

A Conservative House United: How the Post-Warren Court Dismantled the Exclusionary Rule

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I. WHAT HAPPENED TO THE EXCLUSIONARY RULE?

The Supreme Court first suppressed evidence obtained in violation of the Fourth Amendment more than 125 years ago.¹ It confirmed that such evidence must be excluded in all federal prosecutions almost 100 years ago² and applied that constitutional rule to the states more than fifty years ago.³ Only four years after it decided *Weeks*, the Supreme Court confirmed this constitutional rule in vigorous terms.

The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them *Weeks*, to be sure, had established that laying the papers directly before the grand jury was unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion such is not the law. *It reduces the Fourth Amendment to a form of words. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.*⁴

Justice Holmes's opinion in *Silverthorne* emphasized that the exclusionary remedy existed at the very core of these constitutional rights. Without the remedy, the Constitution's promise of freedom from unreasonable searches and seizures was but a "form of words."

With a pedigree like this, the exclusionary rule would seem certain to be cemented securely within the foundations of our constitutional law. But over the

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¹ *Boyd v. United States*, 116 U.S. 616 (1886).

² *Weeks v. United States*, 232 U.S. 383 (1914).

³ *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁴ *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 391–92 (1920) (emphasis added) (citation omitted).

past four decades the Supreme Court has devised doctrines rooted neither in the constitutional text nor its history that have transmogrified the exclusionary remedy from a core element of Fourth Amendment rights into a nuisance. The transformation process has proceeded to the point where serious commentators ask whether the exclusionary remedy “is dead?”⁵

Not surprisingly, much of this commentary attempts to divine the future, calculating the likelihood that the current Justices on the Supreme Court will strike down the exclusionary rule. This often leads to judicial head counting—can the four most conservative justices persuade a fifth to join them in rejecting the exclusionary rule?—that tends to emphasize political explanations for the changes in the law.

The impact of the Justices’ personal views on the future of the exclusionary rule is an important topic. But focusing upon how the Justices’ political preferences might be implemented in the future distracts us from what I believe are more important questions: How did this happen? Was the transformation of a potent constitutional rule into a disfavored procedural device the result of nothing more than politics? Or, do deeper changes in legal theory explain the convulsions in the doctrines governing suppression of evidence?

Changes over time in the political views held by the changing roster of Supreme Court Justices do help explain the derogation of the exclusionary remedy in recent years, but I propose these are but a part—and not the most important one at that—of the story. More important are the changes in our fundamental views about the nature of law in theory and in practice. When the exclusionary remedy was first employed by the Supreme Court, American legal culture emphasized formal rule application; deployed property law to protect a range of legal rights, including those now classified under the label of privacy; and emphasized enforcement of individual constitutional rights, particularly Fourth Amendment rights, at the expense of government power.

The new foundational theories, which generally fit comfortably within the boundaries of contemporary American legal pragmatism, now are so ubiquitous that they are employed—usually without conscious choice—by virtually all American lawyers regardless of their personal political ideologies.⁶ As a result,

⁵ Craig M. Bradley, *Is the Exclusionary Rule Dead?*, 102 J. CRIM. L. & CRIMINOLOGY 1 (2012); see also Wayne R. LaFave, *The Smell of Herring: A Critique of the Supreme Court’s Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757, 759–60 (2009); Jennifer E. Laurin, *Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670 (2011); Tracey Maclin & Jennifer Rader, *No More Chipping Away: The Roberts Court uses an Axe to take out the Fourth Amendment Exclusionary Rule*, 81 MISS. L.J. 1183 (2011); James J. Tomkovicz, *Davis v. United States: The Exclusion Revolution Continues*, 9 OHIO ST. J. CRIM. L. 381, 390–91 (2011).

⁶ See, e.g., RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990); ROBERT SAMUEL SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* 12 (1982); Lynn A. Baker, “*Just Do It*”: *Pragmatism and Progressive Social Change*, 78 VA. L. REV. 697 (1992); Jennifer Gerarda Brown, *Posner, Prisoners, and Pragmatism*, 66 TUL. L. REV. 1117 (1992); Stanley Fish, *Almost Pragmatism: Richard Posner’s Jurisprudence*, 57 U. CHI. L. REV. 1447 (1990) (reviewing RICHARD

Justices holding diverse political views, including competing views about the suppression of evidence, appear to accept without question jurisprudential doctrines essential to the diminishment of the exclusionary remedy.⁷ These doctrines are in many ways the converse of those that held sway a century ago. In contemporary law, formal rule application has been replaced by the use of flexible standards and methods, like interest balancing. Property rules that limited government power have been expunged whenever possible from Fourth Amendment theory and replaced by malleable concepts of “reasonableness.” And *rights* enshrined in the constitutional text have been reclassified as weak interests easily “outweighed” by government claims of necessity.

The ascendance of these jurisprudential ideas in American law is a more important explanation for the changes in exclusionary rule doctrine than are the political leanings of individual Justices.⁸ One “proof” of this claim is that, as we shall see in Part III, the foundations for the post-Warren Court restrictions on the exclusionary rule were laid in a series of opinions written by prominent Warren Court liberals during the 1960s.⁹

The discussion in this Article proceeds in three parts. Part II explains how the original conception of the exclusionary rule was a logical, perhaps an inevitable, product of the Constitution’s text, history, and the legal culture of the late nineteenth and early twentieth centuries.

Part III examines Warren Court cases that displaced the established system of Fourth Amendment rules rooted in property law and replaced it with pragmatist methods and reasoning that have come to dominate Fourth Amendment jurisprudence. These Warren Court decisions dispel the argument that the decline of the exclusionary remedy was simply the result of the emergence of conservative majorities on the Supreme Court. The Court’s decisions over the past four decades would not have been possible without the Warren Court revolution in search and seizure law.

Part IV reviews post-Warren Court opinions that represent important

A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990)); Frederic R. Kellogg, *Legal Scholarship in the Temple of Doom: Pragmatism’s Response to Critical Legal Studies*, 65 TUL. L. REV. 15 (1990); Dennis M. Patterson, *Law’s Pragmatism: Law as Practice & Narrative*, 76 VA. L. REV. 937 (1990); Richard Rorty, *What Can You Expect from Anti-Foundationalist Philosophers?: A Reply to Lynn Baker*, 78 VA. L. REV. 719 (1992); *Symposium on the Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990); Robert S. Summers, *Judge Richard Posner’s Jurisprudence*, 89 MICH. L. REV. 1302 (1991) (reviewing RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990)); Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983).

⁷ See Morgan Cloud, *Judicial Review and the Exclusionary Rule*, 26 PEPP. L. REV. 835 (1999) (Symposium on Reform of the Exclusionary Rule).

⁸ For a detailed study of legal pragmatism and its hegemony in Fourth Amendment theory, see Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 200–04 (1993).

⁹ These developments are examined in detail in Morgan Cloud, *A Liberal House Divided: How the Warren Court Dismantled the Fourth Amendment*, 3 OHIO ST. J. CRIM. L. 33 (2005).

developments in the “new” Fourth Amendment theory. The discussion includes both opinions directly addressing exclusionary rule issues and others whose impact on the nature and scope of Fourth Amendment rights affect the use and the scope of that remedy. These decisions are a primary source of complaints that changes in Fourth Amendment doctrine reflect the political preferences of a conservative majority on these issues. This Article does not attempt to refute the obvious reality that the political views of the Justices have influenced these decisions. It does attempt to explain how the theories supporting these decisions are rooted in contemporary legal pragmatism, and not in any particular political ideology.¹⁰

Understanding this point—that changes in doctrine rest upon changes in jurisprudential theory—is an essential task for critics of the contemporary doctrines. If they wish to change existing rules and reclaim Fourth Amendment rights from the dustbin of pragmatist reasoning, they must first understand that as long as the debate is carried on within the context of contemporary legal pragmatism, they will usually lose. The methods inherent in pragmatist legal reasoning eschew, for example, the idea of strong mandatory rules capable of restricting government power and embrace non-formal methods tending to favor arguments for increased government power deployed to improve society. Unless critics of current doctrines can reclaim traditional theories of constitutional rights and rules, the decline of the exclusionary rule will continue.

We begin at the beginning.

II. THE ORIGINS OF EXCLUSION—RIGHTS, PROPERTY, AND RULES

A. *Substantive Fourth Amendment Rights*

Fourth Amendment exclusion emerged from the process of interpreting the constitutional text with legal theories dominant from the founding until the mid-twentieth century. This original interpretation of the Amendment focused upon two passages of the text. The Amendment’s first fifteen words comprise the first passage: “*The right of the people to be secure in their persons, houses, papers, and effects . . .*”¹¹

The reasonable, indeed the unavoidable, meaning of these words is that the Amendment protects *rights*. Not mere interests, but *rights*, rights attached to our persons and to three categories of property—our papers, houses, and personal property.¹² The textual guarantee of rights related to property is the substantive

¹⁰ T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 965 (1987) (listing parts of the Constitution commonly interpreted by balancing methods, including the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments, as well as the Commerce, Contracts, and Privileges and Immunities Clauses).

¹¹ U.S. CONST. amend. IV (emphasis added).

¹² See, e.g., *United States v. Jones*, 132 S. Ct. 945, 949–50 (2012) (emphasizing how current doctrine deviates from the textual emphasis on property as the basis of many Fourth Amendment rights).

source of the exclusionary remedy.¹³

The Supreme Court first suppressed evidence¹⁴ obtained in violation of the Fourth Amendment in 1886 in *Boyd v. United States*,¹⁵ holding that a judicial subpoena ordering the Boyds to produce shipping invoices violated the Fourth Amendment. The government sought these business records for use as evidence in a civil forfeiture action.¹⁶

The record of the case suggests that the Boyds had, in fact, violated federal law. The United States alleged that E.A. Boyd & Sons (the Boyds) had imported dozens of cases of plate glass without paying the required customs duties and sought civil forfeiture of the glass under a federal statute authorizing subpoenas as well as both civil forfeitures and criminal penalties for tax violations. The Boyds argued that the statute violated both the Fourth Amendment's protection against unreasonable searches and seizures and the Fifth Amendment's prohibition of compelled self-incrimination.¹⁷

The Supreme Court agreed and held that the subpoena violated the Fourth Amendment because, like a literal search, the subpoena's purpose and effect were to find incriminating evidence to be used by the government against the Boyds. This violated the Amendment's proscription of all government intrusions into "the sanctity of a man's home and the privacies of life."¹⁸ Consistent with the political and legal theories that predominated during the nation's first century, the *Boyd* Court treated the right to be free from unreasonable intrusions not as some watered-down impediment to government power, but as a profound and robust bedrock of the democracy. The right prevailed not only against the most egregious

¹³ The right relating to our *persons* typically relates to *liberty* interests. Violations of liberty rights can trigger suppression of evidence found as a result of these transgressions. This Article focuses instead upon searches and seizures for and of private property.

¹⁴ Several earlier Supreme Court opinions had interpreted the Fourth Amendment, but none offered a comprehensive theory of the Amendment. See, e.g., *Ex parte Jackson*, 96 U.S. 727, 733 (1877) (search warrant required to authorize a government search of sealed letters and packages); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 102 (1866) (Fourth Amendment not a limitation on the war-making power); *Smith v. Maryland*, 59 U.S. (18 How.) 71, 76 (1855) (Fourth Amendment only restricted the national government so state statute permitting issuance of a search warrant without requiring an oath does not violate the Constitution); *Luther v. Borden*, 48 U.S. (7 How.) 1, 71–72 (1849) (Woodbury, J., dissenting) (arguing for relevance of Fourth Amendment to a trespass action challenging a warrantless search and seizure performed under state declaration of martial law); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 110 (1807) (Johnson, J., dissenting) (Fourth Amendment not the basis for the decision despite defense arguments citing the Amendment).

¹⁵ 116 U.S. 616 (1886).

¹⁶ *Id.* at 618. The Supreme Court did not describe its opinion in terms of the exclusionary rule, but the decision functioned as a suppression order prohibiting the government from using the documents or their contents as evidence in a judicial proceeding. See *id.* at 638.

¹⁷ *Id.* at 617–21.

¹⁸ *Id.* at 630; see also *id.* at 620, 630, 634–35 (Compliance with the subpoena amounted to compelled self-incrimination because had the Boyds failed to produce the subpoenaed documents, the statute required that the government's allegations be treated as proven.).

government conduct, but also against weaker, more indirect intrusions upon our persons and property.

It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but *it is the invasion of his indefeasible right of personal security, personal liberty and private property . . .* Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers . . . to convict him of crime or to forfeit his goods, is within the condemnation of that judgment.¹⁹

The opinion described robust rights to personal security, liberty, and private property, rights that trumped executive and legislative branch assertions of power and need. The *Boyd* Court rejected the government's "argument of utility that such a search is a means of detecting offenders by discovering evidence."²⁰ Government claims that the subpoenas were essential devices both for efficient law enforcement and for the collection of vital revenues were powerful policy arguments, but not powerful enough to prevail over the fundamental rights lodged in the Bill of Rights.²¹

The *Boyd* opinion also emphasized the importance of constitutional judicial review in preserving these rights against encroachments by the other branches of government.

It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be *obsta principiis*. We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law.²²

Excluding illegally obtained evidence was nothing more than an application of the principle announced by Chief Justice Marshall in *Marbury* that remedies exist for violations of rights.²³ *Boyd* confirmed that the Fourth Amendment preserved *substantive* rights, and defined them largely in terms of private property.

¹⁹ *Id.* at 630 (emphasis added).

²⁰ *Id.* at 629 (quoting *Entick v. Carrington*, 19 Howell's State Trials 1029, 1073 (1765)).

²¹ *Id.* at 632, 636.

²² *Id.* at 635.

²³ See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("[I]t is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress." (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *109)).

These property-based doctrines survived until Warren Court liberals renounced them eighty years later.

Government actors were not entitled to search for and seize any property; they could only pursue objects for which the government could assert a legally recognized property interest. Only a few categories of property satisfied this test. They included imported goods on which duties had not been paid, certain “required records,” and stolen property. But law enforcers could not establish any property interest in the Boyds’ business records, which the government wanted only to use as evidence of violations of law. Lacking a substantive property interest, the government could not search for, seize, or use the shipping invoices without violating the Fourth Amendment.²⁴

Those only familiar with contemporary doctrine might find these ideas odd, but they were essential components of Fourth Amendment theory from 1886 until 1967, when liberals on the Warren Court rewrote constitutional history by discarding substantive rights protected by private property.²⁵ To understand just how radically different the current theory of the exclusionary rule is from the original, we must start with the property-based theory of substantive Fourth Amendment rights articulated in *Boyd*.

The relationship is direct: if the government has no basis in property law to search for or seize property, it cannot use it as evidence against a private citizen. And it must return property wrongfully seized. Exclusion of wrongfully seized evidence makes perfect sense in a legal regime that uses property as a device for protecting liberty and what we now label as “privacy.” It is worth noting that the *Boyd* Court did not create the link between private property and Fourth Amendment rights. The constitutional text does that.

B. Substantive and Procedural Fourth Amendment Rights

Substantive rights to liberty and property are defined in the Fourth Amendment’s opening phrase. The final clause, the Warrant Clause, adds a set of procedural rules framed, in part, by additional references to real and personal property. It commands that “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.”²⁶

Relying heavily on the *Boyd* opinion, in *Weeks v. United States*²⁷ the Supreme Court used both the substantive and procedural dimensions of the Fourth

²⁴ *Boyd*, 116 U.S. at 623. “The two things differ *toto coelo*. In the one case, the government is entitled to the possession of the property; in the other it is not.” *Id.* The Court later expanded the list of property the government was entitled to search and seize to include the instrumentalities by which crimes were committed. *See, e.g., Gouled v. United States*, 255 U.S. 298, 308 (1921).

²⁵ *See infra* Part III (discussing the Warren Court decisions).

²⁶ U.S. CONST. amend. IV.

²⁷ 232 U.S. 383 (1914).

Amendment to explain why personal property must be excluded from use at trial. Although *Weeks* is generally known only for its straightforward application of the exclusionary remedy, more important for the discussion here is how the opinion relied upon both the substantive and procedural facets of Fourth Amendment rights.

The facts were mundane. Federal agents conducted a warrantless search of Weeks's home and seized numerous items for use as evidence against him for operating an illegal interstate lottery.²⁸ Weeks filed pretrial motions seeking to suppress the property seized from his home and for its return to him. The federal trial court ordered the return of the items it found to be irrelevant to the criminal charges, but admitted in evidence other personal property relevant to those charges. Among the evidence were personal letters sent to Weeks that implicated him in the lottery scheme. "Among the papers retained and put in evidence were a number of lottery tickets and statements with reference to the lottery . . . and a number of letters written to the defendant in respect to the lottery"²⁹

A unanimous Supreme Court overruled the lower court, holding that admitting Weeks' personal papers in evidence at trial violated the Fourth Amendment.³⁰ In passage after passage the Supreme Court emphasized not the need to deter police misconduct³¹ but instead the imperative of preserving individual rights from illegal government intrusions. For example,

[*Boyd*] demonstrated that [the Fourth and Fifth] Amendments contemplated perpetuating, in their full efficacy, by means of a constitutional provision, principles of humanity and civil liberty which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change.³²

If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment . . . is of no value, and . . . might as well be stricken from the Constitution.³³

²⁸ *Id.* at 397 (citing *Hale v. Henkel*, 201 U.S. 43, 76 (1906), which in turn cited *Boyd*).

²⁹ *Id.* at 388–389.

³⁰ *Id.* at 398.

³¹ *Weeks* did mention the problem of law enforcers violating the law, but it did not suppress evidence to deter police misconduct. The function of exclusion was instead to preserve rights against the "tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions" *Id.* at 392.

³² *Id.* at 391 (quoting *Bram v. United States*, 168 U.S. 532, 534 (1897)) (noting that the same Chief Justice authored *Bram* and *Boyd*).

³³ *Id.* at 393.

The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.³⁴

Seizure of papers and other personal property was not the only violation of Weeks's substantive rights. The search was in his home, the one *place* explicitly listed in the Fourth Amendment litany of protected property. The Court cited the longstanding principle "that [a] man's house [was] his castle,"³⁵ a place receiving heightened constitutional protection from government intrusions.

In contemporary theory, the home continues to be the place where the Fourth Amendment provides the greatest protection.³⁶ Conferring a high level of protection on the home comports with our conception of personal autonomy. The home is the place we expect to be able to operate with the greatest freedom from intrusions by outsiders—including government agents. The home is the place where property rights most clearly overlap with privacy rights. By violating Weeks's right to locational privacy and by seizing his papers and other personal property, the government searchers managed to violate all of his property-based substantive Fourth Amendment rights.

But even if the government had possessed sufficient interests under property law to justify a violation of Weeks's substantive rights, the evidence would have been suppressed because the government agents also violated the procedural requirements imposed in the Warrant Clause. The warrantless search and seizure of Weeks's home and personal property were not authorized by a warrant. Warrantless invasion of the place and seizure of the property specifically protected by the Fourth Amendment also transgressed the Constitution.

Weeks amplified the holding in *Boyd* in ways that indisputably imposed limits on government authority. A valid warrant was necessary to justify the search of Weeks's home, but even a warrant could not authorize a search for private papers. Seizure of private papers pursuant to a warrant (like the compulsion inherent in their production ordered by a subpoena) constituted a violation of substantive Fourth Amendment rights. Conversely, even if the government could assert a property-based interest in the property it sought, the search and seizure was illegal if the agents failed to satisfy the procedural protections found in the Warrant Clause.

Both the *Boyd* and *Weeks* courts justified the exclusionary remedy as necessary to protect rights. Neither opinion cited the deterrence of police

³⁴ *Id.*

³⁵ *Id.* at 390.

³⁶ *See, e.g.,* *Payton v. New York*, 445 U.S. 573, 589–90 (1980) ("In [no setting] is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home . . . [T]he Fourth Amendment has drawn a firm line at the entrance to the house.").

misconduct as the justification for this remedy. In fact, in *Weeks* the Court rejected unequivocally the argument that remedies for violations of the Fourth Amendment were aimed at the investigating officers. Referring to the officers who carried out the illegal intrusions, the Supreme Court emphasized that “[w]hat remedies the defendant may have against them we need not inquire, as the 4th Amendment is not directed to individual misconduct of such officials. Its limitations reach the Federal government and its agencies.”³⁷

The Court did not expand the remedy’s reach for 44 years. When it did, it imposed the exclusionary remedy far beyond the “Federal government and its agencies.”

III. THE WARREN COURT

A. *Mapp and the Exclusionary Remedy*

*Mapp v. Ohio*³⁸ was the last of the Supreme Court’s seminal exclusionary rule opinions to rely heavily on the constitutional theories articulated in the *Boyd* and *Weeks* opinions.³⁹ The Court reiterated the justifications for exclusion found in these earlier opinions, often quoting from them to support its conclusions. The quoted language stressed that Fourth Amendment rights are fundamental in our democracy, that government and its agents are required to respect these rights, and that the use of illegally seized evidence (like an illegal intrusion) is a violation of the Fourth Amendment.⁴⁰

The *Mapp* opinion emphasized that the exclusionary rule is *not a mere rule of evidence*, but instead is an essential part of the constitutional rights protected by the Fourth Amendment: “There are in the cases of this Court some passing references to the *Weeks* rule as being one of evidence. But the plain and unequivocal language of *Weeks*—and its later paraphrase in *Wolf*—to the effect that the *Weeks* rule is of constitutional origin, remains entirely undisturbed.”⁴¹ In another passage, the Court referred to its opinion as “a decision that the exclusionary rule is an essential ingredient of the Fourth Amendment”⁴²

Like *Boyd* and *Weeks*, *Mapp* employed the exclusionary remedy as a method of constitutional judicial review. It confirmed this by quoting from *Boyd*—“It is the duty of courts to be watchful for the constitutional

³⁷ *Weeks*, 232 U.S. at 398 (emphasis added) (citing *Twining v. New Jersey*, 211 U.S. 78 (1908), overruled in part by *Malloy v. Hogan*, 378 U.S. 1 (1964) and *Boyd v. United States*, 116 U.S. 616 (1886)).

³⁸ 367 U.S. 643 (1961).

³⁹ See, e.g., *id.* at 646–48.

⁴⁰ See *id.* at 647–48.

⁴¹ *Id.* at 649.

⁴² *Id.* at 651. See also *id.* at 655–56.

rights of the citizen, and against any stealthy encroachments thereon,”⁴³ and then praising *Boyd* for exemplifying the Founders’ vision of how courts would protect our individual liberties: “In this jealous regard for maintaining the integrity of individual rights, the [*Boyd*] Court gave life to Madison’s prediction that ‘independent tribunals of justice . . . will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.’”⁴⁴ Concluding, the Court specifically referred to the use of the evidence there seized as: “unconstitutional.”⁴⁵

As the reader surely knows, *Mapp* revolutionized constitutional federalism by holding that the exclusionary rule, as part of the right against unreasonable searches and seizures, was incorporated into Fourteenth Amendment Due Process and imposed upon the States.⁴⁶ The Court’s reasoning emphasized that the remedy was an essential element of the Fourth Amendment right to be free from unreasonable searches and seizures:

Since the Fourth Amendment’s right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then just as without the *Weeks* rule the assurance against unreasonable federal searches and seizures would be “a form of words,” valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court’s high regard as a freedom “implicit in the concept of ordered liberty.” . . . [*I*]t was logically and constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon as an essential ingredient of the right newly recognized by the *Wolf* case. In short, the admission of the new constitutional right by *Wolf* could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment.⁴⁷

⁴³ *Id.* at 647 (quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886)).

⁴⁴ *Id.* (internal citation omitted) (quoting *Boyd*, 116 U.S. at 638).

⁴⁵ *Id.*

⁴⁶ *Id.* at 655.

⁴⁷ *Id.* at 655–56 (emphasis added).

Mapp did not follow *Boyd* and *Weeks* with absolute fidelity. It differed from these seminal precedents in two ways important for the discussion in this Article. First, the *Mapp* opinion mentions deterring police misconduct as one goal of excluding evidence.⁴⁸ It is apparent from the context that the Court's purpose was to emphasize that the exclusionary rule was an essential element of Fourth Amendment rights, but deterrence appears, nonetheless.

The opinion's most direct reference to deterrence is: "Only last year the Court itself recognized that the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'"⁴⁹ The sentence appears in the lengthy passage quoted above,⁵⁰ which explained why the exclusionary rule is an essential ingredient of the right to be free from unreasonable searches and seizures that the Court had imposed upon the states in *Wolf v. Colorado*.⁵¹ The reference to deterrence almost seems a throw away line in a passage devoted to establishing that the exclusionary remedy is the only effective means of guaranteeing Fourth Amendment rights. *Mapp*'s references to deterrence of government misconduct are significant, however, as an example of the process by which the Warren Court rejected traditional rules,⁵² a process that laid the foundation for later decisions by conservative majorities in the Burger, Rehnquist, and Roberts Courts.

Mapp's second deviation from traditional Fourth Amendment doctrine represents an early step in the process of replacing property rules with the more amorphous concept of privacy. The opinion used the term *privacy* when describing the holdings of earlier cases, particularly *Wolf*,⁵³ which the Court described as holding that "[t]he right to privacy [was] operatively enforceable against the States"⁵⁴ Because the exclusionary rule was the only way to guarantee the right articulated in *Wolf*, the Court reasoned, it must be imposed upon the States.⁵⁵ This argument is a critical early step by Warren Court liberals along the path that led to the substitution of privacy for property as the conceptual underpinning of most Fourth Amendment rights.

⁴⁸ *Id.* at 656.

⁴⁹ *Id.* (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960)).

⁵⁰ See *supra* note 47 and accompanying text.

⁵¹ 338 U.S. 25, 33 (1949), *overruled by Mapp v. Ohio*, 367 U.S. 643 (1961).

⁵² Other opinions that offered the deterrence rationale included *Elkins v. United States*, 364 U.S. 206 (1960) (authored by Justice Stewart, who later wrote the majority opinions in two of the essential cases for ending the property rights basis for the Fourth Amendment based system of rules: *Silverman v. United States*, 365 U.S. 505 (1961); *Katz v. United States*, 389 U.S. 347 (1967)); and *Linkletter v. Walker*, 381 U.S. 618 (1965) (like *Mapp*, authored by Justice Clark).

⁵³ *Wolf*, 338 U.S. at 30–31.

⁵⁴ *Mapp*, 367 U.S. at 655.

⁵⁵ *Id.*

B. Privacy Replaces Property

*Katz v. United States*⁵⁶ is commonly considered the Supreme Court opinion that abandoned property and embraced privacy as the touchstone of Fourth Amendment rights. But just as *Weeks* was not the Court's first opinion suppressing evidence, the 1967 *Katz* opinion was not the first to cite privacy as the core Fourth Amendment right or to assert that property had been discredited as the basis for Fourth Amendment rights. *Katz* is important not because it introduced new ideas but because it effectively resolved years of struggle within the Warren Court to define—or redefine—Fourth Amendment doctrine.⁵⁷

Warren Court liberals had begun referring to “privacy” as the right protected by the Fourth Amendment at least six years earlier in *Mapp*. Similarly, opinions issued in 1960 and 1961 established that government actors could violate Fourth Amendment rights without infringing upon property rights, and only months before *Katz*, Justice Brennan, the quintessential Warren Court liberal, authored an opinion declaring that property rights no longer defined Fourth Amendment rights. Each of these opinions helped establish the foundations for a revolution in Fourth Amendment doctrine.

In the first of these cases, *Jones v. United States*,⁵⁸ the Supreme Court extended Fourth Amendment standing to a defendant who was a visitor in a friend's apartment. Not surprisingly, traditional Fourth Amendment doctrine granted standing to challenge the legality of a search or seizure only to people possessing interests recognized under property law; Jones did not. He was neither an owner nor renter of the apartment, although had occasionally spent the night there and possessed a key to the apartment. The *Jones* opinion did not restrict or weaken the rights of people holding property interests. Instead, it expanded the universe of people with standing to include guests “legitimately on [the] premises.”⁵⁹ While *Jones* did not replace property with the more evanescent concept of privacy, it recognized the constitutional privileges that derived from both.

In *Silverman v. United States*,⁶⁰ decided the following year, the Court confronted one of the most perplexing problems of the modern era, the relationship between the Fourth Amendment and technological surveillance. A third of a century earlier, the Court's famous *Olmstead*⁶¹ decision had interpreted the Fourth Amendment's private property foundations to limit searches to government trespasses into constitutionally protected areas and seizures to the exercise of

⁵⁶ 389 U.S. 347 (1967).

⁵⁷ For a more detailed analysis of this struggle, see Morgan Cloud, *A Liberal House Divided: How the Warren Court Dismantled the Fourth Amendment*, 3 OHIO ST. J. CRIM. L. 33 (2005).

⁵⁸ 362 U.S. 257 (1960).

⁵⁹ *Id.* at 267.

⁶⁰ 365 U.S. 505 (1961).

⁶¹ *Olmstead v. United States*, 277 U.S. 438 (1928).

dominion over tangible property. *Silverman* reversed a conviction by applying *Olmstead's* narrow definitions of searches: federal agents had committed a physical trespass into the most constitutionally protected area, the home. But it also seemed to silently overrule *Olmstead's* narrow definition of seizures: the incriminating evidence was obtained by "seizing" intangible conversations. Because the thing seized was an intangible conversation, the *Olmstead* rule could not have been controlling. Like *Jones*, the *Silverman* opinion did not diminish the Fourth Amendment rights of people whose tangible property had been seized, but instead seemed to extend them to new settings.

The most important of the three cases was *Warden v. Hayden*,⁶² in which the Court overruled the "mere evidence rule" announced in *Gouled v. United States*.⁶³ This rule followed *Boyd* and *Weeks* and confirmed that lawful searches and seizures could only be for things over which the government could assert an interest grounded in property law: "including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime."⁶⁴ *Gouled* stretched the doctrine, however, by adding an additional limit to government power. Government agents could not legally search for or seize "merely evidentiary materials, . . . which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest."⁶⁵

The warrantless search in *Hayden's* home and seizure of his personal property did not violate the Fourth Amendment because the police officers possessed probable cause and the intrusions were justified by an exigency—they were in hot pursuit of an armed robber fleeing from the site of his crime. Under traditional Fourth Amendment theory, this satisfied only the procedural requirements derived from the Warrant Clause. Analysis of whether the intrusion violated *Hayden's* substantive Fourth Amendment rights as articulated in the mere evidence rule was more complicated.

While searching *Hayden's* home, officers seized a handgun, ammunition, money, and clothing. The traditional rule prohibiting searches for and seizures of property absent a government property interest authorized these actions for the gun and ammunition, which were instrumentalities of the crime. Similarly, the stolen money could be seized because it constituted the proceeds of the robbery, for which *Hayden* had no legitimate claim under property law, and for which the government acted as surrogate for the rightful owner. But the "mere evidence rule" prohibited searching for and seizing *Hayden's* clothing, which could be used only as evidence to identify him as the robber. The gun, ammunition, and money all were lawful evidence, but what about the clothing?

⁶² 387 U.S. 294 (1967).

⁶³ 255 U.S. 298 (1921); see *supra* note 24 and accompanying text (discussing *Gouled*).

⁶⁴ *Hayden*, 387 U.S. at 296.

⁶⁵ *Id.*

Justice Brennan's opinion resolved the issue by striking down the mere evidence rule, in large part by declaring the end of the property basis for Fourth Amendment rights. Brennan boldly pronounced that "[t]he premise that property interests control the right of the Government to search and seize has been discredited. Searches and seizures may be 'unreasonable' within the Fourth Amendment even though the Government asserts a superior property interest at common law."⁶⁶ Brennan could cite only *Jones* and *Silverman* to support this sweeping assertion, and as we have seen, neither opinion had rejected the link between property and Fourth Amendment rights for those who benefited from that connection. To the limited extent that they even discussed the issue, both decisions extended some Fourth Amendment rights to those not protected by property-based theories without weakening the rights for those who were.

To those familiar with the Justices' recent embrace of constitutional "originalism," perhaps the most jarring element of Brennan's opinion is his explicit rejection of it. In contrast to the sparse precedent supporting the claim that the link between property rights and Fourth Amendment rights was "discredited," Brennan acknowledged that these connections extended back to the framing of the Constitution and to the English precedents that influenced the drafters and ratifiers of the Fourth Amendment. Indeed, he confirmed that the property based rules announced in *Boyd* and *Weeks* embodied the ideas of the framing era.

The Fourth Amendment ruling in *Gouled* was based upon the dual, related premises that historically the right to search for and seize property depended upon the assertion by the Government of a valid claim of superior interest, and that it was not enough that the purpose of the search and seizure was to obtain evidence to use in apprehending and convicting criminals. The common law of search and seizure after *Entick v. Carrington* reflected Lord Camden's view, derived no doubt from the political thought of his time, that the "great end, for which men entered into society, was to secure their property." Warrants were "allowed only where the primary right to such a search and seizure is in the interest which the public or complainant may have in the property seized." Thus stolen property—the fruits of crime—was always subject to seizure. And the power to search for stolen property was gradually extended to cover "any property which the private citizen was not permitted to possess," which included instrumentalities of crime (because of the early notion that items used in crime were forfeited to the State) and contraband. No separate governmental interest in seizing evidence to apprehend and convict criminals was recognized; it was required that some property interest be asserted. The remedial structure also reflected these dual premises. Trespass, replevin, and the other means of redress for persons aggrieved by searches and seizures, depended upon proof of a superior

⁶⁶ *Id.* at 304.

property interest. And since a lawful seizure presupposed a superior claim, it was inconceivable that a person could recover property lawfully seized. As Lord Camden pointed out in *Entick v. Carrington*, a general warrant enabled “the party’s own property [to be] seized before and without conviction, and he has no power to reclaim his goods, even after his innocence is cleared by acquittal.”⁶⁷

Nonetheless, nearly two centuries of constitutional law were outweighed in Brennan’s critique by recent developments within the Court: “We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts.”⁶⁸ What Brennan did not acknowledge—or did not understand—was that by discarding the traditional substantive rights the Court also was opening the door to a weakening of the warrant and exclusionary rules, which he relied upon to preserve Fourth Amendment rights.

In Brennan’s formulation, privacy was the sole right protected by the Fourth Amendment, and the procedural mechanisms contained in the Warrant Clause coupled with the exclusionary remedy, were sufficient to protect it. He admitted that casting aside the mere evidence rule “does enlarge the area of permissible searches,” but this was constitutionally acceptable because these intrusions would only be “made after fulfilling the probable cause and particularity requirements of the Fourth Amendment and after the intervention of ‘a neutral and detached magistrate’”⁶⁹

The subsequent decades have not been kind to Brennan’s assumptions. It turns out that the reliance on property rights had provided the rock upon which the edifice of Fourth Amendment doctrine had been built. Once that foundation was demolished, the other elements of the traditional structure began to crumble.⁷⁰

This possibility must have been considered by the Justices deciding *Hayden*, because Justice Douglas raised it in a powerful dissent. He argued that by excising property rights from Fourth Amendment doctrine, the Court was abolishing the “two faces of privacy” long established under Fourth Amendment law:

(1) One creates a zone of privacy that may not be invaded by the police through raids, by the legislators through laws, or by magistrates through the issuance of warrants.

(2) A second creates a zone of privacy that may be invaded either by the police in hot pursuit or by a search incident to arrest or by a warrant issued by a magistrate on a showing of probable cause.⁷¹

⁶⁷ *Id.* at 303–04 (citations omitted).

⁶⁸ *Id.* at 304.

⁶⁹ *Id.* at 309 (citation omitted).

⁷⁰ See *infra* Parts IV and V.

⁷¹ *Hayden*, 387 U.S. at 313.

As we have seen, traditional doctrine emphasized that even if the procedural requirements of the second “face” were satisfied, searches and seizures transgressing the substantive “face” of Fourth Amendment rights were unconstitutional. Merely obtaining a valid warrant was not enough to justify the search and seizure of private property. Much of Douglas’s dissenting opinion was devoted to establishing that the *substantive* first “face” of the right of privacy “has been recognized from early days in Anglo-American law.”⁷² Brennan agreed, but seemed not to understand why this right was at the center of Fourth Amendment doctrine.

Enforcing substantive Fourth Amendment rights enhanced individual autonomy in at least three ways. First, by limiting the nature of the property subject to government seizure, the mere evidence rule reduced the raw number of searches and the scope of many. Second, property law provided a relatively concrete body of principles readily susceptible to rule-based enforcement. If government agents searched through private papers for evidence of criminality, this violated the Fourth Amendment unless these effects were contraband, stolen, or criminal instrumentalities. Finally, the task of enforcing property rights made exclusion of property—and its return to its owners—a logically powerful basis for the suppression remedy. Decoupled from its justification as preservation of fundamental property *rights*, the remedy was easily converted into something else, something weaker and less important.

Many of the individual elements of the Warren Court’s Fourth Amendment revolution coalesced in *Katz v. United States*,⁷³ decided only months after *Hayden*.

C. *Katz and Privacy*

As a result of an FBI investigation that included electronic surveillance of Katz’s telephone conversations, he was convicted of illegal interstate gambling. At trial the government introduced evidence of Katz’s “end of telephone conversations, overheard by FBI agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which he had placed his calls.”⁷⁴ Applying the existing Fourth Amendment precedents, the lower federal courts admitted this evidence because the FBI agents had not committed a physical trespass into the interior of the telephone booth or a “constitutionally protected area.”⁷⁵ This was no more than a simple application of

⁷² *Id.*; see also *id.*, at 313–25 (Douglas, J., dissenting). Douglas argued that pre-constitutional precedents, including *Entick v. Carrington*, 19 How. St. Tr. 1029, 1067 (1765), demonstrated that the Framers intended to enforce such a substantive limit on the power of government actors to search and seize. As we have seen, Brennan agreed. See *supra* notes 63–66 and accompanying text.

⁷³ 389 U.S. 347 (1967).

⁷⁴ *Id.* at 348.

⁷⁵ *Id.* at 349–351 (footnotes omitted).

the almost forty-year old “trespass doctrine” requiring a physical penetration of a constitutionally protected area before an intrusion could violate the Fourth Amendment.

Justice Stewart’s opinion embraced *Hayden*’s assertion that the traditional rule “that property interests control the right of the Government to search and seize has been discredited”. . . . Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people—and not simply ‘areas’—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.”⁷⁶ Although Stewart acknowledged that Fourth Amendment rights “often have nothing to do with privacy at all,”⁷⁷ his attempt to redefine Fourth Amendment privileges offered only a vague standard that permitted judges to manipulate doctrine as they pleased. “[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”⁷⁸

Elsewhere I have argued that *Katz* should be understood as the culmination of the long running debate within the Court about how to protect Fourth Amendment rights from the use of technologies that could intrude without a physical trespass, while also liberating Fourth Amendment theory from property based definitions dating back to the *Lochner* era—a constitutional *bête noir* for liberals working during and after the New Deal.⁷⁹ *Katz* attempts to accomplish both goals by granting individuals control over the decision of whether to assert or forsake personal privacy. By focusing on the individual’s decisions to “knowingly expose” or “seek to preserve as private” his conduct and property, Stewart intended to ensure that individuals and not the government maintained control over the definition of private matters.

But this reformulation of rights failed precisely because it replaced primary rules that limited the authority of government agents with a hopelessly vague formula lacking substantive legal content. As a result, judges soon turned to the two-part “test” contained in Justice Harlan’s concurring opinion for guidance in deciding cases. Harlan offered his “understanding [that] the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the

⁷⁶ See *id.* at 353 (citations omitted) (citing only two cases, Justice Brennan’s opinion in *Hayden* and Stewart’s own opinion in *Silverman*, as authority for the conclusion).

⁷⁷ *Id.* at 350.

⁷⁸ *Id.* at 351 (citation omitted). The error in this statement is obvious. The Fourth Amendment explicitly protects places. The text specifically protects “houses, papers, and effects.” Houses obviously are “places,” and papers and effects must be kept in places. By protecting personal property directly, the Amendment inevitably provides indirect protection for their locations, as well.

⁷⁹ See, e.g., Cloud, *supra* note 9; Cloud, *supra* note 8; Cloud, *supra* note 57.

expectation be one that society is prepared to recognize as ‘reasonable.’”⁸⁰

By reframing Stewart’s amorphous standard with a two-part “rule,” Harlan’s reformulation of Fourth Amendment theory appeared to offer more guidance to rule-appliers in subsequent cases. Unfortunately, Harlan’s two-part formula also had no substantive content. It was a doctrinal “empty vessel” waiting to be filled by whatever subjectively held views a decision maker—or a court majority—cared to use.

In the hands of judges less committed to individual autonomy than the Warren Court liberals, the Harlan “test” became an efficient device for narrowing the scope of Fourth Amendment rights.⁸¹ The resulting impact on the exclusionary remedy was indirect but powerful. By compressing the scope of protected rights, conservative majorities were able to constrain the number of situations in which exclusion was permitted. Without rules enforcing substantive rights, the Fourth Amendment became less a vibrant expression of constitutional liberty than a vacuous vehicle enabling government intrusions.

Katz, like *Hayden*, ultimately relied upon the Fourth Amendment’s procedural mechanisms—the warrant rule and the exclusionary remedy—to protect the newly enshrined right to Fourth Amendment privacy.⁸² Both mechanisms have proven inadequate to the task. The Warren Court’s attempt to extend the reach of constitutional liberties into previously unregulated areas by introducing *balancing* into Fourth Amendment doctrine has proven to be a similar failure.

D. Terry and Balancing

The Supreme Court’s 1967 decisions in *Hayden* and *Katz* both relied upon the Warrant Clause to justify abandoning the substantive “face” of Fourth Amendment rights, reasoning that the warrant rule coupled with the exclusionary remedy were sufficient to protect individual privacy and liberty. In 1968, *Terry v. Ohio*⁸³ abandoned the warrant-based procedural “face” of the Amendment and sanctioned some searches and seizures violating all of the requirements imposed by the Warrant Clause. The hegemony of rights-protecting rules was being dismantled, step by step.

Traditional theory commanded, as we have seen, that a warrant was a necessary prerequisite of a constitutional search or seizure. Because police officers

⁸⁰ *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

⁸¹ See *infra* Part IV.

⁸² See, e.g., *Katz*, 389 U.S. at 355–56. Justice Stewart stressed that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” *Id.* at 357. This is a rule cited regularly in Supreme Court opinions authorizing searches and seizures conducted without complying with the procedures required under the Warrant Clause. See, e.g., *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 619–20 (1989).

⁸³ 392 U.S. 1 (1968).

frequently must act quickly without waiting to get a warrant, this model also authorized searches and seizures if officers possessed facts sufficient to provide probable cause *and* an accepted warrant exception applied.⁸⁴ Those exceptions generally were triggered by some form of exigency—an automobile in transit, a fleeing felon, evidence of danger to people in a building, and the like.

But in *Terry* the police investigation was not justified by probable cause, let alone a warrant or warrant exception. A Cleveland, Ohio police officer conducted a “stop and frisk” of men he suspected were contemplating an armed robbery, although he possessed neither a warrant nor probable cause. The government argued that a “stop and frisk” was exempt from Fourth Amendment scrutiny because the intrusion was *de minimis*, not amounting to a search and seizure. Terry countered that stops and frisks were seizures and searches governed by the Fourth Amendment, and thus illegal unless satisfying the requirements found in the Warrant Clause.⁸⁵ The Warren Court resolved the dispute by creating an entirely new category of police-citizen encounters governed by an entirely new constitutional standard.

The Court agreed with Terry that “stops and frisks” were searches and seizures governed by the Fourth Amendment, but classified them as a new constitutional category existing somewhere between consensual encounters ungoverned by the Amendment and full-blown arrests and searches regulated by traditional standards.⁸⁶ For the first time the Court held that searches and seizures could be lawful although the investigating officers possessed neither probable cause nor a warrant or warrant exception.⁸⁷

The Court concluded that because stops and frisks were less intrusive than full-blown arrests and searches, they could be constitutional if they satisfied a new, watered-down standard.⁸⁸ The standard, labeled *reasonable suspicion*, was adequate to justify this new intermediate category of intrusions although it was inadequate to authorize full-blown arrests and searches.

The Court’s definition of reasonable suspicion was—and remains—confusing. Unlike probable cause, which is defined in terms of the quantum of

⁸⁴ See, e.g., *United States v. Ross*, 456 U.S. 798, 825 (1982) (quoting *Mincey v. Arizona*, 437 U.S. 385, 390 (1978); *Katz v. United States*, 389 U.S. 347, 357 (1967)) (“The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that ‘searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.’”).

⁸⁵ *Terry*, 392 U.S. at 10–11.

⁸⁶ *Id.* at 19 (“We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a ‘technical arrest’ or a ‘full-blown search.’”).

⁸⁷ *Id.* at 20.

⁸⁸ From this we might extrapolate that reasonableness ultimately might be determined not according to the three-step model adopted in *Terry*, but according to a virtually infinite continuum of possibilities.

information possessed by the police,⁸⁹ reasonable suspicion incorporates four elements into an unusual two-part balancing process. To justify “the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.”⁹⁰ *Terry*’s new standard required police officers, lawyers, and judges to examine not merely the nature and quality of the information possessed by the police, but also to balance the quality of that information against the nature and scope of the government intrusion.⁹¹

Terry’s use of balancing in the definition of reasonable suspicion is confusing, in part because it abandons the relative certainty of traditional rules—the police possess probable cause and a warrant or they do not—in favor of a multi-factor analytical process operating outside of traditional rules. *Terry* commands judges reviewing police conduct to somehow balance government claims of need against the individual’s claims of liberty and privacy while simultaneously balancing the nature and quality of the information possessed by the police against the nature and scope of the intrusion upon the target’s privacy and liberty interests. If the government claims outweighed the citizen’s—as has typically been the result when the Supreme Court has balanced—the intrusions will be constitutional only if the facts known by the police justified the severity of the intrusion both at the beginning of the encounter and as it progressed through different stages.

Reasonable suspicion obviously did not fit within the tradition of rules requiring probable cause and a warrant or exception. As noted above, this was necessary for adoption of the new intermediate category of Fourth Amendment intrusions, because stops and frisks rarely, if ever, could satisfy Warrant Clause standards. To achieve the result it sought, the majority was forced to justify its opinion by relying upon the Fourth Amendment’s Reasonableness Clause. “[T]he conduct involved in this case must be tested by the Fourth Amendment’s general proscription against unreasonable searches and seizures.”⁹²

But how would reasonableness be defined in this context? As we have also seen, before 1967 reasonableness was defined first in terms of substantive rights—based upon the property law concepts that had permeated Fourth Amendment

⁸⁹ The classic definition states that “[p]robable cause exists where ‘the facts and circumstances within their [the officers’] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that’ an offense has been or is being committed.” *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949) (alterations in original) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)). The probable cause test also applied to searches of places and things and to the seizure of property as contraband, instrumentalities of crimes, and evidence.

⁹⁰ *Terry*, 392 U.S. at 21.

⁹¹ The Court described its analysis of the reasonableness of the seizure and search as entailing a dual inquiry that determined “whether the officer’s action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.” *Id.* at 20.

⁹² *Id.*

doctrines. Second, the warrant requirements set out in the Amendment's text—probable cause, particularity, oath before a judge—had supplied a procedural definition of reasonableness. But neither would ever be appropriate—or helpful—in the context of almost all stops and frisks after 1968.

Because traditional justifications for defining reasonable searches and seizures were unavailable, *Terry* deviated into *terra incognita* for criminal investigations in search of a new source of meaning. Unlike the traditional rules, which were grounded in the Amendment's own terms, Justice Warren ranged far from the text to find a new source of meaning. He argued that “there is ‘no ready test for determining reasonableness other than by *balancing* the need to search [or seize] against the invasion which the search [or seizure] entails.’”⁹³ This assertion was supported by only one precedent—a case decided the previous year and involving administrative inspections of buildings, not criminal investigations.⁹⁴

In hindsight it is readily apparent that *Terry* undercut the foundations of Fourth Amendment doctrine in important ways. By shifting the analytical focus from the Warrant Clause to the Reasonableness Clause, the Court was able to replace a rule-based analytical system with the nonformal decision making that exemplifies the style of reasoning that has come to dominate American legal theories. Consistent with the pragmatist ideas that replaced rule-based formal reasoning over the course of the twentieth century, *Terry* commands judges deciding cases to consider not rules but society's needs and interests. “[I]t is necessary ‘first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen.’”⁹⁵

Forty years of balancing decisions have not succeeded in eliminating the confusion this model creates. Instead, these decades of decisions have produced a methodology that leaves judges generally unconstrained in applying their interpretive authority in individual cases.

How this happened is revealed by reviewing how Warren explained the majority's reasoning in *Terry* itself. In analyzing the seizure, the Court balanced the government's interest in “effective crime prevention and detection”⁹⁶ against Terry's interest in “personal security.”⁹⁷ The majority decided it was capable of balancing these competing and weighty interests without first measuring or defining the weight of either. The opinion instead simply concluded that the information possessed by the patrolling officer gave him reasonable suspicion that justified the initial intrusion, the seizure.⁹⁸

⁹³ *Id.* at 21 (alteration in original) (emphasis added) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 536–37 (1967)).

⁹⁴ *Camara v. Municipal Court*, 387 U.S. 523 (1967).

⁹⁵ *Terry*, 392 U.S. at 20–21 (quoting *Camara*, 387 U.S. at 534–35).

⁹⁶ *Id.* at 22.

⁹⁷ *Id.* at 19.

⁹⁸ *Id.* at 21–23.

The search received separate scrutiny.⁹⁹ The search was a frisk, a pat down of the suspect's exterior clothing to look for weapons. The government could assert two interests concerning the search: investigating possible criminal activity and protecting the safety of the public and law enforcers.¹⁰⁰ Again the Court could not assign any quantifiable weights to these government interests or to Terry's countervailing interests in privacy and personal security.¹⁰¹ The Court simply concluded that Terry's interests were less important, because the intrusion was limited to a frisk of his exterior clothing for weapons.

The changes in Fourth Amendment theory resulting from the Warren Court's decisions in *Mapp*, *Hayden*, *Katz*, and *Terry* were intended to enhance and strengthen the privacy rights of the American people by extending Fourth Amendment protections into areas of government activity previously free of constitutional review. In the subsequent decades these changes have provided the tools for majorities of the Burger, Rehnquist, and Roberts Courts to diminish the scope of the rights the Warren Court liberals tried to strengthen. Part IV will examine how the jurisprudential assumptions upon which American law now rests explain how this happened.

IV. AFTER THE WARREN COURT

A. Fourth Amendment Pragmatism

The *Boyd* and *Weeks* opinions applied theories common in constitutional law at the end of the nineteenth and beginning of the twentieth centuries. These theories defined the rights named in the constitutional text—like the liberty and property rights protected by the Fourth Amendment—as irreplaceable elements of the democratic American society. They applied rules vigorously to enforce those rights, rules found in the existing corpus of legal precedents or created to enforce the values underlying the text. Because fundamental rights were natural rights existing before the creation of society, judges were constrained to enforce the values underlying legal rules, even when that required imposing limits on government power not required by a narrow, literal interpretation of the legal text.

Pragmatist theory emerged during that same era in response to and revolt against this type of theory in law, religion, philosophy, and science. Despite occasional efforts by a handful of Justices, the pragmatist theories that swept aside these traditional theories of law in other fields in the first sixty years of the twentieth century did not emerge as a robust force in Fourth Amendment case law until the last few years of the Warren Court. As we can see from the earlier discussions of *Katz* and *Terry*, this theory of law operates almost as the converse of the formal reasoning that had dominated Fourth Amendment doctrine.

⁹⁹ *Id.* at 23.

¹⁰⁰ *Id.* at 21–23.

¹⁰¹ *Id.* at 24–25.

Pragmatist theory rejected the idea that foundational principles and values and the rules derived from them should govern judicial decision making. Instead, pragmatists argued that decision makers should focus upon determining what works in fact, and use that knowledge for the benefit of society. Focusing specifically upon law, John Dewey wrote that “the chief working difference between moral philosophies in their application to law is that some of them seek for an antecedent principle by which to decide; while others recommend the consideration of the specific consequences that flow from treating a specific situation this way or that”¹⁰²

The pragmatist focus on consequences was also instrumentalist, decreeing that judges should resolve disputes to promote social welfare and improvement. Holmes criticized judges for failing “adequately to recognize their duty of weighing considerations of social advantage.”¹⁰³ Felix Cohen warned that “[w]hen the vivid fictions and metaphors of traditional jurisprudence are thought of as reasons for decisions . . . then [we are] apt to forget the social forces which mold the law and the social ideals by which the law is to be judged.”¹⁰⁴

These “social ideals” generally were—for both the early generations of legal pragmatists and the Warren Court liberals—derived from progressive doctrines favoring social, political, economic, and legal change.¹⁰⁵ To achieve these goals, pragmatists turned to nonformal methods of legal reasoning instead of the formal, rule-based reasoning that dominated American legal theory from the mid-19th to the mid-20th centuries. Professor Summers has explained that it was not fortuitous that “the American version of instrumentalist legal theory which has flourished since the middle decades of this century is vigorously antiformalistic.”¹⁰⁶ Pragmatist theory and nonformal method go together—in practice, pragmatist legal theories produced nonformal methods for achieving substantive goals.¹⁰⁷

¹⁰² John Dewey, *Nature and Reason in Law*, 25 INT’L J. ETHICS 25, 31 (1915); see also JOHN DEWEY, *ESSAYS ON PHILOSOPHY AND PSYCHOLOGY*, 1912–1914, at 328 (J. Boydston ed., 1985); 1 ROSCOE POUND, *JURISPRUDENCE* 91 (1959); SUMMERS, *supra* note 6, at 20 (pragmatists defined the role of legal theorists as implementing a “coherent body of ideas about law which will make law more valuable in the hands of officials and practical men of affairs.”); John Dewey, *Nature and Reason in Law*, 25 INT’L J. ETHICS 25, 26 (1915) (“Appeal to nature may, therefore, signify the reverse of an appeal to what is desirable in the way of consequences; it may denote an attempt to settle what is desirable among consequences by reference to an antecedent and hence fixed and immutable rule.”).

¹⁰³ OLIVER WENDELL HOLMES, *The Path of the Law*, in *COLLECTED LEGAL PAPERS* 167, 184 (1920).

¹⁰⁴ Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 812 (1935).

¹⁰⁵ See, e.g., Dewey, *Nature and Reason in Law*, *supra* note 102, at 30–31; see also Aleinikoff, *supra* note 10, at 961–62 (linking the emergence of interest balancing in constitutional theory to developments in the social sciences during the 1930s and the subsequent decades).

¹⁰⁶ SUMMERS, *supra* note 6, at 21.

¹⁰⁷ See P. S. ATIYAH & ROBERT S. SUMMERS, *FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW* 251 (1987) (American antiformalists have engaged in pursued highly substantive reasoning).

Two of the most important pragmatist methods Warren Court liberals adopted were *Terry* interest-balancing and *Katz* expectation-of-privacy analysis. The next section explains how interest balancing by the post-Warren Court Justices embodies two essential characteristics of legal pragmatism: nonformal reasoning employed to advance the social good.

B. *Balancing Interests*

When they decide cases by balancing interests, the Justices do not constrain themselves to applying formal rules to decide cases. Acting more like social engineers than rule appliers, they are free to balance their way to the “correct” results that advance society’s needs as the Justices conceive them. When they balance, the Justices treat government as the surrogate for the entire society while treating the individual challenging government actions as one isolated person.

It is not surprising, therefore, that when the Supreme Court engages in Fourth Amendment balancing,¹⁰⁸ the collective social interests asserted by government almost always outweigh the defendant’s insular claims. The comparative weakness of the individual’s solitary claims are weakened even more by the reality that the citizen trying to suppress evidence has been caught with drugs, weapons, or other tangible and probative evidence of his guilt.

The roster of decisions in which the Court has balanced interests and found that the government’s claimed interests outweigh the individual’s is staggering. A partial list, emphasizing cases decided during the years in which balancing supplanted rule-based decision making in many Fourth Amendment contexts, is instructive. The Supreme Court has: upheld suspicionless seizures of *all* motorists at sobriety checkpoints;¹⁰⁹ upheld investigative detentions of domestic travelers *and* their luggage in airports to enforce drug prohibition laws;¹¹⁰ authorized suspicionless dog sniffs of automobiles to search for drugs;¹¹¹ permitted lengthy seizures of motor vehicles and their occupants;¹¹² sanctioned searches of the passenger compartments of motor vehicles for weapons;¹¹³ authorized incommunicado seizures lasting twenty hours or more of international travelers arriving in the United States to enforce the drug laws;¹¹⁴ upheld suspicionless

¹⁰⁸ See, e.g., Aleinikoff, *supra* note 10, at 977, 989 (Supreme Court does not consider all relevant interests when balancing in constitutional disputes).

¹⁰⁹ Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990).

¹¹⁰ See, e.g., United States v. Sokolow, 490 U.S. 1 (1989); Florida v. Rodriguez, 469 U.S. 1 (1984); United States v. Place, 462 U.S. 696 (1983); Florida v. Royer, 460 U.S. 491 (1983); Reid v. Georgia, 448 U.S. 438 (1980); United States v. Mendenhall, 446 U.S. 544 (1980).

¹¹¹ Illinois v. Caballes, 543 U.S. 405 (2005).

¹¹² United States v. Sharpe, 470 U.S. 675 (1985); United States v. Hensley, 469 U.S. 221 (1985).

¹¹³ Michigan v. Long, 463 U.S. 1032 (1983).

¹¹⁴ United States v. Montoya de Hernandez, 473 U.S. 531 (1985).

seizures of motorists at “checkpoints” located at significant distances away from the international borders to combat illegal immigration;¹¹⁵ approved intrusive searches of students’ personal property in schools to enforce school rules;¹¹⁶ accepted suspicionless drug testing of large groups of public school students;¹¹⁷ affirmed warrantless government searches of probationers’ homes;¹¹⁸ approved warrantless searches of public employees’ offices although the employees had a reasonable expectation of privacy in the area;¹¹⁹ endorsed suspicionless drug testing of railroad employees to promote public safety;¹²⁰ and of U.S. Customs Service employees largely to promote public confidence in the agency’s drug enforcement efforts.¹²¹

These are just some of the cases in which balancing has produced judgments favoring the government. In theory, balancing should be inherently neutral. But this will be true only if the decision makers possess the neutral methods for assigning accurate weights to the interests to be balanced. What the array of decisions issued by the Supreme Court over the past forty years reveals is that no such neutral devices exist for balancing Fourth Amendment claims of authority against autonomy. This body of case law suggests that over time conservative majorities have imposed value judgments favoring efficient law enforcement at the expense of individual autonomy, while professing that these decisions are based upon neutral, objective, and perhaps scientific calculations rather than upon subjective preferences.¹²²

This has prompted critics to attack the weights these majorities have assigned to the competing interests to be balanced, arguing that a “better” valuation would have produced a “better” decision. In *Michigan v. Sitz*, for example, Justice Brennan complained that “the Court misapplies that test by *undervaluing the nature of the intrusion and exaggerating the law enforcement need* to use the

¹¹⁵ *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

¹¹⁶ *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

¹¹⁷ *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995).

¹¹⁸ *Griffin v. Wisconsin*, 483 U.S. 868 (1987).

¹¹⁹ *O’Connor v. Ortega*, 480 U.S. 709 (1987).

¹²⁰ *Skinner v. Ry Labor Execs.’ Ass’n*, 489 U.S. 602 (1989).

¹²¹ *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656 (1989).

¹²² This has been a recurring criticism of the Court’s Fourth Amendment balancing decisions. *See United States v. Sharpe*, 470 U.S. 675, 720 (1985) (Brennan, J., dissenting) (Fourth Amendment balancing is done with the “judicial thumb . . . planted firmly on the law-enforcement side of the scales.”); *see also New Jersey v. T.L.O.*, 469 U.S. at 369 (Brennan, J., concurring in part and dissenting in part) (the Court’s Fourth Amendment balancing tests “amount to brief nods by the Court in the direction of a neutral utilitarian calculus while the Court in fact engages in an unanalyzed exercise of judicial will”); Nadine Strossen, *The Fourth Amendment in Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1184–85 (1988) (arguing that the full “extent to which [balancing] depends on judicial value judgments” is disguised beneath a “vener of objectivity” presented in these opinions).

roadblocks to prevent drunken driving.”¹²³ Dissenting in the same case, Justice Stevens argued that “it seems evident that the Court today misapplies the balancing test The Court *overvalues the law enforcement interest* in using sobriety checkpoints, [and] *undervalues the citizen’s interest* in freedom from random, unannounced investigatory seizures”¹²⁴

These complaints are not that the majority balanced, but that it balanced incorrectly. This is far different from arguing that the Court erred by not emphasizing its duty to protect fundamental rights by applying rules derived from the Constitution’s text. Instead the dissenters are trying—and failing—to win by deploying the majority’s own method of reasoning.

The logic behind this approach is obvious. The Court has balanced with increasing frequency since the late 1960s, so it can hardly be surprising that Justices would choose to frame their arguments in terms of this dominant contemporary method. The problem for civil libertarians is that the prevailing structure of Fourth Amendment balancing dictates that in most cases the government will win and the individual will lose regardless of the arguments offered in support of autonomy.

The majority’s characterization of the competing “interests” in *Michigan v. Sitz* illustrates this reality. The majority characterized the government interest in stopping drunk driving as compelling, a conclusion reached in order to serve societal needs.

No one can seriously dispute the magnitude of the drunken driving problem or the States’ interest in eradicating it. . . . ‘Drunk drivers cause an annual death toll of over 25,000 and in the same time span cause nearly one million personal injuries and more than five billion dollars in property damage.’¹²⁵

The individual driver’s liberty interest in remaining free from suspicionless seizures was, on the other hand, insignificant. “Conversely, the weight bearing on the other scale—the measure of the intrusion on motorists stopped briefly at sobriety checkpoints—is slight.”¹²⁶

No one could possibly be surprised that judges characterizing the “interests” in this way would “discover” that the balance favors the government. The most significant element of the majority’s model is not, however, five Justices’ subjective views about the dangers posed by intoxicated driving or the intensity of roadblock seizures. The dispositive factor is the majority’s apportionment of the populations on either side of the scale. On one side is the government, serving as

¹²³ *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 456 (1990) (Brennan, J., dissenting) (emphasis added).

¹²⁴ *Id.* at 462 (Stevens, J., dissenting) (emphasis added).

¹²⁵ *Id.* at 451 (citation omitted).

¹²⁶ *Id.*

surrogate for the entire population. On the other side is an infinitely smaller group—perhaps a solitary person—claiming that the disruption of his privacy or liberty is more important than the interests of everyone else.

When we balance interests according to this formula, pitting a legitimate interest held by everyone in society—with the government acting as stand-in for the collective population—against the claims of self-interested individuals, the collective good must certainly prevail. As Professor Sundby observed: “[W]hat price is a small intrusion on one’s time and space given the enormity of the government’s interests?”¹²⁷

My own view is that the appropriate classification of interested groups does include the government on one side of the scale, acting on behalf of organized society. But the opposing population is of equal dignity—it also is the entire population. In *Sitz*, for example, everyone in society is affected by suspicionless roadblocks at which every vehicle and every person can be seized.

It is the right held collectively by everyone to be secure in our persons and property that is intruded upon by these government actions. This approach is, of course, more faithful to the Fourth Amendment’s text, which proclaims the “right of the *people*,” and not the right of a solitary soul, than is the well-entrenched personal rights theory that ignores the language of plurality in favor of a counter-textual construction that treats our rights as solitary.

But until—and this seems unlikely to occur in the near or far term—the Supreme Court is willing to adhere to the text of the opening clause of the Amendment, balancing methods are very likely to weigh the interests of the many against the interests of the individual. This means that the best way for individuals to succeed at asserting their rights is to persuade judges to stop balancing to decide Fourth Amendment claims. In this case, the choice of this method generally assures that the government will win the balancing act. So long as dissenting Justices engage in the process of arguing for a “better” classification of competing interests, the individual claims of privacy, property, and liberty usually will fail. A different method must be found if different results are to be obtained.

C. *Expectations of Privacy*

Katz is the source of a second category of pragmatist decision making that has reshaped Fourth Amendment law. The conventional narrative is that *Katz* was a necessary response to the 1928 decision in *Olmstead v. United States*,¹²⁸ which had exempted nontrespassory electronic surveillance from constitutional scrutiny. This description is only partially correct. As we have already seen, *Katz* was only one in a series of Warren Court opinions crafted to extirpate private property law (and

¹²⁷ Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 439 (1988) (footnote omitted).

¹²⁸ 277 U.S. 438 (1928).

therefore *Lochner* era theories) from Fourth Amendment doctrine.¹²⁹ The problem facing the Court was that by abandoning the textual definition of rights, it was left without a tangible replacement.

As we have also seen, Justice Stewart's effort to craft this replacement was ineffectual as a legal rule.¹³⁰ It purported to ensure that individuals had power to preserve their privacy from government intrusions by declaring that what people "seek to preserve as private" can be protected, but what they "knowingly expose" to public scrutiny is not. Because this reformulation of Fourth Amendment theory was too amorphous to serve as a legal rule capable of guiding judges deciding future cases, the gap was filled by the now famous two-part standard Justice Harlan posited in his concurrence. Justice Harlan opined:

As the Court's opinion states, 'the Fourth Amendment protects people, not places.' The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a 'place.' My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.¹³¹

Two attributes of this influential passage deserve attention here. First, Harlan simply misstates the law as it existed at the time *Katz* was decided.¹³² The overwhelming majority of the Court's prior cases established that Americans can expect privacy in our homes not because we subjectively expect that, but because that principle was established by centuries of Anglo-American common law decisions and by the text of the Fourth Amendment. A mere handful of Warren Court cases—we can count the number on one hand—had mentioned privacy but none had established the "rule" Harlan asserted.

Second, each prong of Harlan's two-step analysis is significant. The first prong seems to be an attempt to conform to, or perhaps to bolster, Stewart's

¹²⁹ See *supra* note 72 and accompanying text.

¹³⁰ See *supra* notes 73–76 and accompanying text.

¹³¹ *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (citation omitted).

¹³² Harlan's error is perhaps less egregious than Stewart's assertion that "the Fourth Amendment protects people, not places." The text is unequivocal: the Amendment protects people and some places.

unprecedented claim that what a person seeks to keep private may be protected by the Amendment, a rather substantial misstatement of Fourth Amendment law from 1791 to 1967. The laudable principle both Justices advanced was that the people should be able to claim their rights, and not be required to defer to government efforts to constrain them.

Harlan's second prong, that the subjective expectations expressed by the people must also be objectively reasonable, is a necessary adjunct to the first. A person cannot claim that the Constitution protects any idea he constructs, simply because he subjectively embraces it. This is not law, it is a blueprint for anarchy.

Harlan's purpose was, I believe, to enshrine the idea that existing legal rules can be the measure of what expectations are reasonable. This is one of the functions served by property law for most of the nation's history. Property law supplied rules extrinsic to the Fourth Amendment that established relatively certain limits on government attempts to intrude upon both privacy and property. In the years following *Katz*, the Justices occasionally debated what the nature of these external sources of meaning for reasonableness must be,¹³³ but over the years the Justices have typically opted for nonformal methods of defining "objective" reasonableness that have allowed them to rely upon their own subjective preferences.

The impact of the post-Warren Court's opinions deploying the *Katz* expectations test may have been even greater than that of the Fourth Amendment balancing cases. The Court has applied the expectations test in seemingly every law enforcement setting.¹³⁴ Like interest balancing, expectations analysis has

¹³³ See, e.g., *United States v. Dunn*, 480 U.S. 294 (1987); *Oliver v. United States*, 466 U.S. 170 (1984).

¹³⁴ Here is a representative, if nonexhaustive, list of examples: *California v. Acevedo*, 500 U.S. 565 (1991) and *United States v. Johns*, 469 U.S. 478 (1985) (people have a lessened expectation of privacy regarding containers in automobiles); *California v. Greenwood*, 486 U.S. 35 (1988) (no reasonable expectation of privacy in closed, opaque garbage bags on the curb outside his home); *United States v. Dunn*, 480 U.S. 294 (1987); *New York v. Class*, 475 U.S. 106 (1986) (an automobile owner has no reasonable expectation of privacy in a vehicle's identification number, even when police officers must search the vehicle to locate the number); *Oliver v. United States*, 466 U.S. 170 (1984) (attempts to exclude trespassers, including erecting fences and posting no trespassing signs, do not create a reasonable expectation of privacy in open fields); *United States v. Jacobsen*, 466 U.S. 109, 123 (1984) (chemical "field test" to determine whether a substance is cocaine "compromises no legitimate privacy interest"); *United States v. Knotts*, 460 U.S. 276 (1983) (installing an electronic beeper to monitor a person's travels in public does not invade a reasonable privacy expectation); *United States v. Ross*, 456 U.S. 798 (1982) (people have a lessened expectation of privacy in their automobiles); *Rawlings v. Kentucky*, 448 U.S. 98 (1980) (person must have reasonable expectation of privacy in place searched to have standing to challenge the search even if he claims ownership of the seized property); *Smith v. Maryland*, 442 U.S. 735 (1979) (no reasonable expectation of privacy for numbers dialed from telephones, permitting use of pen registers to record those numbers); *Rakas v. Illinois*, 439 U.S. 128 (1978) (automobile passengers have no privacy interest in the areas under the seat or in an unlocked glove compartment, and therefore lack standing to challenge a search of those areas); *United States v. Miller*, 425 U.S. 435 (1976) (no reasonable expectation of privacy in microfilm copies of deposit slips and checks maintained by their banks). *But see*, *United States v. Karo*, 468 U.S. 705 (1984) (permissible tracking of beeper may become unconstitutional if the beeper

become a ubiquitous type of Fourth Amendment pragmatism.

This does not result from the impact of Harlan's first prong—requiring that an individual's actions revealed a subjectively held expectation of privacy. The first prong is rarely contested because the citizens' subjective attitudes usually are obvious. They hide their criminality behind fences, under roofs, in opaque containers—devices used to secure privacy from prying eyes.

The cases turn, instead, on the Justices' own views about whether American society treats these subjective expectations as objectively reasonable. Nothing other than job title makes the Justices qualified to make such judgments—unless they measure reasonableness by applying some legal standard, as they did when Fourth Amendment rights were defined in terms of property law. Judges can claim expertise in interpreting and applying legal rules, but they are no more expert about what society “thinks” than are any other nine citizens.

Deciding what expectations society recognizes as reasonable often leads the Justices to focus upon societal behaviors, norms, and attitudes. The dispositive standards typically are attributed to existing social values and practices. By turning to societal standards rather than legal rules to find the meaning of “reasonableness,” the Court implements the pragmatist belief that law should be interpreted in light of present social realities and manipulated instrumentally for society's benefit, rather than to obey controlling legal rules.¹³⁵

The Justices' various opinions in *Florida v. Riley*¹³⁶ illustrate how the contextual and instrumentalist characteristics of pragmatist reasoning operate in this area of Fourth Amendment doctrine. No one disputed that Riley had acted in ways revealing a subjectively held expectation that outsiders would not observe his crimes.¹³⁷ Riley was growing marijuana in a greenhouse standing within the curtilage of his mobile home. The interior of the greenhouse was hidden from ground level viewing by the structure's walls, trees, shrubs and his home. In addition, both buildings were enclosed by a fence and Riley had posted a “Do Not Enter” sign by the road. Finally, the greenhouse was roofed. There were missing panels, but ninety percent of the roof remained, making even observation from above difficult. Police officers were able to position their helicopter, however, to permit them to see through these gaps, and identify Riley's illegal marijuana crop. The officers possessed neither probable cause nor a warrant, so if the observation was a search it violated Riley's Fourth Amendment rights.¹³⁸ There was no

tracks the movement of the container into a private home).

¹³⁵ See OLIVER WENDELL HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167, 184 (1920) (criticizing judges for failing “adequately to recognize their duty of weighing considerations of social advantage”); O. W. HOLMES JR., *THE COMMON LAW* 1 (1881) (“The life of the law has not been logic: it has been experience.”).

¹³⁶ 488 U.S. 445 (1989).

¹³⁷ See *id.* at 450 (“Riley no doubt intended and expected that his greenhouse would not be open to public inspection, and the precautions he took protected against ground-level observation.”).

¹³⁸ *Id.* at 448–51.

majority opinion.

A four-Justice plurality held that there had been no search. The plurality concluded that Riley's subjective expectation that the interior of his greenhouse would be free from aerial surveillance was unreasonable. This followed from the plurality's reliance upon contemporary social context. In effect, the plurality judicially noticed that helicopter flights are so common in the United States that "Riley could not reasonably have expected that his greenhouse was protected from public or official observation"¹³⁹ from a helicopter flying lawfully in navigable airspace.¹⁴⁰

What is most important for the discussion here is not whether the plurality's conclusion was correct. What is significant is that all nine Justices engaged in some form of pragmatist reasoning to determine whether Riley was objectively reasonable. What divided the Justices was not a dispute about whether non-formal reasoning was the proper method for resolving the case. The Justices disputed whether an objectively reasonable expectation existed and who bore the burden of establishing that point.

The plurality did not require the government to prove that there had ever been even a single helicopter flight over Riley's property. Rather, it simply assumed that such flights existed somewhere in the county: "[T]here is no indication that such flights are unheard of in Pasco County, Florida."¹⁴¹ If evidence on the question was needed, apparently Riley had the burden of proving a negative. The court record did not contain evidence proving that "helicopters flying at 400 feet are sufficiently rare in this country to lend substance to respondent's claim that he reasonably anticipated that his greenhouse would not be subject to observation from that altitude."¹⁴² The opinion rests not upon evidence, but upon the Justices' unverified personal assumptions about the social context in which the case arose, and the *absence* of evidence controverting these unsubstantiated assumptions. As long as police investigative flights do not violate flight safety regulations, observations from flying machines are not Fourth Amendment searches.

Four Justices dissented and one concurred only in the judgment. Like the plurality, these five Justices used non-formal, pragmatist arguments to support their ideas about what was objectively reasonable. Justice O'Connor concurred. She disagreed with the plurality's reliance upon FAA safety regulations to decide the issue, but also couched her position in classic pragmatist terms.

In determining whether Riley had a reasonable expectation of privacy from aerial observation, the relevant inquiry after *Ciraolo* is not whether the helicopter was where it had a right to be under FAA regulations. Rather, consistent with *Katz*, we must ask whether the helicopter was in

¹³⁹ *Id.* at 450–51.

¹⁴⁰ *Id.* at 451–52.

¹⁴¹ *Id.* at 450.

¹⁴² *Id.* at 451–52.

the public airways at an altitude at which members of the public travel with sufficient regularity that Riley's expectation of privacy from aerial observation was not "one that society is prepared to recognize as 'reasonable.'" . . . If the public rarely, if ever, travels overhead at such altitudes, the observation cannot be said to be from a vantage point generally used by the public and Riley cannot be said to have "knowingly exposed" his greenhouse to public view. However, if the public can generally be expected to travel over residential backyards at an altitude of 400 feet, Riley cannot reasonably expect his curtilage to be free from such aerial observation.¹⁴³

Social behavior, not legal rules, ultimately was the source of decision for Justice O'Connor,¹⁴⁴ as it was for the four dissenters. Justice Brennan argued vigorously that the plurality had misapplied *Katz*, but ultimately concluded:

I find little to disagree with in Justice O'Connor's concurrence, apart from its closing paragraphs. A majority of the Court thus agrees that the fundamental inquiry is not whether the police were where they had a right to be under FAA regulations, but rather whether Riley's expectation of privacy was rendered illusory by the extent of public observation of his backyard from aerial traffic at 400 feet.¹⁴⁵

Brennan disagreed with O'Connor only on "an empirical matter concerning the extent of public use of the airspace at that altitude."¹⁴⁶ Brennan thus did not dispute the legitimacy of using empirical data about actual social behavior to define constitutional rights. He disagreed about who should bear the burden of proof on this question. "Because the State has greater access to information concerning customary flight patterns . . . the burden of proof properly rests with the State and not with the individual defendant."¹⁴⁷

Dissenting separately, Justice Blackmun agreed that reliance on FAA safety regulations was misguided, that *Katz* controlled, and that the reasonableness of Riley's expectation of privacy was an empirical question to be determined in the context of contemporary social practices. But like the four Justices in the plurality, Stevens was willing to assume dispositive facts. He criticized the plurality for establishing "a *per se* rule for the entire Nation based on judicial suspicion alone,"

¹⁴³ *Id.* (O'Connor, J., concurring) (citation omitted).

¹⁴⁴ Justice O'Connor concurred in the judgment because she concluded that Riley, as the party moving to suppress evidence, had the burden of proof on the question of the frequency of flights. *Id.* at 455.

¹⁴⁵ *Id.* at 464–65 (Brennan, J., dissenting).

¹⁴⁶ *Id.* at 465.

¹⁴⁷ *Id.* at 465–66.

but asserted that the Justices “need not abandon our judicial intuition entirely.”¹⁴⁸ Because his personal belief, his “judicial intuition,” was that “private helicopters rarely fly over curtilages at an altitude of 400 feet,”¹⁴⁹ Justice Blackmun would have imposed “the burden of proving contrary facts”¹⁵⁰ on the prosecution.

In *Riley*, all nine Justices, whether joining in the plurality opinion, concurring or dissenting, employed legal pragmatist reasoning to decide the scope of everyone’s privacy from aerial surveillance by police officers hovering above our homes in helicopters. Regardless of their political views, all shared the same methodological techniques.

Given the ubiquity of legal pragmatist methods in resolving these fundamental Fourth Amendment issues, it is not surprising that the same theories now control the resolution of exclusionary rule disputes. The same pragmatist ideas that made it possible for *Katz* expectation of privacy analysis and *Terry* interest balancing to be converted into devices for shrinking Fourth Amendment protections against searches and seizures have facilitated the parallel diminution of the scope of the exclusionary rule.

D. *A Conservative House United: How the Supreme Court Dismantled the Exclusionary Remedy*

The Supreme Court’s decisions altering the exclusionary remedy in recent decades are well-known to contemporary readers, and do not require a lengthy exposition here. They do, however, reveal how these current doctrines fit within the contours of twenty-first century Fourth Amendment pragmatism, so discussion of them is warranted.

Only five years after Chief Justice Warren retired,¹⁵¹ the Supreme Court altered the face of exclusionary theory with a single opinion. *United States v. Calandra*¹⁵² reversed a Court of Appeals decision holding that a grand jury could not compel “a witness to answer questions based on evidence obtained from a prior unlawful search and seizure.”¹⁵³ The Court carefully mined the exclusionary rule precedents, and particularly the decisions of the Warren Court, for authorities supporting the redesign of the remedy in terms the Court still relies upon after nearly forty years.

The Court rejected the original justification for exclusion: suppression is the essential means of enforcing fundamental Fourth Amendment rights, the means of

¹⁴⁸ *Id.* at 467 (Blackmun, J., dissenting).

¹⁴⁹ *Id.* at 468.

¹⁵⁰ *Id.*

¹⁵¹ By the time the Court decided *Calandra*, five justices who had contributed to the Warren Court criminal procedure had left the Court: Goldberg (1965); Warren (1969); Fortas (1970); Black (1972); Harlan (1972). 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1384 (3d ed. 2000).

¹⁵² 414 U.S. 338 (1974).

¹⁵³ *Id.* at 347.

ensuring a remedy for every violation of constitutional rights. Instead, *Calandra* declared that “[i]ts purpose is to *deter*—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.”¹⁵⁴ The Court repeated this assertion throughout the opinion, and its primary authorities were Warren Court opinions, some of which were questionable sources for this proposition.¹⁵⁵

A second innovation in *Calandra*, which Justice Powell misleadingly cast as the traditional analysis, was that “[a]s with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.”¹⁵⁶ This is almost the converse of the analysis in *Boyd*, *Weeks*, and *Mapp*.

Third, *Calandra* defined exclusion not as an essential part of Fourth Amendment rights, as the seminal precedents had done, but instead redefined it as “a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.”¹⁵⁷ The dissent emphasized this assertion’s inconsistency with the controlling precedents:

[T]he Court seriously errs in describing the exclusionary rule as merely “a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect” Rather, the exclusionary rule is “part and parcel of the Fourth Amendment’s limitation upon [governmental] encroachment of individual privacy,” and “an essential part of both the Fourth and Fourteenth Amendments”¹⁵⁸

Finally, rather than define its function as engaging in constitutional judicial review to preserve individual rights against government incursion,¹⁵⁹ the Court borrowed from *Terry* and adopted interest balancing as the method for applying the exclusionary rule.

In deciding whether to extend the exclusionary rule to grand jury

¹⁵⁴ *Id.* (emphasis added) (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960), a Warren Court opinion).

¹⁵⁵ The only authorities for the assertion that the “rule’s prime purpose is to deter future unlawful police conduct,” *id.* at 347, were three Warren Court opinions, including *Mapp*. See *id.* at 356–60 (Brennan, J., dissenting). See also *supra* notes 48–51 and accompanying text.

¹⁵⁶ *Calandra*, 414 U.S. at 348.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 360 (Brennan, J., dissenting) (quoting *Mapp v. Ohio*, 367 U.S. 643, 657 (1961)).

¹⁵⁹ See *id.* at 356 (Brennan, J., dissenting) (“Indeed, there is no evidence that the possible deterrent effect of the rule was given any attention by the judges chiefly responsible for its formulation. Their concern as guardians of the Bill of Rights was to fashion an enforcement tool to give content and meaning to the Fourth Amendment’s guarantees.”).

proceedings, we must weigh the potential injury to the historic role and functions of the grand jury against the potential benefits of the rule as applied in this context. It is evident that this extension [sic] of the exclusionary rule would seriously impede the grand jury Permitting witnesses to invoke the exclusionary rule before a grand jury would delay and disrupt grand jury proceedings In some cases the delay might be fatal to the enforcement of the criminal law.

. . . .

Against this potential damage to the role and functions of the grand jury, we must weigh the benefits to be derived from this proposed extension of the exclusionary rule.¹⁶⁰

In the succeeding decades, conservative majorities strengthened each of these four defining characteristics of the new exclusionary rule. One of the most noteworthy opinions was *United States v. Leon*,¹⁶¹ in which the Court adopted a “good faith exception” to the exclusionary rule, available when police officers acted in good faith reliance on a warrant issued without probable cause.¹⁶²

A warrant issued without probable cause is invalid—it violates one of the Amendment’s most definite commandments. Under the original rights-based theories that generated the exclusionary remedy, evidence secured under an invalid warrant will be suppressed for anyone who has standing.¹⁶³ But *Calandra*’s four innovations—defining deterrence as the exclusive justification for exclusion, limiting exclusion to settings where that “remedial” goal could be achieved, employing interest balancing to make that determination, and categorizing the remedy as a judge-made rule of evidence and not part of the right itself—created a doctrinal basis for the exception.

The *Leon* majority’s reasoning exemplified Fourth Amendment pragmatism and was the antithesis of formal, rule-based legal decision making.¹⁶⁴ It focused on the costs to society of suppressing reliable physical evidence, and concluded that the costs of exclusion outweighed the societal benefits produced by enforcing *Leon*’s rights. *Leon* was the perfect case for adopting the good faith exception under the *Calandra* formula, because there was no police misconduct to deter. The mistake had been made by the judge who issued the warrant and not by the officers who relied upon it. After receiving an informer’s tip, the officers conducted a lengthy investigation attempting to confirm the tip. When they decided they had probable cause, they prepared a warrant application and had it reviewed by

¹⁶⁰ *Id.* at 349–50.

¹⁶¹ 468 U.S. 897 (1984).

¹⁶² See also *Massachusetts v. Sheppard*, 468 U.S. 981 (1984) (*Leon*’s companion case applied the good faith exception to the exclusionary remedy where officers relied in good faith on a warrant violating the particularity requirement of the Warrant Clause resulting from a judge’s clerical error.).

¹⁶³ See *United States v. Jones*, 132 S. Ct. 945 (2012).

¹⁶⁴ See *Leon*, 468 U.S. at 901–902, 907.

prosecutors, who approved it. Only then did they submit the warrant application to a state trial court judge, who issued a facially valid warrant that the officers then executed.¹⁶⁵

If deterring police misconduct is the remedy's only justification, then exclusion is unwarranted on these facts. But if the remedy's justification is to enforce individual constitutional rights—for example, the right not to be subjected to searches and seizures without probable cause—then the opposite conclusion is inevitable. A warrant issued without probable cause violates the text's explicit command. Any judge protecting rights by enforcing the constitutional prohibition would have to suppress the evidence.

Leon demonstrates that theory matters. The result in *Leon* turns on which set of interpretive theories controls. The original rights-based theory of exclusion and the later pragmatist interest balancing approach produce opposite results.

Calandra and *Leon* weakened the exclusionary rule substantially, and the Court's most recent opinions have continued this process. Since 2006 the Supreme Court has issued three decisions that some commentators believe could signal the demise of this historic remedy.

The first was *Hudson v. Michigan*.¹⁶⁶ *Hudson* is noteworthy not because of its limited holding, but because of provocative dicta in the majority opinion that revived questions about the very legitimacy of the exclusionary remedy, echoing debates seemingly resolved long ago.¹⁶⁷ In the decades following *Calandra*, the Court's opinions reduced the remedy's scope and application in particular settings, but they had not threatened its survival. The holding in *Hudson*, like these predecessors, limited the settings in which exclusion was available as a remedy, but its dicta purposely and aggressively questioned the rule's very legitimacy.

The issue litigated in *Hudson* was "whether violation of the 'knock-and-announce' rule requires the suppression of all evidence found in the search."¹⁶⁸ Justice Scalia's majority opinion reaffirmed that the "common-law principle that

¹⁶⁵ *Id.* at 901–02, 905, 923, 925–26.

¹⁶⁶ 547 U.S. 586 (2006). For a more detailed discussion of *Hudson*'s place in the Supreme Court's exclusionary rule jurisprudence, see Morgan Cloud, *Rights Without Remedies: The Court That Cried "Wolf"*, 77 *MISS. L.J.* 467 (2007) (published version of James Otis Lecture).

¹⁶⁷ Writing for three of the dissenters in *Hudson*, Justice Breyer noted that the majority's arguments had resurrected *Wolf*. See *Hudson*, 547 U.S. at 611 (Breyer, J., dissenting) ("To argue, as the majority does, that new remedies, such as 42 U.S.C. § 1983 actions or better trained police, make suppression unnecessary is to argue that *Wolf*, not *Mapp*, is now the law.").

¹⁶⁸ *Id.* at 588. Police officers executing a search warrant went to Hudson's home, announced their presence, but within only "three to five seconds" entered without waiting for the residents' response. Searching the home the officers found Hudson, who had crack cocaine in his clothing, a loaded gun in the chair where he was sitting, and other drugs. Hudson was charged with illegal possession of the drugs and gun. The trial court suppressed the evidence, finding that the officers' de minimis pause after police entry did not satisfy the knock-and-announce requirement. The state trial court granted Hudson's motion to suppress all the evidence, finding that the premature entry violated his Fourth Amendment rights, but the Michigan appellate courts reversed, and Hudson was convicted of drug possession.

law enforcement officers must announce their presence and provide residents an opportunity to open the door is . . . a command of the Fourth Amendment.”¹⁶⁹ Recent precedents had established¹⁷⁰ that officers must wait only a *reasonable* period of time after knocking and announcing before entering a building.¹⁷¹ The searchers in *Hudson* had entered the home within only three to five seconds after announcing their presence, and the State conceded that this violated the knock-and-announce rule.

The majority resolved the dispute by balancing, concluding that “the social costs of applying the exclusionary rule to knock-and-announce violations are considerable,”¹⁷² while suppressing the evidence would do little to deter police misconduct. In light of the majority’s characterization of these interests, it is not surprising that they held that the “remedy of suppressing evidence of guilt is unjustified.”¹⁷³ Like other opinions issued after *Calandra*, the *Hudson* holding narrowed the application of the remedy but did not threaten its survival. Justice Scalia’s dicta did.

Although he acknowledged that in the past the Court had applied the exclusionary rule expansively,¹⁷⁴ Scalia inaccurately claimed that suppression “has *always* been our last resort, not our first impulse”¹⁷⁵ because of the “substantial social costs” that criminals would go free because the police had erred.¹⁷⁶ Scalia argued not only that the costs of exclusion outweighed its benefits, but also that the remedy was no longer needed to deter police misconduct. Changes in the application of 42 U.S.C. section 1983, for example, had made damage suits an adequate remedy.¹⁷⁷ Justice Breyer’s dissent questioned the factual accuracy of this conclusion, arguing that the majority had simply “assumed” it to be correct.¹⁷⁸

¹⁶⁹ *Id.* at 589 (citing *Wilson v. Arkansas*, 514 U.S. 927 (1995)).

¹⁷⁰ Another important precedent was *Richards v. Wisconsin*, 520 U.S. 385, 391, 394 (1997) (holding that when police officers possess reasonable suspicion that complying with the rule would expose them to the “threat of physical violence,” or “that evidence would likely be destroyed,” or suspects would escape if “notice were given,” or that the exercise would be “futile,” they do not have to knock and announce their presence).

¹⁷¹ *United States v. Banks*, 540 U.S. 31, 41 (2003) (police officers acted reasonably by waiting only fifteen to twenty seconds after knocking before entering).

¹⁷² *Hudson*, 547 U.S. at 599.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 591 (quoting *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (“[A]ll evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.”)).

¹⁷⁵ *Id.* (emphasis added). The majority recognized that at one time the Supreme Court had equated “a Fourth Amendment violation as synonymous with application of the exclusionary rule to evidence secured incident to that violation.” *Id.* at 591. It then accurately noted that later decisions had rejected this approach. *Id.* at 591–93.

¹⁷⁶ *Id.* at 596.

¹⁷⁷ *Id.* at 596–597.

¹⁷⁸ In his dissenting opinion, Justice Breyer disputed this claim. See *id.* at 611 (Breyer, J.,

Justice Scalia also argued that the increasing professionalism of police forces, including internal police enforcement actions, was another development that had made the exclusionary remedy unnecessary.¹⁷⁹ While improvement undoubtedly has occurred over the course of the nearly half century since *Mapp* was decided, it seems equally clear that these improvements were to a large degree the product of the Supreme Court's decisions imposing the Fourth and Fifth Amendment exclusionary rules on law enforcement officials.¹⁸⁰

Writing for three of the four *Hudson* dissenters, Justice Breyer argued that the Supreme Court's precedents established that "all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible' [and to hold otherwise] would be 'to grant the right but in reality to withhold its privilege and enjoyment.'"¹⁸¹

Breyer's dissent and the dicta in the majority opinion revisited issues debated decades earlier in *Wolf* and *Mapp*. The majority opinion in the next important case could not have been written before *Leon* was decided.

In *Herring v. United States*,¹⁸² the Court asked what happens "if an officer reasonably believes there is an outstanding arrest warrant, but that belief turns out to be wrong because of a negligent bookkeeping error by another police employee?"¹⁸³ Herring had been arrested by officers lacking probable cause and relying solely upon a warrant that had been "withdrawn" months before the arrest. The prosecution and defense agreed that his arrest violated the Fourth Amendment, but disagreed about whether contraband found in the arrestee's possession was subject to exclusion.¹⁸⁴

Writing for a bare majority, Chief Justice Roberts did not frame the answer in terms of enforcing the requirements articulated in the Warrant Clause or of enforcing the constitutional rights of the citizen who had been subjected to this illegal arrest.¹⁸⁵ Instead, he relied upon interest balancing, deterring police

dissenting) ("[T]he majority, as it candidly admits, has simply 'assumed' that, "[a]s far as [it] know[s], civil liability is an effective deterrent," a support-free assumption that *Mapp* and subsequent cases make clear does not embody the Court's normal approach to difficult questions of Fourth Amendment law." (citation omitted)).

¹⁷⁹ *Id.* at 598–599.

¹⁸⁰ *But see* *United States v. Payner*, 447 U.S. 727 (1980) (federal agents trained to purposely violate one person's rights to secure evidence, another person cited as example of how police training protected individual rights). *See also* *Missouri v. Seibert*, 542 U.S. 600, 611 n.2 (2004) (police officers trained to avoid interrogation rules articulated in *Miranda v. Arizona*, 384 U.S. 436 (1966)).

¹⁸¹ *Hudson*, 547 U.S. 608 (Breyer, J., dissenting) (citing *Mapp v. Ohio*, 376 U.S. 643, 655–56 (1961)).

¹⁸² 555 U.S. 135 (2009).

¹⁸³ *Id.* at 137.

¹⁸⁴ *Id.* at 139.

¹⁸⁵ How far current doctrine has strayed from the original understanding of the centrality of the exclusionary remedy to the enforcement of Fourth Amendment rights is exemplified by Chief Justice Roberts' explanation of how an arrest based upon a non-existent, invalid warrant could be legal—

wrongdoing, and *Leon*'s good faith exception to the exclusionary rule. The majority concluded that the evidence found during a search incident to Herring's illegal arrest should not be suppressed because "the error was the result of isolated negligence attenuated from the arrest."¹⁸⁶

The results of the negligence were not, however, attenuated from the arrest—the results were the arrest and search that followed. To finesse these facts, Chief Justice Roberts turned to the good faith exception to the exclusionary rule first adopted by the Court in *Leon*: "When police act under a warrant that is invalid for lack of probable cause, the exclusionary rule does not apply if the police acted 'in objectively reasonable reliance' on the subsequently invalidated search warrant."¹⁸⁷ While claiming that the controlling standard was "objective," Roberts articulated a rule limiting the application of the exclusionary rule that, in fact, emphasized the officers' subjective purposes (while completely omitting any discussion of individual constitutional rights):

To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level.¹⁸⁸

From the perspective of the individual illegally arrested, whether the officers acted deliberately or negligently is irrelevant. Herring's liberty, privacy, and private property—his effects—all were intruded upon by government agents who lacked probable cause to arrest, and whose only authority to arrest, search, and incarcerate was a non-existent warrant. For most of the twentieth century these acts would have been treated as violations of the Fourth Amendment requiring suppression of the illegally obtained evidence. But employing contemporary pragmatist theories, a majority could reach the opposite result, expounding doctrines that would have been anathema to the Justices who decided *Weeks*.

The Supreme Court's most recent foray into exclusionary rule theory, *Davis v.*

although the government had stipulated that the arrest was unconstitutional. *See id.* at 139 ("When a probable-cause determination was based on reasonable but mistaken assumptions, the person subjected to a search or seizure has not necessarily been the victim of a constitutional violation.").

¹⁸⁶ *Id.* at 137. In support of this conclusion, Chief Justice Roberts cited a series of post-*Calandra* Supreme Court opinions that "establish important principles that constrain application of the exclusionary rule," *id.* at 140, including the theory that "the exclusionary rule is not an individual right and applies only where it 'result[s] in appreciable deterrence' [of] Fourth Amendment violations in the future . . . [and] the benefits of deterrence must outweigh the costs." *Id.* at 141 (citations omitted).

¹⁸⁷ *Id.* at 142 (quoting *United States v. Leon*, 468 U.S. 897, 922 (1984)).

¹⁸⁸ *Id.* at 144.

United States,¹⁸⁹ involved a case in which police officers conducted a warrantless search incident to arrest in the defendant's car. The search complied with existing case law at the time of the arrest, but while Davis appealed his conviction resulting from the search, the Supreme Court decided *Arizona v. Gant*.¹⁹⁰ *Gant* made the search in *Davis* unconstitutional.¹⁹¹ The narrow issue decided in *Davis* was whether *Gant* should be applied retroactively,¹⁹² which the majority refused to do. Justice Alito's majority opinion included wide ranging dicta discussing a variety of Fourth Amendment questions, including the retroactivity of decisions interpreting the Constitution and the nature and scope of the exclusionary rule.

Much of the majority opinion was devoted to a survey of the new exclusionary rule doctrines announced in *Calandra* and expanded in subsequent cases including *Leon*, *Hudson*, and *Herring*. Justice Alito's opinion for a five Justice majority reiterated the doctrines set out in those opinions: the exclusionary remedy is a judge-made rule and not part of the constitutional rights found in the Fourth Amendment, it exists solely to deter police misconduct, it will be enforced only where the benefits of exclusion outweigh the costs to society, and so on.¹⁹³ Justice Alito admitted that:

[T]here was a time when our exclusionary-rule cases were not nearly so discriminating in their approach to the doctrine. "Expansive dicta" in several decisions suggested that the rule was a self-executing mandate implicit in the Fourth Amendment itself. [Citing *Mapp* and other decisions]. As late as our 1971 decision in *Whiteley v. Warden* [401 U.S. 560], the Court "treated identification of a Fourth Amendment violation as synonymous with application of the exclusionary rule." In time, however, we came to acknowledge the exclusionary rule for what it undoubtedly is—a "judicially created remedy" of this Court's own making. We abandoned the old, "reflexive" application of the doctrine, and imposed a more rigorous weighing of its costs and deterrence benefits. In a line of cases beginning with *United States v. Leon*, we also recalibrated our cost-benefit analysis in exclusion cases to focus the inquiry on the "flagrancy of the police misconduct" at issue.¹⁹⁴

¹⁸⁹ 131 S. Ct. 2419 (2011).

¹⁹⁰ 556 U.S. 332 (2009).

¹⁹¹ See *Davis*, 131 S. Ct. at 2425. In *Gant* the Court held that "an automobile search incident to a recent occupant's arrest is constitutional (1) if the arrestee is within reaching distance of the vehicle during the search, or (2) if the police have reason to believe that the vehicle contains 'evidence relevant to the crime of arrest,'" in the process overruling in part *New York v. Belton*, 453 U.S. 454 (1981) (citations omitted).

¹⁹² See *Davis*, 131 S. Ct. at 2423.

¹⁹³ See, e.g., *id.* at 2423–26.

¹⁹⁴ *Id.* at 2427 (citations omitted except where noted within the quotation).

The majority concluded that police officers complying with controlling judicial interpretation of the Fourth Amendment when they acted were not culpable. “Under our exclusionary-rule precedents, this acknowledged absence of police culpability dooms Davis’s claim,”¹⁹⁵ in part because *Herring* permits suppression only when the officers acted “deliberately, recklessly, or with gross negligence,” or the case revealed “recurring or systemic negligence” by law enforcement.¹⁹⁶ The officers who arrested Davis followed binding precedent; there was no misconduct to deter, even if the precedent was later overruled.

Read together, the Court’s opinions from *Calandra* to *Davis* have taken the pragmatist theories introduced into Fourth Amendment doctrine in the 1960s almost as far as is possible without actually overruling *Weeks* and *Mapp* and abandoning the remedy entirely.

V. CONCLUSION: THE PAST AND THE FUTURE

It is easy to understand why judges embrace legal pragmatism. Its nonformal methods and emphasis upon social context permit judges extraordinary independence in deciding cases. Fourth Amendment balancing illustrates this phenomenon. Judicial autonomy in characterizing the interests at stake and at fabricating “weights” for those competing “interests” permits judges to achieve any outcome they prefer. Seizures of all vehicles and drivers at roadblocks are not seizures at all; evidence seized illegally need not be suppressed. This is the exercise of institutional authority, but it is not decision making constrained by antecedent rules, the fundamental task we assign to judges resolving disputes.

In the context of Fourth Amendment disputes, the flexibility inherent in this rule-less decision making becomes even more seductive. The protean diversity of police-citizen encounters renders the search for unifying theories applicable to all encounters a futile endeavor. But if judges can decide each case without the constraints of rules, the complexity of life’s problems no longer is unmanageable. The complexity of life is matched by the malleability of pragmatist methods. All a judge need do is balance to achieve the “best” outcome or divine what expectations she deems reasonable. Struggling to apply rules to unprecedented circumstances is difficult, frustrating, and can produce suboptimal outcomes. Pragmatist methods, on the other hand, permit judges to decide what is the “best” result for society, often without forcing them to follow rules that produce outcomes they find distasteful.

This Article has highlighted the ironic reality that liberal judges jettisoned longstanding rules grounded in the Fourth Amendment’s text and in property law, and replaced them with pragmatist methods. It is apparent that their goal was to “modernize” constitutional law in ways that would enhance individual autonomy. But when more conservative judges replaced the Warren Court liberals, they

¹⁹⁵ *Id.* at 2428.

¹⁹⁶ *Id.*

inherited a new set of theories that permitted them to decide many cases by employing pragmatist methods in ways that constricted Fourth Amendment rights and remedies while expanding government power.

Another irony emerges when we search for alternative theories and methods to replace the current regime of rule-less decision making. The irony is this: the outlines of viable alternatives are embedded in a pair of recent opinions written by Justice Scalia, one of the most influential conservative Justices on Fourth Amendment issues and a harsh critic of the exclusionary remedy. We will begin with the earlier decision.

Federal agents sitting in an automobile parked on a public street used a thermal imager to measure the heat radiating from the interior of Danny Kyllo's home. The agents did not trespass upon Kyllo's property, but their use of the thermal imager was not authorized by a warrant. The imaging results were included (along with other information) in the successful application for a warrant authorizing a search of Kyllo's home. Agents executing that warrant discovered (as expected) a sophisticated indoor marijuana farm employing halide grow lamps that generated the heat detected by the thermal imager. The Ninth Circuit denied Kyllo's suppression motion, concluding that under *Katz* and its progeny, the agents' use of the thermal imager was not a search, and therefore no warrant was needed to authorize its use.¹⁹⁷

Writing for a five Justice majority, Justice Scalia concluded that the thermal imager provided information about the *interior* of Kyllo's home, the core example of a place where people can expect to be free from government prying.¹⁹⁸ "To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment."¹⁹⁹

The opinion rested upon the core principle that before the government can intrude into our homes to obtain evidence to use against us, the intrusion must be justified by a warrant issued by a judge. But the thermal imager had been used successfully without any physical trespass to measure temperatures on the outside of the structure, which was knowingly exposed to public view. The government and the dissenters argued vigorously that the Court's opinions holding that aerial surveillance of a home is not a search controlled here, and no warrant was needed absent a physical trespass.

Scalia's majority opinion rebutted this rather conventional interpretation of recent case law by refining the old trespass doctrine to accommodate the reality of surveillance with sophisticated technologies not existing in 1791, or 1928, or even 1967. *Kyllo* rested upon a new concept, the *functional equivalent* of a trespass.

We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise

¹⁹⁷ *Kyllo v. United States*, 533 U.S. 27, 30–31 (2001).

¹⁹⁸ *See id.* at 38–39.

¹⁹⁹ *Id.* at 34.

have been obtained without physical “intrusion into a constitutionally protected area,” constitutes a search—at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted. On the basis of this criterion, the information obtained by the thermal imager in this case was the product of a search.²⁰⁰

This passage reconceives the Fourth Amendment’s reliance on property concepts to regulate technological intrusions into our homes. It mimics traditional methods by using the physical trespass as an objective measure of an intrusion triggering constitutional scrutiny, while extending this protection to analogous nontrespassory intrusions achieved by technological means. Its solution to a problem that has distorted Fourth Amendment theory since 1928 is elegant in its simplicity. If the government uses technology to obtain information otherwise unattainable without physically trespassing into “a constitutionally protected area,” it has conducted a search that must be authorized by a warrant complying with the requirements of the Warrant Clause.

The theoretical significance of this formulation extends beyond the resolution of the issues in the case. By reconceiving the relationship between text and technology, *Kyllo* suggests possible approaches for remaking Fourth Amendment theory.

Justice Scalia’s majority opinion in the Supreme Court’s most recent opinion involving technological searches built upon *Kyllo*’s innovations. In *United States v. Jones*,²⁰¹ he emphasized the centrality of property based theories to find that the warrantless installation of a device used to track a suspect’s movements violated the Fourth Amendment.

As part of an investigation into drug trafficking, federal agents placed a GPS tracking device on a vehicle registered to Jones’ wife, but which Jones usually operated. The officers had obtained a warrant permitting the installation of the device, but they installed it outside the geographical jurisdiction where that action was authorized and after the warrant had expired. As a result, the installation was a warrantless trespass upon private property.²⁰² The Supreme Court held, in part, “that the Government’s installation of a GPS device on a target’s vehicle, and its use of that device to monitor the vehicle’s movements, constitutes a ‘search.’”²⁰³

Justice Scalia’s majority opinion revived the trespass doctrine. It began by stressing that the vehicle was “an ‘effect’ as that term is used in the Amendment.”²⁰⁴ That was only the beginning of the resurrection of property law

²⁰⁰ *Id.* at 34–35 (citation omitted).

²⁰¹ 132 S. Ct. 945 (2012).

²⁰² *See id.* at 948–49.

²⁰³ *Id.* at 949.

²⁰⁴ *Id.*

concepts. Although the Jeep was registered to Mrs. Jones, as the “exclusive driver” Jones himself “had at least the property rights of a bailee.”²⁰⁵ His Fourth Amendment rights were violated when “[t]he Government physically occupied private property for the purpose of obtaining information [because] such a physical intrusion would have been considered a ‘search’ within the meaning of the Fourth Amendment when it was adopted.”²⁰⁶

The opinion repeatedly stressed the significance of property rights in the Fourth Amendment’s text and the Supreme Court’s interpretation of that language both prior to and after the Warren Court revolution:

The text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to “the right of the people to be secure against unreasonable searches and seizures”; the phrase “in their persons, houses, papers, and effects” would have been superfluous.

Consistent with this understanding, our Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century. . . .

Our later cases, of course, have deviated from that exclusively property-based approach. In *Katz v. United States*, we said that “the Fourth Amendment protects people, not places,” and found a violation in attachment of an eavesdropping device to a public telephone booth. Our later cases have applied the analysis of Justice Harlan’s concurrence in that case, which said that a violation occurs when government officers violate a person’s ‘reasonable expectation of privacy.’²⁰⁷

The reference to Harlan’s concurrence introduced Scalia’s criticism of slavish application of *Katz* to resolve all issues relating to government searches. Justice Scalia asserted that the *Jones* majority construed the Fourth Amendment to protect, “at a minimum,” rights as they were understood in the Eighteenth Century, including rights grounded in property law. In contrast, “[t]he concurrence . . . would apply *exclusively Katz’s* reasonable-expectation-of-privacy test, even when that eliminates rights that previously existed.”²⁰⁸

²⁰⁵ *Id.* at 949 n.2.

²⁰⁶ *Id.* at 949 (quoting passages from the essential precedents for property based interpretations of the Amendment, *Entick v. Carrington*, 95 Eng. Rep. 807 (K.B. 1765) and *Boyd v. United States*, 116 U.S. 616 (1886)). The language quoted from *Entick* included this passage:

[O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour’s close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour’s ground, he must justify it by law.

Id. (citations omitted).

²⁰⁷ *Jones*, 132 S. Ct. at 949–50 (2012) (citations omitted).

²⁰⁸ *Id.* at 953.

Scalia argued for a more flexible use of analytical methods. Where, as in *Jones*, there was a physical trespass, traditional property based analysis could supply the decision rules. But the majority would “not make trespass the exclusive test. Situations involving merely the transmission of electronic signals without trespass would *remain* subject to *Katz* analysis.”²⁰⁹

Read together, *Kyllo* and *Jones* reveal elements of a contemporary alternative to Fourth Amendment pragmatism. First, the new doctrines would resurrect property as a mechanism for defining rights and limiting government power. Justice Scalia’s majority opinions in recent cases have emphasized that both “functional” and literal trespasses against private property can violate the Fourth Amendment. Comparing the installation and use of the GPS tracking device in *Jones* to eighteenth century investigative methods, for example, he wrote that:

There is no doubt that the information gained by that trespassory activity would be the product of an unlawful search—whether that information consisted of the conversations occurring in the coach, or of the destinations to which the coach traveled. In any case, it is quite irrelevant whether there was an 18th-century analog. Whatever new methods of investigation may be devised, our task, *at a minimum*, is to decide whether the action in question would have constituted a “search” within the original meaning of the Fourth Amendment. *Where, as here, the Government obtains information by physically intruding on a constitutionally protected area, such a search has undoubtedly occurred.*²¹⁰

Second, property law serves the critical function of supplying external sources of meaning to the Fourth Amendment text. More than four decades of Fourth Amendment pragmatism have confirmed the wisdom of relying on property in the constitutional text. Property rules provide formal content to search and seizure analysis, even under *Katz*.

We have embodied that preservation of past rights in our very definition of “reasonable expectation of privacy” which we have said to be an expectation “that has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.” *Katz* did not narrow the Fourth Amendment’s scope.²¹¹

Compared to the content-free, non-formal methods so prominent in recent decades, the rules of property law provide relatively firm rules. A judge trying to

²⁰⁹ *Id.*

²¹⁰ *Id.* at 950 n.3 (emphasis added).

²¹¹ *Id.* at 951 (citation omitted).

decide whether Jones possessed a reasonable expectation of privacy in the exterior undercarriage of his vehicle could use *Katz* and its progeny to construct plausible answers producing opposite results. The flexibility of the expectations method permits either outcome, and recent precedents support the conclusion that no search occurred. Conversely, an unpermitted trespass upon private property violates rules extending back to the beginning of legal systems, and are illegal.

Third, the Warrant Clause and its rules—devalued by pragmatist methods that eschew the primacy of rules and favor methods allowing decision makers to pursue “optimal” results—again would be central in Fourth Amendment theory. It is no accident that in both *Kyllo* and *Jones* warrantless government intrusions violated the Fourth Amendment, triggering suppression of evidence. The links between the substantive rights defined in the Amendment’s first clause and the procedural rights described in its second clause are inherently powerful. When judges enforce the property based rights relating to our houses, papers, and effects, the relevance of the Warrant Clause to the meaning of “reasonableness” is obvious. The warrant must, for example, describe with *particularity* the “place to be searched, and the persons or things to be seized.”²¹² The Amendment’s text links property and warrants.

Finally, the revival of these past doctrines appears to be a realistic possibility. In both *Kyllo* and *Jones*, Justice Scalia wrote majority (albeit bare majority) opinions, demonstrating other Justices’ willingness to embrace the new use of traditional ideas. The contours of the internal debate among the Justices is suggested by the fact that both opinions contain passages reaffirming the vitality of *Katz* and its pragmatist foundations. Perhaps this was a necessary concession to secure a majority vote. The clearest affirmation that *Katz* will survive the resurrection of property law in Fourth Amendment doctrine appears in *Jones*. “[U]nlike the concurrence, which would make *Katz* the *exclusive* test, we do not make trespass the exclusive test. Situations involving merely the transmission of electronic signals without trespass would *remain* subject to *Katz* analysis.”²¹³

A more subtle example occurs in *Kyllo*’s critical passage, where Justice Scalia creatively redefines the previously moribund trespass doctrine while simultaneously deferring to the commands of Fourth Amendment pragmatism. The key sentence is: “We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical ‘intrusion into a constitutionally protected area,’ constitutes a search—at least where (as here) the technology in question is not in general public use.”²¹⁴

The bulk of the sentence establishes a dynamic new concept in Fourth Amendment law: nontrespassory technological surveillance that is the functional equivalent of a physical trespass must comply with the requirements of the

²¹² U.S. CONST. amend. IV.

²¹³ *Jones*, 132 S. Ct. at 953.

²¹⁴ *Kyllo v. United States*, 533 U.S. 27, 34–35 (2001) (emphasis added) (citation omitted).

Warrant Clause. The portion of the sentence preceding the hyphen, standing alone, resolves conflicts between the Amendment's text and the realities of electronic surveillance that have bedeviled the Justices since the 1928 *Olmsted* decision. But the radical creativity of that passage is truncated immediately by a concluding clause restricting this new standard of review to technologies "not in general public use."²¹⁵

Anyone familiar with Fourth Amendment law relating to technological searches will recognize that this phrase modifies an earlier standard announced in an aerial surveillance case.²¹⁶ But readers of this article also will recognize that tying a constitutional standard to quantitative analysis of societal behavior is an application of pragmatist methods in general and the reasonable expectation of privacy standard in particular.

I suspect that some of the five Justices in the *Kyllo* majority demanded this obeisance to post-*Katz* jurisprudence before they would join in Justice Scalia's otherwise more radical opinion. If that is correct, then we have come full circle, back to the topic of judicial head-counting with which the article began. The focus at this point is not, however, the narrow, politicized question of whether the exclusionary rule will be extinguished as a matter of Fourth Amendment law.

The question I raise here is whether Justice Scalia will succeed in persuading his colleagues to reform the theories underlying all of Fourth Amendment jurisprudence by reclaiming the links to property rights expressed directly in the text. The *Kyllo* and *Jones* opinions suggest that if this happens, the process will be drawn out, achieved piecemeal, as were past developments in Fourth Amendment theory. If Justice Scalia succeeds, the resulting theory will not be identical to *Lochner* era property theory or post-Warren Court pragmatist nonformalism, but it will contain elements of both, in an amalgam of theories that may enforce the rights embedded in the Fourth Amendment more powerfully than either can alone.

²¹⁵ *Id.* at 34.

²¹⁶ By limiting the scope of the technological trespass concept to technologies not "in general public use," *Kyllo* adapted—in favor of privacy—a standard of review announced in *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986). For an examination of how *Kyllo* changed the *Dow* standard, see Morgan Cloud, *Rube Goldberg Meets the Constitution: The Supreme Court, Technology and the Fourth Amendment*, 72 *Miss. L.J.* 5, 36–50 (2002).