

Northwestern Journal of Technology and Intellectual Property

Volume 17 | Issue 3

Article 3

5-2020

CARPENTER V. UNITED STATES AND THE SEARCH FOR THE FOURTH AMENDMENT

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Northwestern University Pritzker School of Law, J.D., 2020.

N O R T H W E S T E R N
JOURNAL OF TECHNOLOGY
AND
INTELLECTUAL PROPERTY

CARPENTER V. UNITED STATES
AND THE SEARCH FOR
THE FOURTH AMENDMENT

Lucas Henry Funk



May 2020

VOL. 17, NO. 3

CARPENTER V. UNITED STATES AND THE SEARCH FOR THE FOURTH AMENDMENT

*Lucas Henry Funk**

ABSTRACT—Every Fourth Amendment analysis begins with the threshold inquiry of whether there has been a search or seizure. But answering what constitutes a “search” for the purposes of the Amendment has shown to be a difficult task. This is especially so in a world that is constantly changing by way of technology. Since the Amendment was written, both the capabilities of law enforcement as well as the private and commercial use of information have drastically transformed. For that reason, the doctrine has evolved substantially. Search criterion has shifted from physical trespass to reasonable expectations of privacy. Further, no such expectation exists in information that one knowingly reveals to a third party. But, in the Digital Age, these principles suffer from lack of clarity. *Carpenter v. United States* was the most recent confluence of the Fourth Amendment and technology, wherein the Supreme Court held that a search occurs when the Government obtains a user’s cell site location information. This note analyzes that case, as well as historic and contemporary search doctrine. Ultimately, this Note argues that search questions—even those implicating technology—are best answered by applying the Amendment as written.

INTRODUCTION	370
I. THE ORIGINAL, PROPERTY-BASED FOURTH AMENDMENT	372
II. THE KATZ TEST.....	374
A. <i>Criticism of Katz</i>	375
III. THE THIRD-PARTY DOCTRINE	378
A. <i>Origin of the Third-Party Doctrine</i>	379
B. <i>Criticism of the Third Party-Doctrine</i>	381
IV. TECHNOLOGY AND THE FOURTH AMENDMENT	382
A. <i>Fourth Amendment Cases Involving Modern Technology</i>	382
V. <i>CARPENTER V. UNITED STATES</i>	384
A. <i>The Facts of Carpenter</i>	384
B. <i>The Technology of Carpenter</i>	384
C. <i>The Law of Carpenter</i>	385
D. <i>Response to Carpenter</i>	387
VI. SUGGESTED THEORIES OF FOURTH AMENDMENT INTERPRETATION	388
A. <i>The Four Models of the Fourth Amendment</i>	388
B. <i>The Positive Law Model of the Fourth Amendment</i>	390

VII. BACK TO BASICS 391
 A. *The Necessity of Neutral Principles* 391
 B. *A Law of Rules* 393
 C. *Institutionalism and the Separation of Powers* 395
 D. *The Fourth Amendment's Text* 396
 CONCLUSION 399

INTRODUCTION

In an early episode of *West Wing*, President Bartlet ruminates over who will be his first nomination to the Supreme Court.¹ The President is set to pick Judge Peyton Cabot Harrison III until Sam Seaborn, Deputy White House Communications Director, discovers a wrinkle: Judge Harrison authored an unsigned law review note in law school, wherein he explained that the Constitution does not provide for a generalized right to privacy. To him, the text did no such thing.² A meeting in the Oval Office follows, at which the President and company are disheartened to learn that Judge Harrison still holds that view and refuses to part from it.³

After the meeting comes to a sour end, Sam urges the President on the importance of the matter:

It's about the next 20 years; '20s and '30s, it was about the role of government; '50s and '60s, it was civil rights; the next two decades are going to be privacy. I'm talking about the internet. I'm talking about cell phones. I'm talking about health records, and who's gay and who's not. And moreover, in a country born on the will to be free, what could be more fundamental than this?⁴

Indeed, Sam's speech was as American as baseball, hotdogs, apple pie and Chevrolet. But was Sam's speech more than good, patriotic television? Was it good constitutional law?

Sam did hit the nail on the head in at least one respect: it *is* about cell phones. At least it was in *Carpenter v. United States*,⁵ the Supreme Court's latest significant dive into Fourth Amendment-search jurisprudence—an area of law marked by persistent confusion, and thus, the target of frequent and harsh scholarly criticism. It should, therefore, come as no surprise that

* Northwestern University Pritzker School of Law, J.D., 2020.

¹ *West Wing: The Short List* (NBC television broadcast Nov. 24, 1999).

² *Id.*

³ *Id.*

⁴ *Id.*; see also *West Wing - Short List - Supreme Court and Constitution*, YOUTUBE (Feb. 20, 2016), <https://www.youtube.com/watch?v=GaEBXmeaXbI> [<https://perma.cc/E66P-MQUM>] (advance video to 3:36).

⁵ 138 S. Ct. 2206 (2018).

Carpenter was high-profile and hotly discussed.⁶ Prior to *Carpenter*, various models of Fourth Amendment interpretation had been suggested, and surely post-*Carpenter*, more will follow. But the Court declined to adopt any such models, emphasizing the narrowness of its holding.⁷ Those who understand justice as a virtue with a slow and steady developmental pace may appreciate this move, and even more observers—conservative and liberal alike—can appreciate the normative outcome in light of a prevailing taste for privacy against government intrusion. Conversely, others may have been frustrated by the thin decision, hoping for the Court to once-and-for-all clarify the field by announcing a clear and coherent analytical framework for determining when a Fourth Amendment search has occurred.

Regardless, the topic's importance cannot be gainsaid. Whether or not a search has occurred in a given case is the threshold matter that determines whether the Fourth Amendment applies to the government's conduct at all. If a search (or seizure) has not occurred, such conduct is freed from the Amendment's warrant and probable cause requirements.⁸

In this Note, I will survey Fourth Amendment law generally up until *Carpenter* and then describe *Carpenter*'s holding. That will include a summary of the Fourth Amendment's original property-based notions, the *Katz* test, and the third-party doctrine. Along the way, I will mention some criticisms of each. Next, I will list two noteworthy alternative approaches to the Fourth Amendment that have been suggested by scholars. Finally, I will conclude by making (what I hope is) a series of unextraordinary suggestions: that the role of the Court is to say what the law is, notwithstanding externalities and desirable normative outcomes; and that the Court should first determine what the Fourth Amendment's text means, then apply it as such. But here is the (perhaps) extraordinary suggestion: if, after that exercise, judges, scholars, and citizens alike are displeased with the real-world results, the answer should *not* be permitting life-tenured, politically unaccountable judges to engage in a nebulous, open-ended determination of what they perceive as reasonable, or participate in judicial updating to the

⁶ See, e.g., Orin Kerr, *Four Thoughts on the Briefing in Carpenter v. United States*, LAWFARE (Nov. 17, 2017, 3:06 PM), <https://www.lawfareblog.com/four-thoughts-briefing-carpenter-v-united-states> [<https://perma.cc/SF4M-JQXP>]; National Constitution Center, *Does the Warrantless Search and Seizure of Cellphone Records Violate the Fourth Amendment?*, YOUTUBE (Oct. 31, 2017), <https://www.youtube.com/watch?v=hW32k7x7zE0> [<https://perma.cc/2KSV-DKQF>]; Brent Skorup & Melody Calkins, *A Supreme Court Call on the Third Party Doctrine*, WASH. TIMES (June 27, 2017), <https://www.washingtontimes.com/news/2017/jun/27/fourth-amendment-should-apply-to-phone-data/> [<https://perma.cc/YQY7-HXCU>].

⁷ *Carpenter*, 138 S. Ct. at 2220.

⁸ Probable cause and the warrant requirement are outside the scope of this article. The narrow focus herein is how courts should determine when a search has occurred for the purposes of the Fourth Amendment.

extent that they find it necessary. It should be to amend the text, or rely on the people's elected representatives to supplement it through legislation, because that is the only way to preserve the integrity of our system of carefully disbursed powers.

I. THE ORIGINAL, PROPERTY-BASED FOURTH AMENDMENT

The Fourth Amendment protects the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”⁹ Up until *Katz v. United States*¹⁰ in 1967, the Fourth Amendment's interpretive lens was property rights.¹¹ Colonists in the second half of the 1700s, fed up with King George III's abuses, considered paramount the enshrinement of a right against unreasonable searches and seizures.¹² Such a right was found in several state constitutions with language nearly identical to what would become the Fourth Amendment.¹³

Some scholars contend that, for a variety of reasons, it is difficult to say what the founding generation understood the word “search” to mean, and suggest that its meaning is best understood through the analysis of search and seizure cases that shortly preceded the Fourth Amendment.¹⁴ These cases typically involved “physical entries into homes, violent rummaging for incriminating items once inside, and then arrests and the taking away of evidence found.”¹⁵ An early case called *Wilkes v. Wood*¹⁶ suggested that “[f]orcing open a house and breaking open desks was a search, while grabbing the papers and removing them was a seizure.”¹⁷ Another named *Entick v. Carrington*¹⁸ indicated that “[s]earches referred to the forcing open of persons' houses and the breaking open of their desks and cabinets in an effort to find the evidence inside.”¹⁹

This theme continued into the ratification conventions. For instance, Patrick Henry, during Virginia's convention, argued against ratification partly because the Constitution did not contain any protection against

⁹ U.S. CONST. amend. IV.

¹⁰ 389 U.S. 347 (1967).

¹¹ Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 816 (2004) (“It is generally agreed that before the 1960s, the Fourth Amendment was focused on the protection of property rights against government interference.”).

¹² Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 70.

¹³ *Id.* at 70–71.

¹⁴ *Id.* at 72.

¹⁵ *Id.*

¹⁶ (1763) 98 Eng. Rep. 489 (KB).

¹⁷ Kerr, *supra* note 12, at 72.

¹⁸ (1765) 95 Eng. Rep. 807; 19 Howell's State Trials 1029 (KB).

¹⁹ Kerr, *supra* note 12, at 72–73.

unreasonable searches and seizures.²⁰ He expressed concern that federal officials seeking to enforce excise taxes could “go into your cellars and rooms, and search, ransack and measure, everything you eat, drink and wear.”²¹ Reflecting a property-focused understanding of the Fourth Amendment, *Boyd v. United States*²² explained that the “great end for which men entered into society was to secure their property.”²³ The same understanding is found in *Olmstead v. United States*.²⁴ There, the Supreme Court held that wiretapping was not a search or seizure because it did not violate Olmstead’s property rights.²⁵ In the language of the Court, “[t]here was no entry of the houses or offices of the defendants.”²⁶ In dissent, Justice Brandeis argued that “every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.”²⁷ In this way, Justice Brandeis was before his time, as the move from property to privacy did not become *en vogue* until sometime later.

Notwithstanding a doctrinal shift that occurred in the mid-20th century, at least some form of *Entick*’s property understanding is still alive today, evidenced in Justice Scalia’s majority opinion in *United States v. Jones*²⁸:

Our 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.²⁹

²⁰ *Id.* at 73.

²¹ Patrick Henry, Debates, the Virginia Convention (June 16, 1788), in *Ratification of the Constitution by the States: Virginia (3)*, 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1331 (John P. Kaminski & Gaspare J. Saladino eds., 1993). Henry asked “Suppose an exciseman will demand leave to enter your cellar or house, by virtue of his office; perhaps he may call on the militia to enable him to go. If Congress be informed of it, will they give you redress?” *Id.* at 1301. While this inquiry is surely less famous than Henry’s most famous exclamation—“Give me liberty or give me death!”—it is valuable insight into what the founding generation thought the Fourth Amendment meant. See Evan Andrews, *Patrick Henry’s “Liberty or Death” Speech*, HISTORY (Mar. 22, 2015), <https://www.history.com/news/patrick-henrys-liberty-or-death-speech-240-years-ago> [<https://perma.cc/G27V-H96G>].

²² 116 U.S. 616 (1886).

²³ *Id.* at 627 (quoting *Entick*, 19 Howell’s State Trials at 1066).

²⁴ 277 U.S. 438 (1928).

²⁵ *Id.* at 464.

²⁶ *Id.*

²⁷ *Id.* at 478 (Brandeis, J., dissenting).

²⁸ 565 U.S. 400 (2012).

²⁹ *Id.* at 405 (quoting *Entick*, 95 Eng. Rep. at 817).

II. THE KATZ TEST

Some forty years after *Olmstead*, the Supreme Court announced what would become a landmark decision in Fourth Amendment jurisprudence—*Katz v. United States*³⁰—in which Charles Katz was charged with transmitting wagering information by telephone.³¹ FBI agents eavesdropped on Katz’s conversations from a telephone booth by attaching an electronic listening device to the outside of the booth.³² In a significant doctrinal shift, the Court ruled that the Fourth Amendment protects people, not places.³³ Thus, what one seeks to preserve as private, even if in a public area, *may* be protected by the Fourth Amendment.³⁴ Therefore, the Court ruled that by eavesdropping on Katz’s conversations conducted inside the telephone booth, the government invaded Katz’s privacy.³⁵ As such, the government’s actions represented a constitutionally impermissible search under the Fourth Amendment because the surveillance did not have the required antecedent justification of a warrant.³⁶

To no avail, the government argued that the Fourth Amendment did not apply because the means of surveillance did not involve any physical intrusion.³⁷ The Court explained “we have since departed from the narrow view on which [*Olmstead*] rested . . . [and] have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements overheard without any ‘technical trespass under [] property law.’”³⁸ Therefore, the Court viewed property concepts as no longer controlling.³⁹ But even then, there was no talk of reasonable expectations in the majority opinion, only that “electronically listening to and recording the petitioner’s words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a ‘search and seizure’ within the meaning of the Fourth Amendment.”⁴⁰

³⁰ 389 U.S. 347 (1967).

³¹ *Id.* at 348.

³² *Id.*

³³ *Id.* at 351.

³⁴ *Id.* at 351–52.

³⁵ *Id.* at 353.

³⁶ *Id.* at 359.

³⁷ *Id.* at 352.

³⁸ *Id.* at 353 (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

³⁹ *Id.*

⁴⁰ *Id.*

Rather, the phrase “reasonable expectation of privacy” was first used in Justice Harlan’s concurrence,⁴¹ which would give rise to the analytical framework of the Court’s Fourth Amendment-search jurisprudence for many years. Specifically, Justice Harlan set forth a two-prong test: “first that a person [must] have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”⁴²

Justice Black was not impressed. In dissent, he argued that the Fourth Amendment simply did not bear the meaning afforded to it by the majority, and that it was not the proper role of the Court “to rewrite the Amendment in order ‘to bring it into harmony with the times’ and thus reach a result that many people believe to be desirable.”⁴³

A. Criticism of *Katz*

The newly pronounced Fourth Amendment inquiry in *Katz* did not go without criticism for long, and critiques persist to the present day. Negative commentary rolled in as early as 1974: “Justice Harlan himself later expressed second thoughts about this conception, and rightly so. An actual, subjective expectation of privacy obviously has no place in a statement of what *Katz* held or in a theory of what the Fourth Amendment protects.”⁴⁴ Following are two of the most straightforward, persistent critiques.

I. *Katz is Not Faithful to the Text of the Fourth Amendment*

An obvious problem with the *Katz* test, assuming even marginal respect for the Constitution’s text, is its lack of basis in the Fourth Amendment’s words. After all, a short “command + f”⁴⁵ will reveal that the word “privacy” is nowhere therein. Justice Scalia has characterized the test as “notoriously

⁴¹ See *id.* at 360 (Harlan, J., concurring) (“I join the opinion of the Court, which I read to hold only . . . that an enclosed telephone booth is an area where, like a home, and unlike a field, a person has a constitutionally protected reasonable expectation of privacy. . . .”) (citing *Weeks v. United States*, 232 U.S. 383 (1914); *Hester v. United States*, 265 U.S. 57 (1924)).

⁴² *Id.* at 361.

⁴³ *Id.* at 364 (White, J., dissenting).

⁴⁴ Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 384 (1974). Amsterdam continued:

[Subjective expectation of privacy] can neither add to, nor can its absence detract from, an individual’s claim to fourth amendment protection. If it could, the government could diminish each person’s subjective expectation of privacy merely by announcing half hourly on television that 1984 was being advanced by a decade and that we were all forthwith being placed under comprehensive electronic surveillance. . . . [N]either *Katz* nor the fourth amendment asks what we expect of government. They tell us what we should demand of government.

Id.

⁴⁵ Or “control + f” for those non-Mac users.

unhelpful” with “no plausible foundation in the text of the Fourth Amendment.”⁴⁶ He went on to say:

[The Fourth Amendment] did not guarantee some generalized “right of privacy” and leave it to [the Supreme] Court to determine which particular manifestations of the value of privacy “society is prepared to recognize as ‘reasonable.’” Rather, it enumerated (“persons, houses, papers, and effects”) the objects of privacy protection to which the *Constitution* would extend, leaving further expansion to the good judgment, not of this Court, but of the people through their representatives in the legislature.⁴⁷

Justice Thomas has similarly observed that “[t]he phrase ‘expectation(s) of privacy’ does not appear in the pre-*Katz* federal or state case reporters, the papers of prominent Founders, early congressional documents and debates, collections of early American English texts, or early American newspapers.”⁴⁸ He summarized that “[b]y defining ‘search’ to mean ‘any violation of a reasonable expectation of privacy,’ the *Katz* test misconstrues virtually” every word in the amendment.⁴⁹

If at this point, you are looking for the constitutional grounding of the *Katz* test, and neither the text of the amendment nor the majority or concurring opinions in the case provide you any answer, do not fret. Harvey Schneider, appellate counsel in the *Katz* case, experienced something of a revelation.⁵⁰ He explained:

I experienced a mind changing event. . . . As I ruminated about the *Katz* case, I reflected on my Torts class, especially the tort of negligence. I remembered we were taught that negligence was doing what a reasonable man would not do or failing to do what a reasonable man would do. . . . Then it hit me. We (both the Court and the attorneys) had it all wrong. The test for determining whether *Katz*’s communications had been constitutionally seized was not whether the FBI agents engaged in a trespass (a theory that the Court had already abandoned) or whether a public telephone booth was a constitutionally protected area. Rather, the test was whether a reasonable person . . . could have expected his communication to be private.⁵¹

Upon release of the opinion, it was clear that the Court was sufficiently persuaded by Schneider’s “mind changing event,” as it had adopted his

⁴⁶ *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring).

⁴⁷ *Id.* at 97–98 (internal citations omitted) (italics in original). In this way, it appears that Justice Scalia and Judge Harrison were cut from the same cloth.

⁴⁸ *Carpenter v. United States*, 138 S. Ct. 2206, 2238 (2018) (Thomas, J., dissenting).

⁴⁹ *Id.*

⁵⁰ See Harvey A. Schneider, *Katz v. United States: The Untold Story*, 40 MCGEORGE L. REV. 13, 18–19 (2009).

⁵¹ *Id.*

suggestion as the new standard for answering whether a Fourth Amendment search had occurred, despite the absence of any textual or historical mooring.⁵²

I will not plunge into the minutiae surrounding theories of constitutional interpretation, but hopefully it is not shocking to suggest that, regardless of theoretical differences, any constitutional interpretive framework must afford at least *some* weight to the text. For “our peculiar security is in the possession of a written constitution,” and we should not “make it a blank paper by construction.”⁵³

2. *Katz Requires Judges to Make Normative Decisions*

The judiciary does not properly serve any legislative function. Rather, it should “apply written laws to facts in cases that are actually before it.”⁵⁴ Yet the *Katz* test forces courts to do what is, in effect, legislation. *Katz* teaches that an expectation of privacy is actually reasonable when “the expectation be one that society is prepared to recognize as ‘reasonable.’”⁵⁵ But of course, that is impossible to do while maintaining participation in a neutral, legal decision-making enterprise, because the answer to the question of what society is prepared to recognize as reasonable “calls for the exercise of raw political will belonging to legislatures, not the legal judgment proper to courts.”⁵⁶

Even if the Court believed itself proper for making policy judgments on behalf of the laity, studies suggest that conflict exists between the opinion of the Court and that of the American people as to what is perceived as reasonable.⁵⁷ For example, one study found that survey participants and the Court disagree about whether police use of undercover agents to obtain information violates “justifiable expectations of privacy.”⁵⁸ While the Court

⁵² *See id.* at 21.

⁵³ Letter from Thomas Jefferson to Wilson Cary Nicholas (Sept. 7, 1803), in 41 THE PAPERS OF THOMAS JEFFERSON: 11 JULY TO 15 NOVEMBER 1803, 346, 347 (Barbara B. Oberg ed., 2014).

⁵⁴ Sen. Ben Sasse, *Sasse on Kavanaugh Hearing: “We Can and We Should Do Better than This”*, BEN SASSE: PRESS RELEASES (Sept. 4, 2018), <https://www.sasse.senate.gov/public/index.cfm/2018/9/sasse-on-kavanaugh-hearing-we-can-and-we-should-do-better-than-this> [https://perma.cc/H4LD-PXXB].

⁵⁵ *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

⁵⁶ *Carpenter v. United States*, 138 S. Ct. 2206, 2265 (2018) (Gorsuch, J., dissenting) (citing THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

⁵⁷ *See* Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at “Understandings Recognized and Permitted by Society”*, 42 DUKE L.J. 727, 732, 740–42 (1993) (“[T]he results strongly suggest that some of the Court’s decisions regarding the threshold of the Fourth Amendment and the warrant and probable cause requirements do not reflect societal understandings. Indeed, some of the Court’s conclusions in this regard may be well off the mark.”).

⁵⁸ *Id.* at 740.

is convinced that one assumes the risk that a “false friend”⁵⁹ will reveal confidences, survey participants found various types of undercover activity to be very intrusive.⁶⁰ Along the same lines, whereas the Court has held that a bank depositor “takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government,” survey participants found government perusal of bank records to be quite intrusive.⁶¹ Consider also government conduct such as entry onto the curtilage of one’s home or a dog’s sniff of an individual. Where the Court has held that neither implicate the Fourth Amendment,⁶² survey participants generally found both actions to be as intrusive as a “frisk.”⁶³ Perhaps this is why commentators have described the *Katz* test as “an unpredictable jumble,’ ‘a mass of contradictions and obscurities,’ ‘all over the map,’ ‘riddled with inconsistency and incoherence,’ ‘a series of inconsistent and bizarre results that the Court has left entirely undefended,’ ‘unstable,’ ‘chameleon-like,’ . . . ‘a conclusion rather than a starting point for analysis,’ ‘distressingly unmanageable,’ ‘a dismal failure,’ ‘flawed to the core,’ [and] ‘unadorned fiat.’”⁶⁴ At the end of the day, asking *courts* to determine what expectations of privacy *society* is prepared to recognize as reasonable, amid constantly changing technology, is arguably unreasonable.

III. THE THIRD-PARTY DOCTRINE

Not long after *Katz*, the third-party doctrine emerged. In short, the doctrine says that an individual lacks a reasonable expectation of privacy in information they voluntarily share with third parties, such as a bank, phone

⁵⁹ The “false friend” doctrine holds “evidence revealed to the government by a confidant of the defendant is admissible precisely because there is no reasonable expectation of privacy in such situations.” Donald L. Doernberg, “*Can You Hear Me Now?*”: *Expectations of Privacy, False Friends, and the Perils of Speaking Under the Supreme Court’s Fourth Amendment Jurisprudence*, 39 IND. L. REV. 253, 255 (2006).

⁶⁰ Slobogin & Schumacher, *supra* note 57, at 740.

⁶¹ *Id.* (quoting *United States v. Miller*, 425 U.S. 435, 443 (1976)).

⁶² See *Oliver v. United States*, 466 U.S. 170, 179–81 (1984) (holding that because fences and “No Trespassing” signs do not effectively bar the public from viewing open fields, an asserted expectation of privacy in open fields is not one that society recognizes as reasonable); *United States v. Place*, 462 U.S. 696, 707 (1983) (holding that exposure of luggage to a trained narcotics detection dog is not a search for Fourth Amendment purposes).

⁶³ Slobogin & Schumacher, *supra* note 57, at 740–41.

⁶⁴ *Carpenter v. United States*, 138 S. Ct. 2206, 2244 (2018) (Thomas, J., dissenting) (original brackets removed).

company, or credit card company.⁶⁵ It traces its roots to two cases: *United States v. Miller*⁶⁶ and *Smith v. Maryland*.⁶⁷ Explanations of each follow.

A. Origin of the Third-Party Doctrine

In *Miller*, the government charged Miller with various federal offenses, and he moved to suppress documentary evidence offered by the government: records obtained from his two bank accounts.⁶⁸ The records were obtained via subpoena, which required the president of each bank to appear and produce “all records of [Miller’s] accounts, i.e., savings, checking, loan or otherwise.”⁶⁹ The banks obliged and Miller was subsequently indicted.⁷⁰ Relying on *Boyd*, the court of appeals found that the government violated Miller’s Fourth Amendment rights by requiring the bank to produce the records, but the Supreme Court disagreed.⁷¹

Justice Powell, writing for the Court, explained that “‘no interest legitimately protected by the Fourth Amendment’ is implicated by governmental investigative activities unless there is an intrusion into a zone of privacy, into ‘the security a man relies upon when he places himself or his property within a constitutionally protected area.’”⁷² Because the records in this case were not within a zone of privacy, there was no Fourth Amendment violation.⁷³

But why did these records fall outside such protection? Because they were considered “business records of the banks.”⁷⁴ The Court reasoned that a “depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government,” and as such,

the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.⁷⁵

⁶⁵ Simon Stern, *The Third-Party Doctrine and the Third Person*, 16 NEW CRIM. L. REV. 364, 364 (2013).

⁶⁶ 425 U.S. 435 (1976).

⁶⁷ 442 U.S. 735 (1979).

⁶⁸ 425 U.S. at 435.

⁶⁹ *Id.* at 437.

⁷⁰ *Id.* at 438.

⁷¹ *Id.* at 439–40.

⁷² *Id.* at 440 (quoting *Hoffa v. United States*, 385 U.S. 293, 301–02 (1966)).

⁷³ *Id.* at 443.

⁷⁴ *Id.* at 440.

⁷⁵ *Id.* at 443.

Justice Brennan dissented, adopting the reasoning of the California Supreme Court.⁷⁶ That Court, ruling on a state constitutional provision which mirrored the Fourth Amendment, explained “[i]t cannot be gainsaid that the customer of a bank expects that the documents, such as checks, which he transmits to the bank in the course of his business operations, will remain private, and that such an expectation is reasonable.”⁷⁷ So it would seem to follow that “[a] bank customer’s reasonable expectation is that . . . the matters he reveals to the bank will be utilized by the bank only for internal banking purposes.”⁷⁸ Contemporary audiences may sympathize with Justice Brennan’s view, but he, like Justice Brandeis in *Olmstead*, was unable to convince his fellow justices.

Three years later, the Supreme Court again affirmed the third-party doctrine in *Smith*. In that case, a woman was robbed and subsequently received phone calls by a man who claimed to be the robber.⁷⁹ After being told by the man to go to her front porch, she recognized a vehicle passing by as the one that was used in connection with her robbery.⁸⁰ Police then traced the license plate number and discovered that the car belonged to Smith.⁸¹ At the request of the police, Smith’s phone company attached a pen register to his phone that would record the numbers he dialed.⁸² This evidence was used in Smith’s eventual indictment for robbery.⁸³

In rejecting Smith’s argument that installation of the pen register was a search, the Court followed *Katz*’s two-step analysis.⁸⁴ Justice Blackmun first explained that people do not retain an expectation of privacy in the numbers they dial, because they convey the dialed number to the phone company, who in turn makes records containing such information for the purposes of phone bills and the like.⁸⁵ Next, proceeding to *Katz*-step two, the Court said “even if petitioner did harbor some subjective expectation that the phone numbers he dialed would remain private, this expectation is not one that society is

⁷⁶ *Id.* at 447 (Brennan, J., dissenting).

⁷⁷ *Burrows v. Superior Court*, 529 P.2d 590, 593 (Cal. 1974).

⁷⁸ *Id.*

⁷⁹ *Smith v. Maryland*, 442 U.S. 735, 737 (1979).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 742–44.

⁸⁵ *Id.* at 742. If you thought that Amsterdam may have exaggerated earlier with his suggestion that after *Katz*, the government could diminish expectations of privacy by broadcasting on national television that it would engage in comprehensive surveillance of every citizen, think again. Justice Blackmun took time to explain that “[m]ost phone books tell subscribers, on a page entitled ‘Consumer Information,’ that the company ‘can frequently help in identifying to the authorities the origin of unwelcome and troublesome calls.’” *Id.* at 742–43.

prepared to recognize as reasonable.”⁸⁶ Relying on *Miller*, the Court explained “a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties,” because that person “assume[s] the risk” of disclosure.⁸⁷ Smith was out of luck because “[w]hen he used his phone, [he] voluntarily conveyed numerical information to the telephone company” and “assumed the risk that the company would reveal to police the numbers he dialed.”⁸⁸

B. Criticism of the Third Party-Doctrine

Commentary of the third-party doctrine has almost unanimously concluded that the doctrine is “not wrong, but horribly wrong,” which is especially obvious to anyone familiar with modern technology.⁸⁹ One commentator has observed that “[a] list of every article or book that has criticized the doctrine would make this the world’s longest law review footnote.”⁹⁰ Indeed, some suggest that the third-party doctrine “presents one of the most serious threats to privacy in the digital age” because “so much of what we do is recorded by third parties that the [doctrine] increasingly renders the Fourth Amendment ineffective in protecting people’s privacy against government information gathering.”⁹¹ Nor is this view exclusive to any particular judicial philosophy or political affiliation.

Justice Sotomayor has remarked “it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties.”⁹² In her view, the doctrine is “ill-suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks.”⁹³ Justice Gorsuch agrees:

Can the government demand a copy of all your e-mails from Google or Microsoft without implicating your Fourth Amendment rights? Can it secure your DNA from 23andMe without a warrant or probable cause? *Smith* and *Miller* say yes it can—at least without running afoul of *Katz*. But that result strikes most lawyers and judges today—me included—as pretty unlikely.⁹⁴

⁸⁶ *Id.* at 743 (internal quotation marks omitted).

⁸⁷ *Id.* at 743–44.

⁸⁸ *Id.* at 744.

⁸⁹ Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 564 (2009).

⁹⁰ *Id.* at 563 n.5.

⁹¹ Daniel J. Solove, *Fourth Amendment Codification and Professor Kerr’s Misguided Call for Judicial Deference*, 74 FORDHAM L. REV. 747, 753 (2005).

⁹² *United States v. Jones*, 565 U.S. 400, 417 (2012) (Sotomayor, J., concurring).

⁹³ *Id.*

⁹⁴ *Carpenter v. United States*, 138 S. Ct. 2206, 2262 (2018) (Gorsuch, J., dissenting).

IV. TECHNOLOGY AND THE FOURTH AMENDMENT

If you have not noticed by now, a persistent theme is the difficulties presented in trying to answer when a Fourth Amendment search has occurred against the backdrop of our use of, and law enforcement's access to, ever-evolving technology. It is one thing to answer whether a search has occurred when the government walks through your front door, into your office, and rummages through your desk; it is quite another to answer whether a search has occurred when the government is able, via technology, to know the otherwise unknowable without ever stepping foot or laying a hand on your property. What follows are some examples of the Fourth Amendment's relationship with modern(ish) technology, so the reader can get a sense of the difficult questions frequently presented. As an aside, before the tech enthusiasts riposte that the technology involved in these cases is not *that* advanced, consider that, to create doctrinal questions, technology need not be on the very cutting edge of the present day. It only need be something likely beyond the contemplation of the framers or that the Court has not previously considered.

A. Fourth Amendment Cases Involving Modern Technology

You can perhaps imagine Danny Kyllo's surprise when he learned that the warrant leading to the search of his home and his eventual indictment was in part based upon information gathered by something called an Agema Thermovision 210 thermal imager, which revealed heat emanating from his home consistent with that of high-intensity lamps used for marijuana growth.⁹⁵ Because the Agema Thermovision 210 was able to observe things that could not be observed with the naked eye, law enforcement was able to gather this information about Kyllo's home in just a few moments from across the street.⁹⁶ After the Ninth Circuit held that Kyllo's Fourth Amendment rights had not been violated, the Supreme Court granted certiorari.⁹⁷

In short, the Court held 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."⁹⁸ Because the thermal imager used by law enforcement in this case did just that, absent a warrant, an unlawful

⁹⁵ *Kyllo v. United States*, 533 U.S. 27, 29–30 (2001).

⁹⁶ *Id.* at 29–30.

⁹⁷ *Id.* at 31.

⁹⁸ *Id.* at 34 (internal citation and quotation marks omitted).

search had occurred.⁹⁹ Justice Scalia, anticipating the difficulties that would persist in the technological age, explained, “[w]hile the technology used in the present case was relatively crude, the rule we adopt must take account of more sophisticated systems that are already in use or in development.”¹⁰⁰ One commentator, responding to the “not in general use” language in the opinion, seemed to give a nod to Amsterdam’s earlier retort to the *Katz* test: “Would the widespread sale of cheap Ronco combo pocket-thermal-imagers-’n’-toenail-clippers give police greater constitutional leeway to scan houses?”¹⁰¹ *Kyllo* could be described as the most significant contemporary case to raise technology-search difficulties. But as promised, here is at least one more, the importance of which is that it seemingly revived the Fourth Amendment’s property foundation.

Antoine Jones was suspected of narcotics trafficking, so the government placed a GPS tracking system on a vehicle registered to his wife.¹⁰² The device enabled the government to gather 2,000 pages of data in a twenty-eight-day period, and Jones was eventually charged with the violation of multiple federal laws.¹⁰³ When the case arrived to the Supreme Court, the majority opinion, authored again by Justice Scalia, found for Jones. When the government placed the device on Jones’s vehicle, it occupied his private property, a physical intrusion within the meaning of the Fourth Amendment when adopted.¹⁰⁴ Because the government’s conduct amounted to an intrusion onto a constitutionally protected area—a vehicle, undoubtedly one’s “effect” within the meaning of the amendment—a search occurred.¹⁰⁵

So, in the world after *Jones*, property-based notions of the Fourth Amendment survive, but they are not the exclusive inquiry. If there’s no trespass, the *Katz* reasonable expectation of privacy test provides another route for those aggrieved by what they claim was a government search. That is unless that expectation of privacy regards information held by a third party.

⁹⁹ *Id.* at 40. In dissent, Justice Stevens argued that “any member of the public might notice that one part of a house is warmer than another part or a nearby building if, for example, rainwater evaporates or snow melts at different rates across its surfaces.” *Id.* at 43 (Stevens, J., dissenting).

¹⁰⁰ *Id.* at 36 (majority opinion).

¹⁰¹ John P. Elwood, *What Were They Thinking: The Supreme Court in Revue, October Term 2000*, 4 GREEN BAG 2D 365, 371 (2001); see Amsterdam, *supra* note 44.

¹⁰² *United States v. Jones*, 565 U.S. 400, 402–03 (2012).

¹⁰³ *Id.* at 403.

¹⁰⁴ *Id.* at 404–05.

¹⁰⁵ *Id.*

V. *CARPENTER V. UNITED STATES*

Timothy Carpenter and his fellow marauders were likely just trying to make a living (albeit dishonestly), rather than lay the groundwork for the next significant step in Fourth Amendment jurisprudence. But that is exactly what happened in the perfect storm that became *Carpenter v. United States*: the confluence of the *Katz* test, the third-party doctrine, and the problem of evolving technology.

A. *The Facts of Carpenter*

After one of Carpenter's accomplices confessed to their involvement with a string of store robberies, prosecutors obtained Carpenter's cell phone records pursuant to the Stored Communications Act, which "permits the Government to compel the disclosure of certain telecommunications records when it 'offers specific and articulable facts showing that there are reasonable grounds to believe' that the records sought 'are relevant and material to an ongoing criminal investigation.'"¹⁰⁶ A federal magistrate judge then issued two orders directing Carpenter's cell carriers to disclose the cell site location information (CSLI) during the four-month period when the robberies occurred.¹⁰⁷

B. *The Technology of Carpenter*

Now is an appropriate time for a brief aside on CSLI. For a cell phone to do nearly anything, it must connect to a cell tower.¹⁰⁸ Each time it does, the phone generates information stored by the phone company "about which tower the phone connected to—essentially where the phone was—on a given date and time."¹⁰⁹ These small bits of data create what is called CSLI, which is in turn stored by wireless providers.¹¹⁰ The number of cell towers ("cell sites") has increased with the number of cell phones and therefore increased the precision of the location information about users.¹¹¹ Before *Carpenter*, police could use this information, via statutes like the Stored Communications Act, to reconstruct almost anyone's movements over a period of many months.¹¹²

¹⁰⁶ *Carpenter v. United States*, 138 S. Ct. 2206, 2212 (2018) (citing 18 U.S.C. § 2703(d) (2012)).

¹⁰⁷ *Id.*

¹⁰⁸ Brief for Elec. Frontier Found. et al. as Amici Curiae Supporting Petitioner at 2, *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (No. 16-402).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

This is a wonderful thing for law enforcement. At least 95% percent of Americans own a cell phone, and most take it with them everywhere they go.¹¹³ In the United States, there are 396 million mobile devices.¹¹⁴ That is 72 million more cell accounts than people, at least at the end of 2016.¹¹⁵ While turned on, cell phones regularly send and receive information from cell towers, and each tower has multiple “sites” facing three or four different directions, each of which connects the phone to the cellular network.¹¹⁶ The user does nothing during this process, as the phone connects to sites automatically, moving from tower to tower along with the location of the phone (and therefore, the user).¹¹⁷ As cell phone use has continued to expand to the general public, so has the presence of cell sites, with now over 300,000 in the United States alone.¹¹⁸

Moreover, because smart phones do much more than make calls, they transmit and receive a huge amount of data.¹¹⁹ As users switched to smart phones, the amount of data transferred over wireless networks increased by 3,500% from 2010 to 2016.¹²⁰ And because the amount of cell sites and data transferred through them has similarly increased, so too has the accuracy of the location information that is generated.¹²¹ You can imagine how useful this information is for law enforcement looking to find out where a suspect has been and when.

C. *The Law of Carpenter*

Back to the case at hand. The Court first considered what to do with *Smith* and *Miller*. It remarked that the Court in the 1970s—which gifted us with the third-party doctrine—could not have comprehended the deeply

¹¹³ *Id.* at 5 (citing *Mobile Fact Sheet*, PEW RES. CTR. (Jan. 12, 2017), <http://www.pewinternet.org/fact-sheet/mobile> [<https://perma.cc/LQ86-SWFB>]).

¹¹⁴ *Id.* (citing CTIA, *Annual Year-End 2016 Top-Line Survey Results* 3 (May 2017) [hereinafter CTIA 2016 Survey], <https://www.ctia.org/docs/default-source/default-document-library/annual-year-end-2016-top-line-survey-results-final.pdf> [<https://perma.cc/-E8XT-YHDQ>] (reporting 396 million “wireless subscriber connections”)).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 6–7 (citing *Electronic Communications Privacy Act (ECPA) (Part II): Geolocation Privacy and Surveillance, Hearing Before the Subcomm. on Crime, Terrorism, Homeland Sec., and Investigations, of the H. Comm. on the Judiciary*, 113th Cong. 50, 53 (Apr. 25, 2013) [hereinafter 2013 Blaze Testimony] (written testimony of Matt Blaze, Professor, University of Pennsylvania), <https://www.govinfo.gov/content/pkg/CHRG-113hrg80542/pdf/CHRG-113hrg80542.pdf> [<https://perma.cc/7QMU-5UFZ>]).

¹¹⁷ *Id.* at 7.

¹¹⁸ *Id.* (citing CTIA 2016 Survey at 4 (reporting 308,334 cell sites in 2016)).

¹¹⁹ *Id.* at 9.

¹²⁰ *Id.* (citing CTIA 2016 Survey at 3 (reporting 388 billion megabytes in 2010 and 13,719 billion megabytes in 2016)).

¹²¹ *Id.* at 10–12.

revealing nature of CSLI.¹²² Because of that “unique nature,” the Court held that the third-party doctrine does not apply to CSLI.¹²³ So a search occurred when the Government obtained Carpenter’s CSLI.¹²⁴ And because that search did not occur pursuant to a warrant supported by probable cause—but rather, the Stored Communications Act, which requires a showing “well short” of probable cause—it was unreasonable and thus unconstitutional.¹²⁵

One proposition underpinning the holding is that a person generally has a reasonable expectation of privacy in the whole of their physical movements.¹²⁶ Historically, it was difficult and costly for law enforcement to embark on such comprehensive tracking, so it is reasonable that society expects law enforcement would not catalogue their every movement.¹²⁷ But now, as in its pursuit of Mr. Carpenter, the government can obtain a time-stamped record of an individual’s movement—revealing their familial, political, professional, and religious affiliations—in an easy, cheap, and efficient way.¹²⁸ That, the Court said, offends reasonable expectations of privacy.¹²⁹ Worse yet, “[w]ith access to CSLI, the Government can now travel back in time to retrace a person’s whereabouts, subject only to the retention policies of the wireless carriers, which currently maintain records for up to five years.”¹³⁰ This sort of “tireless and absolute” surveillance, to the Court, was too far,¹³¹ so it held that “when the Government accessed CSLI from the wireless carriers, it invaded Carpenter’s reasonable expectation of privacy in the whole of his physical movements.”¹³²

At this point, a dispassionate observer might be wondering how the third-party doctrine’s legs were so easily swept from beneath it. After all, at first glance, there does not appear to be any daylight between the sort of “business record” obtained by the government in *Smith* and *Miller*, and the CSLI obtained here: information kept by the service provider in the course of its business. This was the Government’s position in *Carpenter*.¹³³ It urged

¹²² *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 2221.

¹²⁶ *Id.* at 2217.

¹²⁷ *Id.*

¹²⁸ *Id.* at 2217–18.

¹²⁹ *Id.* at 2217.

¹³⁰ *Id.* at 2218.

¹³¹ *Id.*

¹³² *Id.* at 2219.

¹³³ *Id.*

that, at bottom, the legal question here “turns on a garden-variety request for information from a third-party witness.”¹³⁴

The Court responded that such a position “fails to contend with the seismic shifts in digital technology that made possible the tracking of not only Carpenter’s location but also everyone else’s, not for a short period but for years and years.”¹³⁵ To the Court, there is a “world of difference” between CSLI and the information at issue in *Smith* and *Miller*.¹³⁶ But is there? Again, the Court’s particular qualm with CSLI is that it reveals familial, political, professional, religious, and sexual associations.¹³⁷ And few would disagree that around-the-clock tracking, whether geographically or through a user’s “digital footprint,” does indeed reveal such things. But is it obvious that one’s bank statement does not? Hardly.

Sensing technology’s tendency for rapid development, and in line with its observation that “the rule the Court adopts must take account of more sophisticated systems that are already in use or in development,” the Court emphasized the narrowness of its holding.¹³⁸ The Court confined its rule to CSLI-type data and did “not disturb the application of *Smith* and *Miller* or call into question conventional surveillance techniques and tools, such as security cameras,” nor did it “address other business records that might incidentally reveal location information.”¹³⁹

D. Response to Carpenter

The dissenters were less than impressed. Justice Kennedy suggested that “the Court’s stark departure from relevant Fourth Amendment precedents and principles is, in my submission, unnecessary and incorrect.”¹⁴⁰ Justice Thomas’s chief complaint was that the majority “use[d] the ‘reasonable expectation of privacy’ test,” which “has no basis in the text or history of the Fourth Amendment. And, it invites courts to make judgments about policy, not law.”¹⁴¹ Justice Alito criticized the opinion for fracturing “two fundamental pillars of Fourth Amendment law, and in doing so, [guaranteeing] a blizzard of litigation while threatening many legitimate and valuable investigative practices upon which law enforcement has

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 2217.

¹³⁸ *Id.* at 2218, 2220 (internal quotation marks omitted) (quoting *Kyllo v. United States*, 533 U.S. 27, 36 (2001)).

¹³⁹ *Id.* at 2220.

¹⁴⁰ *Id.* at 2223 (Kennedy, J., dissenting).

¹⁴¹ *Id.* at 2236 (Thomas, J., dissenting).

rightfully come to rely.”¹⁴² Finally, Justice Gorsuch added that the opinion leaves lower courts with “two amorphous balancing tests, a series of weighty and incommensurable principles to consider in them, and a few illustrative examples that seem little more than the product of judicial intuition.”¹⁴³

On the other hand, the gallery was quite pleased. Various media characterized the decision as “a win for digital privacy advocates” that would have “implications for all sorts of information held by third parties, including browsing data, text messages, emails, and bank records.”¹⁴⁴ Enthusiasm was not in short supply, as some suggested that *Carpenter* was a “groundbreaking victory for privacy rights in the digital age”¹⁴⁵ and “a big win for privacy advocates” that “will likely have important consequences for cases across the country.”¹⁴⁶

VI. SUGGESTED THEORIES OF FOURTH AMENDMENT INTERPRETATION

If Fourth Amendment jurisprudence has anything going for it, it is that there is no dearth of suggested interpretations. What proceeds are a couple of those suggestions.

A. *The Four Models of the Fourth Amendment*

One mode of Fourth Amendment interpretation is really a collection of models for determining whether there is a reasonable expectation of privacy in a given case. It suggests that “no one test effectively and consistently distinguishes the more troublesome police practices that require Fourth Amendment scrutiny from the less troublesome practices that do not.”¹⁴⁷ This theory envisions that courts deciding whether a reasonable expectation of privacy exists in a particular case can choose from a toolbox of four distinct methods of answering that question.¹⁴⁸ Those four tools (or models) are deemed as follows: (1) Probabilistic, (2) Private Facts, (3) Positive Law, and (4) Policy.¹⁴⁹

¹⁴² *Id.* at 2247 (Alito, J., dissenting).

¹⁴³ *Id.* at 2267 (Gorsuch, J., dissenting).

¹⁴⁴ Louise Matsakis, *The Supreme Court Just Greatly Strengthened Digital Privacy*, WIRED (June 22, 2018, 12:26 PM) <https://www.wired.com/story/carpenter-v-united-states-supreme-court-digital-privacy/> [<https://perma.cc/8XJQ-49SJ>].

¹⁴⁵ Carol Rose, *U.S. Supreme Court Issues Groundbreaking Victory for Privacy Rights*, ACLU MASS., (June 22, 2018, 12:00PM) <https://www.aclum.org/en/news/us-supreme-court-issues-groundbreaking-victory-privacy-rights> [<https://perma.cc/F7MP-Y53S>].

¹⁴⁶ Rachel Levinson-Waldman, *Supreme Court Strengthens Digital Privacy*, BRENNAN CTR. FOR JUSTICE, (June 22, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/supreme-court-strengthens-digital-privacy> [<https://perma.cc/LA28-PUSX>].

¹⁴⁷ Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 506 (2007).

¹⁴⁸ *Id.* at 549–50.

¹⁴⁹ *Id.* at 508–22.

Under the Probabilistic Model, “a reasonable expectation of privacy depends on the chance that a sensible person would predict that he would maintain his privacy.”¹⁵⁰ This model relies on “social practices” to consider the likelihood that a person will be observed or a place investigated.¹⁵¹ Thus, “a person has a reasonable expectation of privacy when the odds are very high that others will not successfully pry into his affairs.”¹⁵² The odds of exposure are in an inverse relationship with the reasonableness of the expectation of privacy.¹⁵³ It is argued that, as with the other three models, the Court has already deployed this model before.¹⁵⁴

Next, the Private Facts Model “focuses on the information the government collects, and considers whether that information is private and worthy of constitutional protection.”¹⁵⁵ Under this approach, when the government obtains information that is especially private, the acquisition of that information constitutes a search—however, if the information collected is not private or does not otherwise merit protection, then no search has occurred.¹⁵⁶ The focus of this inquiry is the substance of a search rather than the procedure of it.¹⁵⁷

The third approach, called the Positive Law Model, is one in which the court looks at “whether there is some law that prohibits or restricts the government’s action (other than the Fourth Amendment itself).”¹⁵⁸ The government violates reasonable expectations of privacy when it breaks the

¹⁵⁰ *Id.* at 508.

¹⁵¹ *Id.*

¹⁵² *Id.* at 508–09.

¹⁵³ *Id.*

¹⁵⁴ *E.g.*, *Bond v. United States*, 529 U.S. 334, 338–39 (2000) (holding that a law enforcement officer’s physical manipulation of opaque bag that passenger carried onto cross-country bus and placed in rack directly above his seat violated Fourth Amendment prohibition against unreasonable searches of effects; although bus passenger had expectation that his bag might be handled by bus employee or other passenger, he did not have expectation that employee or other passenger would feel bag in exploratory manner); *Minnesota v. Olson*, 495 U.S. 91, 100 (1990) (holding that Defendant, who was overnight guest in upper part of duplex, had legitimate expectation of privacy in the premises which was protected by Fourth Amendment and, thus, had standing to challenge warrantless entry to effect his arrest).

¹⁵⁵ Kerr, *supra* note 147, at 512.

¹⁵⁶ *Id.* at 512–13.

¹⁵⁷ *Id.* at 513; *see, e.g.*, *Dow Chem. Co. v. United States*, 476 U.S. 227, 238–39 (1986) (holding that Environmental Protection Agency’s aerial photography of a chemical company’s 2,000-acre outdoor industrial complex, while EPA was lawfully within navigable air space, was not “search” for Fourth Amendment purposes, because “the photographs here are not so revealing of intimate details as to raise constitutional concerns; although they undoubtedly give EPA more detailed information than naked-eye views, they remain limited to an outline of the facility’s buildings and equipment”); *United States v. Jacobsen*, 466 U.S. 109, 114 (1984) (explaining that even when government agents may lawfully seize a sealed package to prevent loss or destruction of suspected contraband, the Fourth Amendment requires that they obtain a warrant before examining contents of such a package).

¹⁵⁸ Kerr, *supra* note 147, at 516.

law in order to obtain information.¹⁵⁹ Often, this question, under this approach, turns on whether the information collected was legally available to the public: “If a member of the public could have accessed the information legally, then it does not violate a reasonable expectation of privacy for the government to do the same.”¹⁶⁰ Like the other models, there are examples where the Court has followed what looks like the Positive Law Model.¹⁶¹

Lastly, the Policy Model asks “should a particular set of police practices be regulated by the warrant requirement or should those practices remain unregulated by the Fourth Amendment?”¹⁶² This model envisions judges as policymakers:

If the consequences of leaving conduct unregulated are particularly troublesome to civil liberties, then that conduct violates a reasonable expectation of privacy. On the other hand, if the practical consequences of regulating such conduct unnecessarily restrict government investigations given the gain to civil liberties protection, then any expectation of privacy is constitutionally unreasonable.¹⁶³

Therefore, in these circumstances, whether an “expectation of privacy is reasonable hinges on a normative value judgment.”¹⁶⁴ It is argued that this model was on display in *Katz* and *Kyllo*.¹⁶⁵

B. The Positive Law Model of the Fourth Amendment

While inspired by the model mentioned above,¹⁶⁶ this Positive Law Model is different.¹⁶⁷ It asks whether a government actor has done something

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *E.g.*, *Rakas v. Illinois*, 439 U.S. 128 (1978). The court explained “[o]ne of the main rights attaching to property is the right to exclude others, and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude.” *Id.* at 144 n.12 (internal citation omitted). Because the plaintiffs in the case “asserted neither a property nor a possessory interest in the automobile searched nor an interest in the property seized,” they “failed to show that they had any legitimate expectation of privacy in the glove compartment or area under the seat of the car in which they were merely passengers,” and thus “were not entitled to challenge a search of those areas.” *Id.* at 129.

¹⁶² Kerr, *supra* note 147, at 519.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 519–20.

¹⁶⁶ William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1825 n.8 (2016) (“Our term is taken from Orin S. Kerr[.]”).

¹⁶⁷ Most obviously because the author of the Four Models approach, which itself includes a positive law model, thinks *this* model is “seriously flawed as a method of interpreting the Fourth Amendment.” Orin Kerr, *Against the Positive Law Model in the Carpenter Cell-Site Case*, THE WASH. POST (Nov. 22, 2017, 12:06 PM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/11/22/against-the-positive-law-model-in-the-carpenter-cell-site-case/> [https://perma.cc/ST86-LMKU].

that would be unlawful for a similarly situated nongovernment actor to do.¹⁶⁸ In other words, “the Fourth Amendment is triggered if the officer—stripped of official authority—could not lawfully act as he or she did.”¹⁶⁹ Under this approach, a search happens when (1) a government actor violates a law that applies to both government and private actors; and (2) the government actor has taken advantage of an exception for government officials.¹⁷⁰

At first blush, some may accuse the Positive Law Model of being a mere recast of the original, property-based notions of the Fourth Amendment. But this model is distinct in that it draws on all bodies of the positive law to determine whether a search has occurred, not just property law.¹⁷¹ Moreover, in stark contrast to the Court’s use of general, conceptualized property notions before—those that “borrow[ed] the general look and feel of trespassory actions”—the Positive Law Model would formally incorporate *actual* positive law, chapter and verse, to determine “whether the officials in question were doing something that ordinary people would have gotten into legal trouble for doing in like circumstances.”¹⁷²

VII. BACK TO BASICS

As to where we should go from here, I submit that courts first determine what the Fourth Amendment meant when it was ratified and then apply that meaning in a straightforward way to new phenomena that exist today. If that leaves us dissatisfied, then our choices are to amend the Constitution or enact positive law to manifest our normative goals. But subverting our constitutional structure is not a viable choice, despite the challenge that technology may present to Fourth Amendment questions. This is based on a few assumed values: the necessity of neutral principles, a law of rules, institutionalism and the separation of powers, and the Fourth Amendment’s text. Following, I will explain each value and its application here.

A. *The Necessity of Neutral Principles*

The first premise should be noncontroversial. It is that in all cases, especially those of constitutional law, the question of whether to laud or condemn the Court’s decision cannot turn on “whether its result in the immediate decision seems to hinder or advance the interests or the values”

¹⁶⁸ Baude & Stern, *supra* note 166, at 1831.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *See id.* at 1834–35.

¹⁷² *Id.* at 1835–36.

that one favors.¹⁷³ If such were the rubric for appraisal, many may favor the decision in *Carpenter* for its protection of digital privacy; the merits of the Court's rationale fall into the background amid the immediate result—the striking down of an intrusive government search. The same can be said for *Katz*: most people balk at the suggestion that the government may listen in on their phone calls without implicating the Fourth Amendment. Understandably so.

But adoration for substantive outcomes should not mean sweeping procedural considerations into the dustbin: substantive outcomes, as in the legal result reached in the case, and procedural considerations, as in the method by which the court arrived at the particular substantive outcome. The dictate asserted here is that the method by which a result is reached must be based on neutral principles—those that rest “on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.”¹⁷⁴ After their adoption, “the principles must be applied ‘neutrally’—that is, consistently in comparable situations. . . . [O]nce the Court has chosen a generalizably applicable principle of interpretation for a particular constitutional provision,” such as the Fourth Amendment, “it may not selectively ignore that principle,” like the third-party doctrine, “in a particular case, merely because it does not like the specific result in that case.”¹⁷⁵

Carpenter, scrutinized under this rubric, leaves something to be desired. One “cannot fault the Sixth Circuit for holding that *Smith* and *Miller* extinguish any *Katz*-based Fourth Amendment interest in third party cell-site data,” because that “is the plain effect of their categorical holdings.”¹⁷⁶ Blindfolded to the implications on the ground, it is difficult to answer why the third-party doctrine’s straightforward application did not dispose of Mr. Carpenter’s arguments—at least legally speaking. But the Court—perhaps sensing how distasteful it would be to conclude that under its current precedents, the Government was not in error—opted for an “implicit but unmistakable conclusion that the rationale of *Smith* and *Miller* is wrong.”¹⁷⁷ Surely, the pace of justice, like that of the turtle, is slow and steady. Yet it is hard to not feel let down that the Court seems to have intentionally walked

¹⁷³ Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 11 (1959).

¹⁷⁴ *Id.* at 19.

¹⁷⁵ Martin H. Redish & Daniel M. Greenfield, *Bankruptcy, Sovereign Immunity and the Dilemma of Principled Decision Making: The Curious Case of Central Virginia Community College v. Katz*, 15 AM. BANKR. INST. L. REV. 13, 55 (2007). In other words, the ends, a priori, cannot justify the means. They are distinct inquires of equal importance.

¹⁷⁶ *Carpenter v. United States*, 138 S. Ct. 2206, 2272 (2018) (Gorsuch, J., dissenting).

¹⁷⁷ *Id.*

the batter instead of taking the more aggressive step of trying to strike it out for all time. The intentional walk may be the more prudent and strategic move in the long game. But some would rather see the head-on collision: if it is the case that the third-party doctrine is wrong—as the majority implicitly indicated—then get rid of it.

Some may understandably suggest that, at least in the context of digital privacy, “there are certain political results that are to be preferred, and legal principle must be circumvented to achieve these normative ends.”¹⁷⁸ After all, a majority of Americans, for instance, oppose government bulk collection of citizen data, and two thirds believe there are not sufficient limits on the types of data that can be collected.¹⁷⁹ But dispensing with legal principle to constitutionalize favorable policy reduces the judicial process to a political state of nature, a war of all against all, where, as Hobbes warned, life is “nasty, brutish and short.”¹⁸⁰ At the end, *Carpenter* is difficult to defend if committed to consistent and neutral principles of decision.

B. *A Law of Rules*

Justice Scalia, in his exploration of the dichotomy between the “general rule of law” and the “personal discretion to do justice,” shared a story of Louis IX of France:

In summer, after hearing mass, the king often went to the wood of Vincennes, where he would sit down with his back against an oak, and make us all sit round him. Those who had any suit to present could come to speak to him without hindrance from an usher or any other person. The king would address them directly, and ask: “Is there anyone here who has a case to be settled?” Those who had one would stand up. Then he would say: “Keep silent all of you, and you shall be heard in turn, one after the other.”¹⁸¹

At that point, a judgment would be rendered, and it would be binding.¹⁸² But that is not how justice ought to be done in the United States, because here,

¹⁷⁸ Redish & Greenfield, *supra* note 175, at 56.

¹⁷⁹ George Gao, *What Americans Think About NSA Surveillance*, National Security and Privacy, PEW RES. CTR. (May 29, 2015), <https://www.pewresearch.org/fact-tank/2015/05/29/what-americans-think-about-nsa-surveillance-national-security-and-privacy/> [<https://perma.cc/63VS-YPXN>].

¹⁸⁰ *Id.* (quoting THOMAS HOBBS, *THE LEVIATHAN: OR THE MATTER, FORME, AND POWER OF COMMONWEALTH, ECCLESIASTICAL AND CIVIL* 100 (Michael Oakshott ed., Collier Books 1962) (1651)).

¹⁸¹ Hon. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1175 (1989) (quoting Jean de Joinville, *The Life of Saint Louis*, in *CHRONICLES OF THE CRUSADES* 163, 177 (Margret R.B. Shaw ed. & trans., Penguin Books 1963)).

¹⁸² *Id.*

the *law* is king—the final sovereign.¹⁸³ Two precepts support this taste for bright-line rules as opposed to narrow, exception-based holdings, and both are offended by *Carpenter*'s holding.

First, a law of rules serves equal treatment. “When a case is accorded a different disposition from an earlier one, it is important, if the system of justice is to be respected, not only that the latter case *be* different, but that it *be seen to be so*.”¹⁸⁴ If not, litigants might doubt that they have received a fair shake. This notion strikes at the heart of a sense of justice innate in most from birth: that the rules should be the *same for everyone*. In *Carpenter* still, this sensibility is hardly offended, because the judgment resulted in a private-citizen-defendant's victory—not the converse, where the state-as-villain wins against the defendant who has substantially less resources and knowhow. But surely, most would agree that the proposition that “the rules should be the same for everyone” cuts both ways, notwithstanding who is a party to the litigation. And it will not always be the case that parting with the rules favors the little guy. Had the pronouncement in *Carpenter* been to convict the criminal defendant by dispensing with a longstanding rule that clearly applied and would have saved the day, red flags would have understandably been raised.

The second precept is that our judiciary is a hierarchical system. The Supreme Court announces its judgment, which is followed by the courts of appeals, the district courts, and the state courts when ruling on federal issues. When the Court decides issues narrowly, as it did in *Carpenter*, the lower courts are given little with which to work.

Recall that from the Republic's inception to the mid-twentieth century, the Fourth Amendment was based in property concepts. Then, the “premise that property interests control the right of the Government to search and seize” was “discredited,”¹⁸⁵ and the Court invented the reasonable expectation of privacy test, which was followed quickly by the third-party doctrine. Then, at the beginning of the twenty-first century, the Fourth Amendment's property origins were revived. Now, *Carpenter* carves out what appears to be a narrow exception to the third-party doctrine—if not an implicit repeal of it—but the Court, in its own words, does not comment on “real-time CSLI,” “tower dumps,”¹⁸⁶ “the application of *Smith* and *Miller*,”

¹⁸³ *Id.* at 1176 (citing Thomas Paine, *Common Sense*, in *COMMON SENSE AND OTHER POLITICAL WRITINGS* 3, 32 (Nelson F. Adkins ed., Liberal Arts Press 1953); ARISTOTLE, *THE POLITICS OF ARISTOTLE* 127 (Ernest Barker trans., Oxford 1946)).

¹⁸⁴ *Id.* at 1178 (emphasis in original).

¹⁸⁵ *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 304 (1967).

¹⁸⁶ The Court explains “tower dumps” as “a download of information on all the devices that connected to a particular cell site during a particular interval.” *Carpenter v. United States*, 138 S. Ct. 2206, 2220 (2018).

“conventional surveillance techniques and tools, such as security cameras,” or “other business records that might incidentally reveal location information.”¹⁸⁷

In this way, *Carpenter* raises more questions than it answers, and lower courts are left with little to guide them.¹⁸⁸ The result is a grant of the discretion to do justice, like Louis IX of France sitting under a summertime tree, taking each case as it comes, at which point a value judgment follows. But that is not the system we were given by the Framers, nor should it be the system that we want. *Carpenter* misses the mark if our ultimate end is a law of rules.

C. Institutionalism and the Separation of Powers

The next principle is what might be called institutionalism—or instead, a healthy respect for the separation of powers. With institutionalism, a court confronted with a doctrinal issue “must initially inquire whether that issue has already been resolved by the political branches in the form of legislation. In other words, it must first ask whether the judiciary is the appropriate governmental *institution*, under the circumstances, to make that normative policy choice.”¹⁸⁹ This view holds that, while the federal judiciary’s insulation from the political accountability enables it to enforce the counter-majoritarian Constitution, as a corollary, it requires “a substantial degree of political humility when engaging in the sub-constitutional process of statutory interpretation.”¹⁹⁰

Here, I take this theory one step further to suggest that the judiciary’s insulation from political accountability also requires it to exercise political humility in the form of fidelity to the written Constitution as ratified. Like the institutionalism described above, this too finds its roots in American political theory: “In a representative democracy, it is not the role of the unrepresentative and unaccountable federal courts to ignore, undermine, or reject” clear constitutional dictates.¹⁹¹ Indeed, “a fundamentally democratic society assumes as its ultimate normative political premise some notion of self-determination,” so it follows that we ought to accord respect to constitutional exercises of democratic will.¹⁹² But similarly, the same respect

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 2267 (Gorsuch, J., dissenting).

¹⁸⁹ Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An “Institutionalist” Perspective*, 83 NW. U. L. REV. 761, 765 (1989) (emphasis in original).

¹⁹⁰ Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and “The Martian Chronicles”*, 78 VA. L. REV. 1769, 1782 (1992).

¹⁹¹ *Id.*

¹⁹² Redish, *supra* note 189, at 762.

should be accorded when the people “prescribe specific normative principles of governmental behavior beyond the reach of simple majoritarian processes” through codification in the Constitution.¹⁹³

This is fundamental to our system. “The People, through ratification, have already weighed the policy tradeoffs that constitutional rights entail,” and those tradeoffs are not for the Court to reconsider or balance.¹⁹⁴ The Framers “knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people,” and therefore “were loath to leave too much discretion in judicial hands.”¹⁹⁵ These observations distill to the notion that no court has authority to “unilaterally alter” the Constitution that the people approved, especially when interpretive alterations are based on the Court’s sense of whether the rights codified are too broad or narrow for modern times.¹⁹⁶ This is not the role of the courts, yet it is exactly what *Katz* asks of them. Thereby, the doctrine is inconsistent with the structure of our government. This is why any theory of Fourth Amendment interpretation that leaves room for the courts to make value judgments must be declined. It is not for judges to mold or “new-model” the law.¹⁹⁷ Judges have but one job, which is to say what the law is.¹⁹⁸ It was Hamilton who described that liberty “ha[s] every thing to fear from [the] union’ of the judicial and legislative powers.”¹⁹⁹

D. *The Fourth Amendment’s Text*

The final point is the Fourth Amendment’s text. Notwithstanding the method of interpretation to which one commits themselves, we can hopefully all agree that the Court’s constitutional interpretation may “never contradict the document’s unambiguous textual maxims, regardless of any particular Justice’s agreement or disagreement with the sociopolitical value of those directives.”²⁰⁰ So to begin, we can read the words of the Fourth Amendment

¹⁹³ *Id.*

¹⁹⁴ *Luis v. United States*, 136 S. Ct. 1083, 1101 (2016) (Thomas, J., concurring).

¹⁹⁵ *Crawford v. Washington*, 541 U.S. 36, 67 (2004).

¹⁹⁶ *Carpenter v. United States*, 138 S. Ct. 2206, 2246 (2018) (Thomas, J., dissenting).

¹⁹⁷ Hon. Neil M. Gorsuch, *Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RES. L. REV. 905, 910 (2016) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *327).

¹⁹⁸ *Id.* at 911 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

¹⁹⁹ *Id.* at 913 (quoting THE FEDERALIST NO. 78 (Alexander Hamilton)).

²⁰⁰ Martin H. Redish & Matthew B. Arnould, *Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a “Controlled Activism” Alternative*, 64 FLA. L. REV. 1485, 1523 (2012).

to figure out, at the least, what it “cannot reasonably be construed to mean.”²⁰¹

1. *What the Fourth Amendment Does Not Say*

The Fourth Amendment’s text protects the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”²⁰² By process of elimination then, we know that the Fourth Amendment protects no thing that cannot be reasonably construed as a person, house, paper, or effect.

This exclusion leaves no room for the *Katz* test. If a reasonable expectation of privacy is found in a thing enumerated in the Amendment, the test is superfluous. If a reasonable expectation of privacy is found in a thing not enumerated in the Amendment, or if no reasonable expectation of privacy is found in a thing that is enumerated in the Amendment, it is in clear contradiction with the text. After all, we know that the word “search” and the phrase “reasonable expectation of privacy” had no legal association at all before *Katz*.²⁰³ Further, with *Katz* must go its outgrowths, including the third-party doctrine—either something is yours under the Amendment and thus constitutionally protected, or it is not. The analysis need not be more complicated than that.

This principle must also result in disqualifying the Positive Law Model because the “text of the Fourth Amendment cannot plausibly be read to mean ‘any violation of positive law’ any more than it can plausibly be read to mean ‘any violation of a reasonable expectation of privacy.’”²⁰⁴ Administrable as it is, the Positive Law Model fails for its lack of grounding in the text of the Amendment. Positive law may be *a* factor, but it cannot be *the* factor.

2. *What the Fourth Amendment Does Say*

It is easy to say what the text does not mean. Ascertaining with confidence what it does mean is quite another undertaking. Difficulties exist in determining what the words meant at the time of ratification and how they embrace new phenomena now, but we are not totally lost.

We know that “search” was probably not a term of art, and that its meaning to the founding generation was the same as it is today: “[t]o look over or through for the purpose of finding something; to explore; to examine

²⁰¹ *Id.* (emphasis omitted).

²⁰² U.S. CONST. amend. IV.

²⁰³ *Carpenter v. United States*, 138 S. Ct. 2206, 2238 (2018) (Thomas, J., dissenting) (“The phrase ‘expectation(s) of privacy’ does not appear in the pre-*Katz* federal or state case reporters, the papers of prominent Founders, early congressional documents and debates, collections of early American English texts, or early American newspapers.”).

²⁰⁴ *Id.* at 2242.

by inspection.”²⁰⁵ Regarding the categories of things protected by the Amendment, while we are not certain, we may be confident that “the available linguistic and statutory evidence suggests that ‘persons, houses, papers, and effects’ was understood to provide clear protection for houses, personal papers, the sorts of domestic and personal items associated with houses, and even commercial products or goods that might be stored in houses—while leaving commercial premises and interests otherwise subject to congressional discretion.”²⁰⁶

Furthermore, we know that to come within the protection of the Fourth Amendment, something must be yours. “The obvious meaning of the provision is that each person has the right to be secure against unreasonable searches and seizures in his own person, house, papers, and effects.”²⁰⁷ This culminates to the constitutional dictate that a search occurs when the government looks over or through your person, your house, your personal papers, or your effects, and that tent of protection also includes personal items and commercial products.

3. *What the Fourth Amendment Says About Technology*

Surely, there still exists what some see as a problem: technology and the Amendment’s mooring to property-trespass concepts. Perhaps one might conclude, on a strict construction of the Amendment’s text and history, that, when the government uses the latest and greatest tech to look straight through the wall of your home and into your living room, no search has occurred since it has not physically trespassed. This would seemingly be an extension of the notion that “the eye cannot by the laws of England be guilty of a trespass.”²⁰⁸ But the Fourth Amendment’s trespass foundation is based on “*actual intrusion* into a constitutionally protected area,” not technical trespass.²⁰⁹ To intrude is “to thrust oneself in without invitation, permission, or welcome.”²¹⁰ It does not seem too much of a stretch to suggest that the Government *intrudes* when it uses technology to place itself into a constitutionally protected area, such as your home, and thus a search occurs. Moreover, whether or not the technology used by the Government to achieve this is in general public use ought to command no weight at all—a search is a search. We need not confine ourselves to only phenomena that existed at

²⁰⁵ *Id.* at 2238 (quoting *Kyllo v. United States*, 533 U.S. 27, 32 n.1 (2001)).

²⁰⁶ Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 714 (1999).

²⁰⁷ *Minnesota v. Carter*, 525 U.S. 83, 92 (1998) (emphasis omitted).

²⁰⁸ *Boyd v. United States*, 116 U.S. 616, 628 (1886).

²⁰⁹ *Silverman v. United States*, 365 U.S. 505, 512 (1961) (emphasis added).

²¹⁰ *Intrude*, MERRIAM-WEBSTER (2020), <https://www.merriam-webster.com/dictionary/intrude> [https://perma.cc/F6T9-SWY3].

the time of the founding, and new phenomena ought not drive us away from principled constitutional analysis. Even Justice Scalia, ever the originalist, supported this notion.²¹¹

What about the not-so-clear cases, such as *Carpenter*? The instances where we entrust our information to a third party, or where the third party creates data about us without much involvement from us at all? Straightforward application of the Amendment may still suffice. Recall that the Amendment is animated when something is yours, and falls into one of the four buckets enumerated in the Amendment. More importantly, a third party's access "to or possession of your papers and effects does not necessarily eliminate your interest in them."²¹² This derives from the concept of bailment: "delivery of a thing in trust for some special object or purpose, and upon a contract, expressed or implied, to conform to the object or purpose of the trust."²¹³ As such, entrusting a thing that is "yours" to someone else does not deprive you of a property interest in that thing.

This principle can be extended to most data-related questions, with the view that your data—whether it be in the cloud, on your phone, or collected by your wireless provider—is the modern-day equivalent of your "papers and effects."²¹⁴ This remains true even if you happen to share control of such data with your wireless provider. Absolute ownership and control is not a precondition to the Fourth Amendment's protection: "People call a house 'their' home when legal title is in the bank, when they rent it, and even when they merely occupy it rent free."²¹⁵ The best part is that none of this requires mangling the text or fundamentally changing its substance.

CONCLUSION

Simple application of the Fourth Amendment's terms, even with its property foundation, will not render it irrelevant nor give rise to an Orwellian-surveillance state. The Amendment's jurisprudence only ventured so far off course when the Court strayed from its clear textual dictates.

²¹¹ PBS NewsHour, *Justice Scalia Writes Guide for Interpreting the Law*, YOUTUBE (Aug. 9, 2012), <https://www.youtube.com/watch?v=D3pcNmuK0mU> [<https://perma.cc/MC84-U2DJ>] (advance video to 5:25) ("It is not that I think the Constitution cannot be applied to new phenomena, such as television . . . of course it can. You have to figure out how those principles apply to new phenomena.").

²¹² *Carpenter v. United States*, 138 S. Ct. 2206, 2268 (2018) (Gorsuch, J., dissenting).

²¹³ *Id.* (quoting J. STORY, COMMENTARIES ON THE LAW OF BAILMENTS § 2, p. 2 (1832)). Justice Gorsuch further explains that a "bailee who uses the item in a different way than he's supposed to, or against the bailor's instructions, is liable for conversion." *Id.* at 2269. This canon has already been extended to the Fourth Amendment: "The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be." *Ex parte Jackson*, 96 U.S. 727, 733 (1877).

²¹⁴ *See Carpenter*, 138 S. Ct. at 2269 (Gorsuch, J., dissenting).

²¹⁵ *Id.* (quoting *Minnesota v. Carter*, 525 U.S. 83, 95–96 (1998) (Scalia, J., concurring)).

Imagine that your vehicle's GPS malfunctioned, instructing you to take a left turn when you should have taken a right, only for you to realize miles and miles later. Would you continue to charge forward down that path? Or would you accept the inevitable conclusion that you had been led astray, then course correct, turning back the way you came? It is okay for us to humbly accept that the *Katz* experiment and its progeny are a failure, and that it is time for us to turn back around.

By no means do I endeavor to provide a complete exegesis on the original Fourth Amendment—yet any meaningful constitutional interpretation must account for the text and history. Rather, I write in support of a Fourth Amendment course correction, and the proposition that when it comes to the meaning of the text when ratified, we are not totally lost. Upon studied care, we may discern a reasonably clear path going forward—one faithful to the Fourth Amendment's text, history, and meaning, as well as our system of government.

At bottom, fidelity to our constitutional structure and the role of the judiciary should drive us to take the Fourth Amendment for what it *says*, not what we *wish* it would say. Our carefully devised system of disbursed powers is too important to deconstruct for the sake of changing a provision that becomes politically unpopular. If we take issue with the protection that the Fourth Amendment affords, the proper course is to amend the provision or charge the branch most directly accountable to the people with protecting privacy by way of legislation. The answer is not to repose the responsibility of determining what the text ought to say in an unelected and politically unaccountable judiciary.