.} About halfway through the approximately forty-five minute interrogation, the officers questioned Banks about his suppliers. \textit{Id.} He refused to reveal his suppliers without first talking to his attorney, but the officers continued the questioning. \textit{Id.} Banks was subsequently arrested. Appellant's Opening Brief at 5, United States v. Banks, 282 F.3d 699 (9th Cir. 2001) (No. 00-10439).

\textsuperscript{39} Banks, 540 U.S. at 33; Respondent's Brief at 5, Banks (No. 02-473). The evidence found included a .38 caliber semi-automatic pistol with a laser sight and seven rounds in the magazine, a .40 caliber semi-automatic pistol, a .22 caliber Beretta pistol, a bullet-proof vest, a scale, $6000 in cash, and eleven ounces of crack cocaine. Brief for the United States at 4, Banks (No. 02-473).
\textsuperscript{40} Banks, 282 F.3d at 703.
\textsuperscript{41} \textit{Id.}
\textsuperscript{42} \textit{Id.} at 703. He plead guilty to "possession of a controlled substance with intent to distribute and to being a drug user in possession of a firearm." \textit{Id.}
On appeal to the United States Court of Appeals for the Ninth Circuit, a split panel reversed on the knock and announce issue and ordered suppression of the evidence.\footnote{43} The court classified entries into the following four distinct categories to help in the determination of what is reasonable under the circumstances:

(1) entries in which exigent circumstances exist and non-forcible entry is possible, permitting entry to be made simultaneously with or shortly after announcement; (2) entries in which exigent circumstances exist and forced entry by destruction of property is required, necessitating more specific inferences of exigency; (3) entries in which no exigent circumstances exist and non-forcible entry is possible, requiring an explicit refusal of admittance or a lapse of a significant amount of time; and (4) entries in which no exigent circumstances exist and forced entry by destruction of property is required, mandating an explicit refusal of admittance or a lapse of an even more substantial amount of time.\footnote{44}

The court focused on when a reasonable waiting time would constitute a denial of admittance and listed factors an officer should consider in making an entry without an explicit denial.\footnote{45}

As for \textit{Banks}, the court of appeals found no exigent circumstances or affirmative denial of admission and, therefore, reversed and remanded the case, holding that the fifteen to twenty second waiting period was not "sufficient in duration to satisfy the constitutional safeguards."\footnote{46} One judge dissented, saying that the factors used by the court, including time of day, the small apartment, and the loud announcement, indicated that fifteen to twenty seconds was enough to support "a reasonable inference that admittance had been constructively denied."\footnote{47} The United States appealed, and the United States Supreme Court granted certiorari.\footnote{48}

\footnote{43} \textit{Banks}, 540 U.S. at 34.
\footnote{44} \textit{Banks}, 282 F.3d at 704. The court put Banks' search in the last category because the officers destroyed the door without first hearing a refusal to admit. \textit{Id.}
\footnote{45} \textit{Id.} These factors include the following: (a) size of residence; (b) location of residence; (c) location of officers in relation to main living or sleeping areas; (d) time of day; (e) nature of suspected offense; (f) evidence demonstrating the suspect's guilt; (g) suspect's prior convictions and the type of offenses; (h) any other observations "triggering the senses of the officers that reasonably would lead one to believe that immediate entry was necessary." \textit{Id.}
\footnote{46} \textit{See id.} at 704--06. The court rejected Banks' other two Fifth Amendment arguments, which were not at issue on appeal to the Supreme Court. \textit{See id.} at 705--06.
\footnote{47} \textit{Banks}, 540 U.S. at 34.
\footnote{48} \textit{Id.}
III. BACKGROUND

The background section begins with an examination of the history and basic principles of the knock and announce rule. The section discusses the first knock and announce case to reach the Supreme Court and the Court's use of the federal statute for guidance in the states. The section then details the origins of the blanket and particularized approaches used across the nation and the subsequent problems that arose because of these varying approaches. Also discussed is the proper application of the Fourth Amendment to the knock and announce rule and their combined application in the states. Finally, the section examines the most recent knock and announce case reviewed by the Supreme Court and its impact on the progression of the knock and announce rule.

A. The Basic Requirements of Knock and Announce and Its Origin

The knock and announce rule requires police officers executing a search warrant at a residence to announce their presence and authority before the officers forcibly enter the home. In general, a police officer is required to identify herself as a police officer, demand entry, inform the occupants of the legal basis for entry, and give the occupants an opportunity to cooperate by allowing entry. Although some scholars disagree, the rule has been said to serve the following three purposes: (1) it lessens the potential for violence, whereas an unannounced entry into a home could cause the resident to fear for his safety and take defensive measures; (2) it helps protect privacy by lowering the chances that the police might enter the wrong premises as well as allowing residents a brief time to prepare for

49. See infra Part III.A.
50. See infra Part III.B.
51. See infra Part III.C, F.
52. See infra Part III.E.
53. See infra Part III.G.

54. Wilson v. Arkansas, 514 U.S. 927, 929 (1995) (recognizing that the common law requirements of search and seizure include the requirement that a law enforcement officer generally must first announce his presence and authority before breaking open the doors of a dwelling).

55. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE Vol. I, § 3.6(b) (1984) (stating that this requirement applies to entry by force, a pass key, opening an unlocked door, and in some circumstances, to passage through an already open door, but not to entry by ruse because such activity does not intrude on the noted purposes of the requirement). The police must make an announcement so that the occupants can reasonably be expected to hear it; a whisper would not be appropriate. See Miller v. United States, 357 U.S. 301, 309–10 (1958).

56. Michael R. Sonnenreich & Stanley Ebner, No-Knock and Nonsense, An Alleged Constitutional Problem, 44 ST. JOHN'S L. REV. 626, 647 (1969) (stating that it "is difficult to see what actual protection is given to any right of privacy by the announcement rule").
police entry and avoid shock or embarrassment; and (3) it prevents needless destruction of property by allowing the resident the opportunity to allow the officers to enter the residence. The knock and announce rule is intended to make entry as peaceful and nondestructive as possible under the circumstances, not to prevent police entry.

A seventeenth century English case, Semayne's Case, is the most commonly cited source of the common law knock and announce rule, although Semayne's Case itself indicates that the rule may be traced back to a thirteenth century statute affirming the common law. In its earliest days, the common law limited police officers' authority to break into a house for an arrest because this action invaded the individual's privacy. The requirements stated in Semayne's Case are now reflected in 18 U.S.C. § 3109, in the statutes of many states, and in state constitutional provisions incorporating English common law. These state statutes requiring notice and announcement also generally codify the common law exceptions to the rule, although both the federal statute and some state statutes do not expressly mention them. The exceptions, however, have evolved with the common law rule and include exceptions for danger to the officer, possible destruction of evidence, and potential escape of the suspect.

59. LAFAVE, supra note 55, at 184.
61. Miller v. United States, 357 U.S. 301 (explaining that breaking into a house for an arrest "invades the precious interest of privacy summed up in the ancient adage that a man's house is his castle").
62. See supra note 5; Miller, 357 U.S. at 308; LAFAVE, supra note 58, at 598.
63. See Wilson, 514 U.S. at 933 (giving a list of state statutes); LAFAVE, supra note 58, at 598; Hemmens, supra note 2, at 566–68 (detailing the progression of common law knock and announce through England and into American colonial times).
64. Wilson, 514 U.S. at 933.
65. See LAFAVE, supra note 58, at 598; G. Robert Blakey, The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California, 112 U. PA. L. REV. 499, 504–05 (1964) (listing many common law qualifications that were widely adopted and giving a lengthy discussion of this development in early American case law); Hemmens, supra note 2, at 568.
66. Hemmens, supra note 2, at 569.
B. The Knock and Announce Rule in a State of Confusion: *Miller v. United States*

The United States did not address the issue of unannounced entry until 1958 in the case of *Miller v. United States*. In *Miller*, the defendant asked, "Who's there?" after hearing a knock on the door at 3:45 a.m. In response, the police, without a search or arrest warrant, answered softly "the police." Miller opened the door slightly, leaving the chain on the door, and attempted to close the door when she realized it was the police. The police forced their way in, broke the chain, and proceeded to search the apartment, finding evidence used at trial against Miller.

The Supreme Court, in an opinion by Justice Brennan, determined that the entry was unlawful because the police did not first expressly announce their presence and purpose. Local statute and the common law required this knock and announcement, but the court declared and the Government agreed that the requirement was to be tested by the standard in 18 U.S.C. § 3109. Justice Brennan noted that some situations would not require announcement because the police would be "virtually certain" that the resident knew of their presence and purpose. Although the Court acknowledged that the common law exceptions existed, it did not address them because they were not at issue in that case. After *Miller*, state courts were still free to decide such cases based on state law while federal courts were left trying to interpret 18 U.S.C. § 3109. This resulted in various interpretations in state and federal courts.

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69. *Id.*
70. *Id.*
71. *Id.* at 303–04.
72. *Id.* at 309–10.
73. *Id.* at 302, 306–07, 309–10. It is interesting to note that the court could have decided the issue on a number of grounds with varying consequences including the Fourth Amendment, 18 U.S.C. § 3109, the Federal Rules of Criminal Procedure, or state procedure. Blakey, *supra* note 65, at 519–24 (discussing the possible approaches and their consequences).
75. *Id.* at 309.
77. *Id.; see also* Blakey, *supra* note 65, at 527 (stating that the federal courts have "disagreed, moreover, on some of the most fundamental aspects of the Court's decision"). The article also gives a lengthy discussion of various federal and state interpretations and decisions, pointing out that California all but ignored the Supreme Court's ruling in deciding state cases. *Id.* at 531–32.
C. Another Try at Clarification: *Ker v. California*

The plurality opinion in *Ker v. California*\(^7\) aptly illustrates the confusion both by courts nationwide and the Justices of the Supreme Court as to search and seizure cases.\(^7\) In *Ker*, the police entered the defendant’s apartment without notice or announcement, relying on their belief that Ker would destroy evidence if he knew the police were coming to search the apartment.\(^8\) Although the Court did not expressly hold that the Fourth Amendment included the common law knock and announce requirement, it did hold that courts should judge the circumstances of entry by the Reasonableness Clause of the Fourth Amendment.\(^8\) The eight justices agreed that certain circumstances would warrant an entry without a knock and announcement, but they split evenly on the particular circumstances in which this would be justified.\(^8\)

Justice Clark’s opinion held that courts should allow the police to ignore the knock and announce requirement when exigent circumstances warrant.\(^8\) Although the opinion did not specify when these circumstances would be present, it focused on the facts in *Ker*, which included a belief by the officers that Ker had narcotics that could be quickly and easily destroyed.\(^8\) With Justice Harlan’s concurrence in the result, differing in that he based his decision on the Fourteenth Amendment and “fundamental fairness” rather than on the plurality’s Fourth Amendment and Reasonableness Clause analysis, the Court upheld Ker’s conviction.\(^8\)

Justice Brennan’s dissent, however, found that the police were not justified in entering the apartment without the proper announcement.\(^8\) He argued that the knock and announce rule was part of the Reasonableness Clause of the Fourth Amendment based on the common law at the time of the framing of the Bill of Rights.\(^8\) Justice Brennan further stated that the

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79. Blakey, supra note 65, at 539. The five part opinion includes various combinations of the Justices agreeing and disagreeing with each part, finally arriving at a plurality opinion written by Justice Clark with a dissent led by Justice Brennan. *Ker*, 374 U.S. at 24, 44, 46.
80. *Ker*, 374 U.S. at 40. The officers gained entrance to Ker’s apartment from a pass key obtained from the manager of the apartment. *Id.* at 28.
81. *Ker*, 374 U.S. at 33; see also Hemmens, supra note 2, at 571.
83. *Ker*, 374 U.S. at 40–41. Justice Clark reasoned that the entry fell within an exception that the California courts had added to California’s knock and announce statute. *Id.* at 37–39.
84. *Id.* at 40–41.
85. *Id.* at 44 (Harlan, J., concurring). Harlan felt that courts should judge state searches on the “more flexible concept of fundamental fairness, of rights basic to a free society, embraced in the Due Process Clause of the Fourteenth Amendment.” *Id.*
86. *Id.* at 46 (Brennan, J., dissenting).
87. *Id.* at 47–51 (Brennan, J., dissenting).
exceptions to the rule were created after the passage of the Bill of Rights and should, therefore, be narrowly tailored to uphold the intent of the framers. In his explanation, he set out only three circumstances that would justify unannounced entry: (1) when the person already knows of the officers' authority and purpose; (2) when the officers have a justifiable belief that the persons are in imminent peril of bodily harm; and (3) when the persons, while aware of someone outside, are then engaged in activity that justifies the officers belief that the person is attempting to escape or destroy evidence.

At the heart of the Ker opinion is the disagreement about how specific a showing the Fourth Amendment requires to excuse a failure to knock and announce. The plurality contended that Ker's possession of easily disposable narcotics was a justification for the police's failure to knock and announce. This contention implied that courts and officers could consider generalizations about drug suspects' tendencies to dispose of drugs as a basis under the Fourth Amendment for excusing unannounced entries. The plurality, however, did not specifically state that the court could justify these entries based solely on generalizations. Adversely, the Brennan dissent found that the Fourth Amendment allowed justification only by a showing of facts about the individual circumstances that officers could not explain. While listing his three sole exceptions, Justice Brennan felt that the officers' experience with narcotics suspects did nothing to help make the exception apply in this case. Brennan further explained that the destruction of evidence exception applied only if there was activity in the suspect's home at the time of entry that gave the police officers the belief that an attempt to destroy evidence was underway.

The Supreme Court's opinion caused serious confusion in state and federal courts as to how specific a showing was necessary to justify an unannounced entry by the police. Some lower courts began to excuse all

88. Id. at 47–51, 54 (Brennan, J., dissenting).
89. Ker, 374 U.S. at 47 (Brennan, J., dissenting); see also Blakey, supra note 65, at 542–43.
91. Id.
92. Id.
93. Id.
94. Id. at 554.
95. Ker v. California, 374 U.S. 23, 61–63 (1963) (Brennan, J., dissenting) (stating "if police experience in pursuing other narcotics suspects justified an unannounced police intrusion into a home, the Fourth Amendment would afford no protection at all").
96. Id. at 47, 61 (Brennan, J., dissenting).
97. See Hemmens, supra note 2, at 573; Schwartz, supra note 90, at 555.
unannounced entries in drug cases while other courts limited their blanket exceptions to larger drug cases. Still, other courts opted for a more particularized standard, requiring as specific a justification as the Brennan dissent had required in Ker. Not only did Ker fail to explicitly clarify which statutes, state or federal, were applicable, it also raised new questions about how the Court would handle drug-related cases.

D. A Slightly More Specific Standard: Sabbath v. United States

Four years after Ker, the Supreme Court again dealt with the issue of knock and announce in the case of Sabbath v. United States. In Sabbath, a federal customs officer apprehended a drug smuggler and persuaded him to deliver the drugs to Sabbath. The officers watched the smuggler enter Sabbath’s apartment and proceeded to knock on the door. Getting no response, the officers opened the unlocked door, guns drawn, and entered without announcement. The Court held that the federal law enforcement officers had violated 18 U.S.C. § 3109 by failing to knock and announce their presence without having a “substantial basis” for the belief that an announcement was unnecessary. The Court based this decision on the

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98. As one author described, “A number of courts have recently adopted a blanket rule allowing police armed with valid search warrants to smash down the front doors of homes with battering rams and rush inside with guns drawn when the object of the search is drugs and the home has a toilet.” Charles Patrick Garcia, Note, The Knock and Announce Rule: A New Approach to the Destruction-of-Evidence Exception, 93 COLUM. L. REV. 685, 685 (1998).

99. Schwartz, supra note 90, at 555–56. Schwartz’s article discusses the differing approaches, noting that the relaxed particularized approaches imply that announcement may only be required when officers have reason to believe that a suspect possesses too great a quantity of drugs to flush. “Thus, in the guise of requiring case-by-case review of the justifiability of unannounced entries, some courts effectively excepted all but the largest drug cases from knock and announce.” Id. at 556–57.

100. Id. at 558.

101. See Hemmens, supra note 2, at 573. Did Justice Clark’s plurality opinion mean that police may forgo the knock and announce requirement for any suspect in possession of easily flushable drugs? Would the nature of the illegal contraband create the “exigent circumstance” without any further showing or would the circumstances need to be so specific that an exception would never be carved out? See id.


103. Id. at 586–87.

104. Id. at 587.

105. Id.

106. Id. at 591. Amusingly, the Court calls the issue “uncomplicated” while stating that certiorari was granted “to consider the somewhat uncomplicated but nonetheless significant issue of whether the agents’ entry was consonant with federal law.” Id. at 588.
federal statute instead of the Fourth Amendment, leaving it unclear whether state officers had to also meet the new "substantial basis" test.\(^{107}\)

After the Court's previous decisions, there still existed serious conflict among state and federal courts about the link between the knock and announce rule and the Constitution.\(^{108}\) The previous decisions\(^ {109}\) did not explicitly clarify whether the Fourth Amendment requires notice or whether notice is only a statutory requirement.\(^ {110}\) The confusion continued until the Supreme Court granted certiorari in the 1995 case of \textit{Wilson v. Arkansas} "to resolve the conflict among the lower courts as to whether the common law knock and announce principle forms a part of the Fourth Amendment reasonableness inquiry."\(^ {111}\)

E. The Constitutional Application in the States: \textit{Wilson v. Arkansas}

In \textit{Wilson}, the Court for the first time expressly stated that the common law knock and announce requirement was a part of the Fourth Amendment's ban on unreasonable searches and seizures.\(^ {112}\) Although the issue only arose because of an oddity in Arkansas law, it allowed the Court to resolve a long-standing conflict among the courts.\(^ {113}\) In \textit{Wilson}, the police looked through a screen door, proceeded to open the screen door, and entered the residence while simultaneously identifying themselves as police officers armed with a warrant.\(^ {114}\) The Supreme Court, in an opinion by Justice Thomas, looked at the "traditional protections against unreasonable searches and seizures afforded by the common law at the time of the framing."\(^ {115}\) Justice Thomas further concluded that there was "no doubt that the reasonableness of a search and seizure may depend in part on whether law enforcement officers announced their presence and authority prior to entering."\(^ {116}\) The Court, however, made sure to say that the requirements were

\begin{itemize}
  \item \(^{107}\) Hemmens, \textit{supra} note 2, at 574.
  \item \(^{108}\) \textit{Id}.
  \item \(^{109}\) \textit{See supra} Part III.A–C.
  \item \(^{110}\) Hemmens, \textit{supra} note 2, at 574.
  \item \(^{112}\) Hemmens, \textit{supra} note 2, at 576.
  \item \(^{113}\) Schwartz, \textit{supra} note 90, at 548. Although 18 U.S.C. § 3109 had long required federal officers to knock and announce, and most states also included a knock and announce requirement, the Arkansas Supreme Court held that Arkansas law contained no knock and announce requirement. \textit{Id.} at 548–49. The Arkansas court found that "there is no authority for Ms. Wilson's theory that the knock and announce principle is required by the Fourth Amendment." Wilson \textit{v. State}, 317 Ark. 548, 553, 878 S.W.2d 755, 758 (1994).
  \item \(^{114}\) Wilson, 514 U.S. at 929. Upon entry, the officers found marijuana, methamphetamine, valium, narcotics paraphernalia, a gun and ammunition. They also found the defendant in the bathroom flushing marijuana down the toilet. \textit{Id}.
  \item \(^{115}\) \textit{Id} at 931.
  \item \(^{116}\) \textit{Id}. As one author noted, "A fair reading of Wilson suggests that it created a pre-
not inflexible and that exigent circumstances could justify avoiding the requirements of the general rule.\textsuperscript{117} The Court still did not clarify what constituted exigent circumstances, instead leaving the lower courts the duty of determining what circumstances would make an unannounced entry reasonable under the Fourth Amendment.\textsuperscript{118}

The Court's decision in \textit{Wilson} did not address the problem of blanket versus particularized approaches in determining the reasonableness of specific circumstances necessary to make an unannounced entry, leaving this area still jumbled to both federal and state courts.\textsuperscript{119} Specifically, the Court failed to rule on the claim that easily disposable drugs is sufficient justification for making an unannounced entry.\textsuperscript{120} One commentator described the exception as threatening to "overwhelm" the rule by overstepping the bounds of traditional liberties.\textsuperscript{121} Most lower courts considered this speculation insufficient to sustain an unannounced entry without exigent circumstances known by the officers at the time of the execution of the warrant.\textsuperscript{122} Other courts, like the Wisconsin Supreme Court, however, allowed blanket exceptions to the general rule.\textsuperscript{123} In 1997 the United States Supreme Court ruled on the issue, finally deciding which of these approaches is compatible with the Fourth Amendment.\textsuperscript{124}

F. The Final Say on Blanket Approaches: \textit{Richards v. Wisconsin}

Shortly after the Supreme Court issued the opinion in \textit{Wilson}, a Wisconsin defendant, Richards, sought review of the Wisconsin Supreme Court's decision that a blanket exception applied in drug cases, allowing police to ignore the knock and announce requirement.\textsuperscript{125} Richards asserted

\begin{itemize}
\item \textsuperscript{117} Id. at 934. The Court stated that the "Fourth Amendment's flexible requirement of reasonableness should not be read to mandate a rigid rule of announcement that ignores countervailing law enforcement interests." \textit{Id}.
\item \textsuperscript{118} Id. at 936. "We simply hold that although a search or seizure of a dwelling might be constitutionally defective if police officers enter without prior announcement, law enforcement interests may also establish the reasonableness of an unannounced entry." \textit{Id}. Justice Thomas also indicated that some of the common exceptions to knock and announce would have a good shot at passing constitutional muster in the lower courts. \textit{Id.} at 935–36. Some felt that this approach was "unnecessarily cautious" given the amount of case law and statutory provisions discussing exceptions to the requirements of knock and announce. Hemmens, \textit{supra} note 2, at 577.
\item \textsuperscript{119} See \textit{supra} note 76 and accompanying text.
\item \textsuperscript{120} See \textit{Wilson}, 514 U.S. at 936.
\item \textsuperscript{121} Garcia, \textit{supra} note 98, at 719.
\item \textsuperscript{122} Hemmens, \textit{supra} note 2, at 577.
\item \textsuperscript{123} \textit{Id}. at 577–78.
\item \textsuperscript{124} Schwartz, \textit{supra} note 90, at 559.
\item \textsuperscript{125} Richards v. Wisconsin, 520 U.S. 385 (1997).
\end{itemize}
that the Fourth Amendment’s Reasonableness Clause prohibited a blanket rule, instead requiring a case-by-case determination.\(^{126}\) While the Wisconsin Supreme Court reasoned that its blanket exception was necessary because of the “special circumstances of today’s drug culture,”\(^{127}\) the United States Supreme Court objected to this theory, identifying at least two major concerns.\(^{128}\) First, the exception required “considerable overgeneralization” of the facts of each case and therefore “impermissibly insulate[d] these cases from judicial review.”\(^{129}\) The second problem with the blanket approach was that “the reasons for creating an exception in one category can, relatively easily, be applied to others.”\(^{130}\) The Court went on to say that if these per se exceptions were allowed in every investigation that required some risk, the knock and announce rule of the Fourth Amendment’s reasonableness requirement “would be meaningless.”\(^{131}\) Instead, the Court, in a unanimous decision, announced that it is the duty of the court in each case to determine whether the facts and circumstances of the particular entry justify dispensing with the knock and announce requirement.\(^{132}\) The Court went on to find that, in these “actual circumstances,” Richards’s recognition of the officers, along with the easily disposable nature of the drugs justified the officers’ decision to enter unannounced.\(^{133}\) In sum, although the Court finally rejected the blanket exceptions to the knock and announce requirement, it affirmed Richards’s conviction.\(^{134}\)

After Richards, the exact specifications of entry were still not clear. The Court’s opinion implied that the Constitution did not require exacting

\(^{126}\) State v. Richards, 549 N.W.2d 218, 220 (Wis. 1996).

\(^{127}\) Richards, 520 U.S. at 392.

\(^{128}\) Id.

\(^{129}\) Id. at 393. The court explained that not every drug case would pose the risks of officer safety and preservation of evidence to the same degree. Id. In certain situations, the governmental interests may not outweigh the privacy interests intruded upon by an unannounced entry. Id. For example, police could conduct a search when the individuals present in the residence have no connection with the drugs and would, therefore, be unlikely to threaten the officers or destroy the evidence. Id.

\(^{130}\) Id. at 393–94.

\(^{131}\) Id. at 394. The court gives the example of armed bank robbers who are by definition likely to have weapons and the “fruits of their crime may be destroyed without too much difficulty.” Id.

\(^{132}\) Id. Interestingly, the Wisconsin law did not even require judicial approval for a no-knock warrant. Hemmens, supra note 2, at 582. Instead, the police needed no judicial approval to make an unannounced entry as long as the object they sought was drugs. Id. The police officers in Richards, however, originally sought a no-knock warrant, but the magistrate who signed the warrant struck the portions of the proposed warrant that would have given the officers permission to make an unannounced entry. Richards, 520 U.S. at 395. The Court, however, found that this fact did not change the reasonableness of the officers’ decision, “which must be evaluated as of the time they entered the motel room.” Id.

\(^{133}\) Richards, 520 U.S. at 396.

\(^{134}\) Id.
proof; instead, officers only needed to have a "reasonable suspicion" that their announcement would be dangerous, futile, or would inhibit the investigation. Richards explicitly states that the showing is not high and that "felony drug investigations may frequently present circumstances warranting a no-knock entry." The generalizations must be coupled with specific facts about an entry to establish the reasonableness of a no-knock entry.

Similar to the previous Supreme Court opinions, Richards failed to list specific facts that would allow the police to forgo the knock and announce requirement and, similarly, failed to specify the weight that law enforcement should give generalizations about suspects in a case-by-case determination of reasonableness. Further, the Court did not constitutionalize a stringent particularized approach, but instead it set what one commentator has labeled as a "regime of case-by-case review that allows courts to approve of unannounced entries in virtually all drug cases."

While the Supreme Court has seemed to consistently give deference to the police, some lower courts were reluctant to do so. The Ninth Circuit Court of Appeals took a more "expansive view" of the protections given by the Fourth Amendment, ruling that the police may avoid the knock and announce rule when even "mild" exigent circumstances exist, but requiring a higher showing of exigency to damage property. The United States Supreme Court next clarified this issue in United States v. Ramirez.

135. Schwartz, supra note 95, at 561. In her article, Schwartz discusses that there is a "major difference between relaxed and more stringent versions of the particularized approach" concerning the standard of proof that must be established to show that an exception to knock and announce applies in a particular case. Id. At the stringent end, she says, some courts require unambiguous facts that leave no doubt at the time of entry that an announcement would be a useless gesture or that exigent circumstances exist, similar to Justice Brennan's dissent in Ker. Id.

136. Richards, 520 U.S. at 394. As the court explains, "This standard—as opposed to a probable cause requirement—strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of search warrants and the individual privacy interests affected by no-knock entries." Id.

137. Id. at 394. The Court seemed to endorse these generalizations, even citing previous Supreme Court decisions supporting the claim that these generalizations are indisputable. Id. at 391 n.2.

138. Id. at 394, 396.

139. Schwartz, supra note 90, at 564. The author suggests that the Court, in repeatedly stating that unannounced entries are frequently justified in drug cases, suggests that law enforcement can give generalizations great weight in this determination. Id.

140. Id. at 565–66. As one commentator said, "By requiring only 'reasonable suspicion,' the Court has insured that law enforcement officers will be able to avoid the knock and announce rule with ease." Hemmens, supra note 2, at 589.

141. Hemmens, supra note 2, at 589.

142. Id. at 589–90.

G. The Supreme Court Unites for the Reasonableness Standard: *United States v. Ramirez*

In 1997 the Supreme Court granted certiorari in *United States v. Ramirez* to determine whether damage to property resulting from a no-knock entry requires a higher degree of exigency than any other unannounced entry. In *Ramirez*, the police were looking for an escaped federal prisoner who had assaulted an officer. Through information from an informant, they suspected that the escapee was at the Ramirez house. The police were issued a no-knock warrant and proceeded to surround the home. Some forty-five officers then announced their presence while one officer broke the window of a garage attached to the home, suspecting, based on the informant, that there were guns in the garage.

On appeal to the Ninth Circuit Court of Appeals, the court held that a two-tier analysis applied. The court stated that while a mild exigency is sufficient to justify an unannounced entry carried out without destruction of property, "more specific inferences of exigency are necessary when property is destroyed." In an opinion by Justice Rehnquist, the United States Supreme Court discussed both *Wilson* and *Richards*, saying that neither case addressed the question of whether property damage determined the lawfulness of an unannounced entry. The Court expressly held that it does not, saying that the general "touchstone of reasonableness which governs Fourth Amendment analysis . . . governs the method of execution of the warrant" and that

144. *Id.* at 68. In his article, Hemmens notes that this is the third knock and announce case the Court has considered in the past three terms, having not accepted one since *Sabbath* more than twenty-five years before. Hemmens, *supra* note 2, at 595. This fact alone, he says, "indicates the Court is struggling to define the parameters of the rule of announcement." *Id.* He blames this struggle in part on the fact that the police have become increasingly more aggressive in their fight with the "war on drugs." *Id.*


146. *Id.* at 68.

147. *Id.* at 68–69.

148. *Id.* Awakened by the noise of breaking glass, Ramirez, believing that his home was being burglarized, retrieved a pistol and fired into the garage. The officers then fired back and shouted "police." Ramirez then realized that it was the police and surrendered. *Id.* at 69.

149. Hemmens, *supra* note 2, at 593.

150. *Ramirez*, 523 U.S. at 69–70. "[The Ninth Circuit] held that this heightened standard had not been met on the facts of this case." *Id.* One author noted that the Ninth Circuit's rule is "well-intentioned, but misses the mark." Hemmens, *supra* note 2, at 601. Hemmens states that the focus of the courts should not be on property damaged, but on the amount of information the police possess about the "actual, present danger that they face. They should have probable cause to enter without knocking and announcing. However, this is a battle that has already been fought and lost in *Richards.*" *Id.* (footnote omitted).

151. *Ramirez*, 523 U.S. at 70. The court then says, "It is obvious from their holdings, however, that it does not." *Id.* at 70–71.
the unnecessary destruction of property may violate the Fourth Amendment while the entry itself is valid.\textsuperscript{152} In applying these principles, the Court found that the officers' conduct was "clearly reasonable" given the informant's information and the violent nature of the suspect and that no Fourth Amendment violation had occurred.\textsuperscript{153}

The \textit{Ramirez} opinion also finally clarified the status of the common law exceptions to the knock and announce rule.\textsuperscript{154} Ramirez asserted that the federal knock and announce statute, 18 U.S.C. § 3109,\textsuperscript{155} prohibited the damaging of property in any circumstances other than those specified in the statute.\textsuperscript{156} The Court, however, disagreed saying, "We remove whatever doubt may remain on the subject and hold that § 3109 codifies the exceptions to the common-law announcement requirement."\textsuperscript{157} The Court concluded, therefore, using \textit{Wilson} and \textit{Richards}, that the federal statute includes an exigent circumstances exception measured by the standard of "reasonable suspicion," as stated in \textit{Richards}.\textsuperscript{158}

H. Where Are We Now?

While one writer has called the knock and announce rule "little more than an empty promise,"\textsuperscript{159} the Supreme Court has clearly tried to balance law enforcement needs with the rights of individual privacy, although its efforts have incited much confusion.\textsuperscript{160} With the use of the reasonableness standard of the Fourth Amendment, the Court has given lower courts a standard by which to review police entries. With the unclear standard of reasonableness, however, courts are faced with a new problem of determining if a particular situation is reasonable under the Fourth Amendment. In 2003 the Supreme Court granted certiorari in \textit{United States v. Banks} to help lower

\begin{itemize}
\item \textsuperscript{152} \textit{Id.} at 71.
\item \textsuperscript{153} \textit{Id.} at 72. The Court stated, "The police certainly had a 'reasonable suspicion' that knocking and announcing their presence might be dangerous to themselves or to others." \textit{Id.}
\item \textsuperscript{154} \textit{Id.} at 73.
\item \textsuperscript{155} See supra note 5 and accompanying text.
\item \textsuperscript{156} Ramirez, 523 U.S. at 72.
\item \textsuperscript{157} \textit{Id.} at 73 (stating that if the federal statute codifies the common law, and the common law informs the Fourth Amendment, the decisions in \textit{Wilson} and \textit{Richards} "serve as guideposts in construing the statute").
\item \textsuperscript{158} \textit{Id.} The Court concluded by saying that the police had met the standard and, therefore, § 3109 was not violated. \textit{Id.} Interestingly, the Supreme Court had previously upheld a search in \textit{Richards v. Wisconsin}, 520 U.S. 385 (1997), where the police had damaged property. Hemmens, supra note 2, at 599.
\item \textsuperscript{159} Hemmens, supra note 2, at 601–02 (noting that a better rule would be one in which the police must demonstrate, at the time of the entry, that there is probable cause to believe that one of the common law exceptions to the rule exists).
\item \textsuperscript{160} See \textit{Richards v. Wisconsin}, 520 U.S. 385, 394 (1997).
\end{itemize}
courts determine when it is reasonable for police officers to enter a home after a proper knock and announcement fails to lead to a peaceful entry.  

IV. REASONING

In United States v. Banks, the United States Supreme Court sought to clarify how courts should apply the reasonableness standard of the Fourth Amendment to the length of time police must wait after making their announcement before entering a residence without permission. After a brief overview of the Ninth Circuit Court of Appeals’s decision, a unanimous Court led by Justice Souter began its analysis by examining the standards for requiring or dispensing with the knock and announce requirement, explaining that the same criteria are important in determining when officers can enter after knocking and announcing. Next, the Court re-examined both Wilson and Richards by emphasizing the exceptions noted in those cases and restating their holdings. The Court also discussed the rule taken from Ramirez, that police may damage premises when necessary if exigent circumstances are present, without a showing of elevated urgency. Lastly, the Court re-emphasized that the federal statute and the Fourth Amendment should render the same result in a case-by-case analysis.

A. The Court Emphasizes the Case-by-Case Approach

In analyzing the Fourth Amendment’s Search and Seizure Clause, the Court pointed out that the wording is simple, giving nothing specific about the requirements for the execution of a warrant. Because of the vagueness of the Clause, the Court had to “flesh out” an application of the reasonableness standard. In determining how to apply the reasonableness standard, the Court explained that it had avoided strict categories and “protocols” for searches, instead treating reasonableness as a “function of the facts of cases
so various that no template is likely to produce sounder results than examining the totality of circumstances in a given case.” The Court emphasized that forming categories would lessen the significance of details that should be important in a case while “inflating” less important details. The Court was quick to point out, however, that there were “factual considerations of unusual, albeit not dispositive, significance.”

B. The Court Applies Precedent

The Court reviewed both Wilson and Richards, restating that officers are not obligated to knock and announce when they have a reasonable suspicion that the announcement would be dangerous, futile, or lead to the destruction of evidence. The Court then analogized the circumstances of this case with the circumstances of Ramirez, noting that the Court based both cases on the significance of the exigency, shown by the circumstances known to the officers. The only difference, the Court pointed out, was the point at which the officers had a reasonable belief that there was a risk of announcing. While the officers in Ramirez had a no-knock warrant, where a judge had previously decided that the announcement would raise a risk, the officers in this case claimed that the risk of losing evidence arose shortly after the knock and announcement. While the officers went to the residence without a reasonable suspicion of facts justifying a no-knock entry, the Court held that after fifteen to twenty seconds the officers could reasonably have suspected that the drugs would have been destroyed if they had waited any longer.

Although Banks argued that fifteen to twenty seconds was too brief, both because he could not hear the officers and because it might have taken him longer than twenty seconds to answer the door, the Court held that the inquiry rested on what facts the officers knew at the time of the execution of the warrant. The Court disposed of the argument that officers should wait

171. Id. at 36.
172. Id.
173. Banks, 540 U.S. at 36. This quote illustrates the lack of specificity, also clearly shown in Ker, that the Court has continuously used regarding the weight properly given to factual considerations. See supra note 100 and accompanying text.
175. Id. at 37.
176. Id. at 38.
177. Id.
178. Id. The Court also pointed out, however, that it believed this call was a “close one.” Id. The majority cites multiple Courts of Appeals cases that have also held that similar wait times with similar facts were reasonable. See id. at 38.
179. Id. at 39-40 (stating that there was no evidence that the officers knew that Banks was in the shower and unable to answer the door).
until the occupant has had time to get to the door by saying that the officers claimed exigency as a basis for entry, making the "crucial fact" the particular exigency, not the time to reach the door. In clarification, the Court held that the opportunity to dispose of the drugs is what was important, combined with the execution of the warrant during the day when someone was likely to be at the residence ready to dispose of the drugs in fifteen to twenty seconds. The Court explicitly stated that fifteen to twenty seconds did "not seem [like] an unrealistic guess about the time someone would need to get in a position to rid his quarters of cocaine." Once the officers had established an exigency, they were not required to wait any longer before entering the residence, even if there was damage to the door.

C. Damage to Property as a Factor in Assessing a Reasonable Wait Time

Although the Court explicitly held that the exigent circumstances in this case warranted damage to property, it was quick to point out that law enforcement should still consider damage to property in determining a proper wait time in a case-by-case analysis. In a case where there was no reason to suspect any immediate risks, the Court said that the reasonable wait time before forcing entry may be much longer, giving the person more time to answer the door. The need to damage property should be a good reason for officers to be patient if the circumstances do not warrant urgency.

The Court next disapproved of the court of appeal's "scheme" that required enhanced exigency when officers damaged property. The Court expressly stated that this requirement "was already bad law before the court

180. Banks, 540 U.S. at 40. The Court emphasized that the time would vary with the size of the residence, from five seconds for a motel room to several minutes for a townhouse. Id.

181. Id. "That is, when circumstances are exigent because a pusher may be near the point of putting his drugs beyond reach, it is imminent disposal, not travel time to the entrance, that governs when the police may reasonably enter." Id. The Court also noted that most prudent drug dealers keep their drugs close to a toilet or kitchen sink for quick disposal. Id.

182. Id. The Court also said that Banks's apartment was small, and a man can walk the length of an apartment in fifteen seconds. Id. at 40.

183. Id. at 40–41 (stating that there is no reason to treat post-knock exigency differently than the no-knock exigency in Ramirez).

184. Id. at 41 One reason the Court cited for making officers knock and announce was the opportunity for the occupant to "save his door." Id.

185. Id. The Court explained that it is difficult to be more precise without making the reasonable time under the circumstances a rigid set of rules, as the Ninth Circuit had done. Id.

186. Banks, 540 U.S. at 41. The Court used the example of police seeking a stolen piano. If police are executing a warrant in search of a piano, they may be able to "spend more time to make sure they really need the battering ram." Id.

187. Id.
of appeals decided this case." The Court also scolded the Ninth Circuit for ignoring another recent decision in which the Court had disapproved of a framework that limited officers’ consideration of certain factors. The Court criticized this “categorical scheme” by saying that it threatened the totality of the circumstances analysis and that “[a]ttention to cocaine rocks and pianos tells a lot about the chances of their respective disposal and its bearing on reasonable time.” The Court said statements like “significant amount of time” and “an even more substantial amount of time,” both used by the court of appeals, “tell very little.”

D. The Court Reconciles the Fourth Amendment and Statutory Law

Lastly, the Court reaffirmed its holding in Ramirez that the result should be the same under a Fourth Amendment and an 18 U.S.C. § 3109 analysis. The Court reiterated that the federal statute codifies the common law knock and announce requirement, as well as the exceptions, that in turn inform the Fourth Amendment. The Court again stated that § 3109 contains an exigent circumstances exception requiring refusal after notice, just as it requires an original announcement. Therefore, “[a]bsent exigency, the police must knock and receive an actual refusal or wait out the time necessary to infer one.” In this case, the officers had knocked and announced their presence and entered by force only after their reasonable suspicion of exigency “had ripened” satisfying both § 3109 and the Fourth Amendment, even without an actual refusal of admittance. Thus, the Court reversed the court of appeals’s ruling and held in favor of the United States.

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188. Id. at 42 (citing Ramirez as rejecting this principle and noting that the court of appeals did not cite Ramirez).
189. Id. (citing United States v. Arvizu, 534 U.S. 266, 122 S. Ct. 744 (2002)).
190. Id. (stating that categorizing threatens the totality of the circumstances principle by “replacing a stress on revealing facts with resort to pigeonholes”).
191. Id.
192. Banks, 540 U.S. at 42.
193. See supra note 5 and accompanying text.
194. Banks, 540 U.S. at 42 (permitting an officer to enter by force if, after notice, he is refused admittance).
195. Id. at 42–43.
196. Id. at 43.
197. Id.
198. Id.
199. Id.
V. SIGNIFICANCE

As law enforcement faces new challenges involving both the war on drugs and the war on terror, government officials and private citizens alike are increasingly more likely to find themselves in contentious positions. With the United States Supreme Court's decisions spanning a half-century, it has still managed to leave police officers, individuals, and lower courts with little more than a few examples of what is constitutionally right and wrong in very particular situations. Although progress has been made, especially in elevating the knock and announce requirement from a common law rule to a fundamental requirement of the Fourth Amendment, there is still apprehension about how to apply the rule day-to-day, case-by-case. While the Court has occasionally told officials what they should not have done in a particular situation, it has failed to explicitly tell them what they can routinely do; similarly, the Court has failed to protect the individual right of privacy guaranteed by the Fourth Amendment by allowing exceptions that sweep so broadly that they can be manipulated by almost any circumstance.

In Banks, the Court applied the exigent circumstance exception to entries where the police had made a knock and announcement. Instead of providing clarification to this confusing exception, the Court made it seem applicable to almost any situation involving drugs, including one in which a knock and announcement was originally required. By doing this, the Court made it even easier for police officers to avoid the true spirit of the knock and announce requirement and perhaps even gave officers, at least in situations involving drugs, incentive to make an original announcement and then quickly enter anyway.

A. The Constitution Does Not Distinguish Between the Individual Rights of Drug Dealers and Other Americans

Although the Court has not specifically used generalizations about suspects to support an exception to the knock and announce rule, the

200. Arrests for drug law violations in 2005 are expected to exceed the 1,678,192 arrests in 2003. DRUGSENSE, War on Drugs Clock, at http://www.drugsense.org/wodclock.htm (last visited March 1, 2005). So far, 270,838 people have been arrested for drug law violations this year. Id.
201. See supra Part III.
203. See id. at 600.
204. See Banks, 540 U.S. at 37–38.
205. See id. at 39–41; see generally Hemmens, supra note 2, at 600.
206. See Blakey, supra note 65, at 557; see also Hemmens, supra note 2, at 601.
opinions make it apparent that the court commonly uses generalizations about drug suspects as a basis for determining that exigent circumstances exist. In Ker, the Court focused on the easily disposable nature of the drugs at issue when the police made their unannounced entry, despite the fact that when the police made their entry Mr. Ker was reading a newspaper, Mrs. Ker was busy in the kitchen, and the marijuana at issue was in full view on the kitchen sink, illustrating the "complete unawareness" of the impending police visit and the low risk of destruction of evidence.208

In Richards, the Court specifically stated that felony drug investigations would "frequently present circumstances" in which a knock and announcement would be unnecessary.209 Although the Court ruled generally in favor of defendants by disposing of a blanket rule for drug cases,210 it still gave sufficient importance to the fact that the suspect was accused of selling and possessing drugs.211 It seems that the Court has declared a standard of reasonable suspicion, but has applied it differently based on the defendant in each particular case. As one author said, "Rhetoric and narrative can enable a court to profess adherence to the American tradition of individual rights at the same time as it denies the need to protect criminal defendants or other outsiders who invoke the people's rights."212 In her article, Adina Schwartz comments about how the Supreme Court's opinions discuss the differences in people, rather than the commonalities and, in doing so, it tailors its decisions to the particular individual seeking the protection rather than upholding the traditional legal protections deserved by all.213 All people, therefore, suffer because courts have no way to ensure that people receive substantive protection, as opposed to purely formal protections.214

In Banks, the officers knocked, waited, and then entered without an admittance or refusal based on their belief that the suspect was harboring drugs.215 Without this belief, there would have been no reason to burst into the apartment without refusal of admittance. The officers' fear of destruction of the drugs created the exigent circumstances necessary for officers to shorten the waiting time and enter promptly.216 The Court even stressed the difference between a piano and cocaine rocks in determining how long officers must wait before entering.217 The facts of Banks show that the Court

208. Id. at 60 (Brennan, J., dissenting).
210. Hemmens, supra note 2, at 600.
212. Schwartz, supra note 90, at 594.
213. Id.
214. Id.
216. Id. at 38.
217. Id. at 41–42.
placed great emphasis on the officers' beliefs that drugs were located in the apartment. The Court added that fifteen to twenty seconds did not seem like an "unrealistic guess" about the time that someone would need to rid his or her home of cocaine.\footnote{218} Again, the Court inadvertently focused on the involvement of drugs and failed to determine any other reason for entry.

If the Court continues to justify entries, case-by-case, based on the suspicion that an accused could dispose of the drugs, police intrusion will threaten the privacy of many citizens' home.\footnote{219} By considering fifteen to twenty seconds a constructive refusal of entry, and the same as a no-knock entry with exigent circumstances, the Court allows officers to choose between fighting a no-knock entry in court or making the announcement and then entering anyway because the defendant was made aware of the police presence and had disposable drugs.

In Richards, the suspect fled when he realized the police were at his door, although they had stated that they were maintenance men.\footnote{220} If the officers had first announced that they were police officers and then entered anyway, they could have justified the entry under the ruling in Banks because the suspect knew the police were outside and he possessed drugs. Although it seems that the knock and announce requirement protects Fourth Amendment rights, officers may now, after Banks, use it as a tool to attain the exigent circumstances necessary for a forceful entry. The Court is allowing entry in any drug-related search almost immediately after announcement because the officers can create the exigent circumstances necessary for entry by making an announcement. If the police officers believe a suspect has drugs, but make their announcement anyway, they create the exigent circumstances, suspicion of drugs and knowledge of the officers' presence, which will exist in any drug-related search. If officers can forcibly enter seconds after announcing, where is the protection in requiring announcement in the first place?

B. Law Enforcement Concerns With the Supreme Court's Analysis

With the Court's declaration of a case-by-case analysis, it leaves the decision up to the officers executing a warrant to determine when entry is legal.\footnote{221} Police officers, however, have nothing to guide them except the terms "reasonable suspicion" and the previously decided cases, which illustrate that drug possession can easily be cause for entry.\footnote{222} The United States

\footnotesize\begin{itemize}
\item \footnote{218} Id. at 40.
\item \footnote{219} See Hemmens, supra note 2, at 601.
\item \footnote{220} Richards v. Wisconsin, 520 U.S. 385, 388-89 (1997).
\item \footnote{221} Banks, 540 U.S. at 35-36; see also Tor, supra note 59, at 873-74.
\item \footnote{222} "[C]ourts are increasingly displaying a willingness to allow police officers to invade the privacy rights of citizens if the invasion appears minimal [footnote omitted] and the goal
\end{itemize}
Court of Appeals for the Eighth Circuit case of *Doran v. Eckhold* illustrates the compromising position of law enforcement when implementing the undefined knock and announce rule. In *Doran*, a jury returned a two million dollar verdict against police officers who executed a warrant without first knocking and announcing, even after the jury found that the lead officer’s shooting of the suspect was reasonable. Although the lead officer made a determination at the time of the execution of the warrant that the necessary exigent circumstances existed, the court found as a matter of law that the facts known to the officers were not sufficient to support a reasonable belief that the sufficient exigent circumstances existed. While police officers must serve warrants and search homes, they will be reluctant to do so if they can be held monetarily liable.

Although this issue has not yet reached the United States Supreme Court, it demonstrates law enforcement’s need for a clearer rule that will protect police officers from two million dollar judgments. While it is difficult to define a bright line rule that will strike the proper balance between privacy and law enforcement needs, private citizens and police officers both deserve a predictable rule that they can depend on day-by-day.

C. The Arkansas Supreme Court Might Take a Different View

The Arkansas Supreme Court has recognized its authority to impose greater restrictions on law enforcement activities in Arkansas based upon state law than what the United States Supreme Court requires under federal constitutional standards. In doing so, the court has held that there are contexts in which the Arkansas Supreme Court will provide more protection

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224. *Id.* at 1049.
225. *Id.* at 1053. The police asserted a concern for officer safety “pointing” to the following evidence:

an anonymous, uncorroborated tip that the Dorans were buying and making methamphetamine; the uncorroborated statement that the younger Mr. Doran had been arrested for illegal firearm possession; the uncorroborated statement that there were guns in the house; and drug residue in a trash bag found outside the home.

*Id.* The court stated that the officers had “relied on very sketchy information, a reliance we find unreasonable, and outweighed by the privacy interest the Fourth Amendment is meant to protect.” *Id.*

226. As one author phrased it, “Under the present status of the law, the interest each of us has in lawful and effective law enforcement is today denied the simple due process requirement of an ascertainable standard of conduct.” Blakey, *supra* note 65, at 553–54.
under the Arkansas Constitution than federal courts provide under the
Fourth Amendment. Further, the court has shown a "longstanding and
steadfast adherence to the sanctity of the home and protection against unrea-
sonable government intrusions." The court has expressed this adherence
multiple times, ruling in favor of privacy of the home over law enforcement
interests. Most recently, the court held the law enforcement practice of
"knock and talks" unconstitutional under the Arkansas Constitution. Although the court did not mandate a particular change in the knock and
talk procedure, it said that the execution of a written consent form expressly
stating that the home owner has the right to refuse consent "undoubtedly
would be the better practice for law enforcement to follow." The court
repeatedly stressed the "rich and compelling" right-to-privacy tradition in
Arkansas, which requires a strict-scrutiny review and a compelling state
interest. The court explained that Arkansas has endorsed this principle
"clearly and unmistakably since the time Arkansas was admitted to state-
hood."

The Arkansas Supreme Court has granted protection under the Arkan-
sas Constitution for knock and talks as well as pre-textual arrests. In Sulli-
van v. State, the court noted that while the United States Supreme Court was
"tilting in one direction" in its analysis, the Arkansas Supreme Court has
consistently taken a different direction. The court held that, in Arkansas,
"arrests that would not have occurred but for an ulterior investigative mo-
tive" are unreasonable under the Arkansas Constitution and evidence ob-
tained from these arrests should be suppressed.

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230. See id.; Sullivan, 348 Ark. 647, 74 S.W.3d 215; Griffin, 347 Ark. 788, 67 S.W.3d
582.
231. A knock and talk occurs when:
[several police officers] accost a home dweller on the doorstep of his or her
home and request consent to search the home. If an oral consent is given, the
search proceeds. What is found by police officers may then form the basis for
probable cause to obtain a search warrant and result in the subsequent seizure of
contraband. It is the intimidation effect of multiple police officers appearing on a
home dweller’s doorstep, sometimes in uniform and armed, and requesting con-
sent to search without advising the home dweller of his or her right to refuse
consent that presents the constitutional problem.

Brown, 2004 WL 583837, at *3.
232. Id. at *8.
233. Id.
234. Id.
235. Id.
236. Sullivan, 348 Ark. at 655, 74 S.W.3d at 221 (stating that the position was solidified
based on the Arkansas Constitution and previous court decisions).
237. Id. at 655–56, 74 S.W.3d at 221.
The Arkansas Supreme Court has shown a willingness to extend privacy protections beyond the United States Supreme Court’s Fourth Amendment rulings. Given the appropriate case, it is a possibility that the Arkansas Supreme Court might consider extending similar protections beyond the federal knock and announce requirements. If the Arkansas Supreme Court decides a knock and announce case in the future, it could set new precedent in Arkansas that is more protective of the sanctity of the home than past federal court decisions.

D. Conclusion

The positive aspect of the Court’s decision in Banks is that there is now at least some evidence of a reasonable waiting time, fifteen to twenty seconds. There is still, however, much question over whether that amount of time is a minimum or a maximum, whether that amount of time is only necessary in felony drug cases or if it also applies to other situations, and whether the presence of drugs alone will provide the degree of exigency necessary to enter a home. Until the Court decides many more cases that provide more insight into the specific circumstances in which the law will allow entry, police officers, individuals, and lower courts must continue to try to guess what is reasonable under the circumstances. 238

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238. See Blakey, supra note 65, at 558. “The real question is whether we want to permit the chaos in law enforcement to continue until the Court has had an opportunity to deal with it on a case-by-case basis.” Id.

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