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Article

***Perspectives on the Fourth Amendment*  
Forty Years Later: Toward the Realization  
of an Inclusive Regulatory Model**

**Donald A. Dripps<sup>†</sup>**

I first read *Perspectives on the Fourth Amendment*<sup>1</sup> in the autumn of 1984. I was working on an article devoted to a recent Supreme Court decision recognizing a new exception to the exclusionary rule, and I was lucky enough to have an office four doors down from Wayne LaFave's. At some point Wayne told me "you really have to read this," and when Yoda speaks, the Jedi novitiate listens.

I remember reading it, transfixed, at a single sitting. Of all the legal scholarship I have read with admiration and excitement, only *Democracy and Distrust*—which I blundered into while checking citations for the law review and stayed up until dawn to finish—struck me so immediately and so convincingly as a tour de force, a classic.

My view is not eccentric. Justices of the Supreme Court have cited *Perspectives* thirteen times.<sup>2</sup> A 2012 study of the most-cited law review articles ranked *Perspectives* seventeenth.<sup>3</sup> Not seventeenth for criminal procedure or even for constitutional law generally—seventeenth.

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1. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974) [hereinafter *Perspectives*].

2. A search of the Westlaw Supreme Court Cases database for "Amsterdam /s perspectives on the fourth amendment" returned thirteen cases.

3. See Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1489 tbl.I (2012).

Not only is *Perspectives* very widely admired. That admiration seems greatest among specialists in the field—those who are paid to know this branch of the law and to criticize what has been said about it before. Those who have referred in print to *Perspectives* as a “classic” include the late Craig Bradley, David Sklansky, Chris Slobogin, Carol Steiker, and the late William Stuntz.<sup>4</sup> I add myself to this list,<sup>5</sup> less to pretend to luster by linkage than to prove conclusively that expressed admiration for *Perspectives* is not confined to nice people who might say nice things just to be nice.

The lectures focused on a series of questions: (1) What is the scope of the Fourth Amendment’s protections against “searches” and “seizures”?<sup>6</sup> (2) What interpretive method, narrowly historical or broadly normative, should be used to answer question 1?<sup>7</sup> (3) When the amendment does apply, what restrictions does it impose on government agents?<sup>8</sup> (4) In answering the previous question should we regard the amendment as protecting “atomistic spheres” of individual liberty, property, and privacy, or as protecting a general “right of the people to be secure” against police practices inconsistent with the values of a free society?<sup>9</sup> (5) Should the restrictions the amendment im-

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4. Craig M. Bradley, *The Reasonable Policeman: Police Intent in Criminal Procedure*, 76 MISS. L.J. 339, 342 (2006); David A. Sklansky, *Back to the Future: Kyllo, Katz, and Common Law*, 72 MISS. L.J. 143, 148 n.13 (2002); Christopher Slobogin, *Peeping Techno-Toms and the Fourth Amendment: Seeing Through Kyllo’s Rules Governing Technological Surveillance*, 86 MINN. L. REV. 1393, 1425 n.146 (2002); Carol S. Steiker, “First Principles” of Constitutional Criminal Procedure: A Mistake?, 112 HARV. L. REV. 680, 684 n.10 (1999); William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 3 n.2 (1997).

5. Donald A. Dripps, *The Fourth Amendment and the Fallacy of Composition: Determinacy Versus Legitimacy in a Regime of Bright-Line Rules*, 74 MISS. L.J. 341, 344 n.8 (2004).

6. *Perspectives*, *supra* note 1, at 361–62 (“The first question is whether the amendment should be viewed as a restriction upon only particular methods of law enforcement or as a restriction upon law enforcement practices generally.”).

7. *Id.* at 363 (“[A] fundamental question about the fourth amendment is what method should be used to identify the range of law enforcement practices that it governs and the abuses of those practices that it restrains.”).

8. *Id.* at 356 (proposing to address, *inter alia*, “the restrictions that the fourth amendment imposes upon those activities”).

9. Asking:

My second question is whether the amendment should be viewed as a collection of protections of atomistic spheres of interest of individual citizens or as a regulation of governmental conduct. Does it safeguard *my* person and *your* house and *her* papers and *his* effects against unreasonable searches and seizures; or is it essentially a regulatory

poses be articulated as categorical rules or as fine-grained standards?<sup>10</sup>

Broadly speaking, Professor Amsterdam answered these questions in favor of a normative, or at least very generally historical approach, to questions 1 and 2,<sup>11</sup> in favor of a “regulatory model” rather than the “atomistic model” with respect to questions 3 and 4,<sup>12</sup> and in favor of rules—ideally rules written at least in the first instance by the police—with respect to question 5.<sup>13</sup>

Forty years later, the Supreme Court has largely, but not yet completely, adopted the perspectives defended by Professor Amsterdam. What explains the limited but stubborn persistence of historical analysis, the atomistic perspective, and standards as opposed to rules? Much of the explanation lies in the institutional limits on judge-made law, limits Professor Amsterdam shrewdly yet generously surveyed. Nonetheless we may now foresee that technological and institutional changes might finally usher in a Fourth Amendment regime much like the one Professor Amsterdam defended.

This Article proceeds in five stages. First, I briefly summarize *Perspectives* and analyze just what features made it so celebrated. Second, I locate *Perspectives* in its particular point in

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canon requiring government to order its law enforcement procedures in a fashion that keeps us collectively secure in our persons, houses, papers and effects, against unreasonable searches and seizures?

*Id.* at 367 (last emphasis added).

10. *See id.* at 377 (“The question remains at what level of generality and in what shape rules should be designed in order to encompass all that can be encompassed without throwing organization to the wolves.”).

11. *See, e.g., id.* at 399 (“To suppose [the founders] meant to preserve to their posterity by guarantees of liberty written with the broadest latitude nothing more than hedges against the recurrence of particular forms of evils suffered at the hands of a monarchy beyond the seas seems to me implausible in the extreme.”); *id.* at 403.

The ultimate question, plainly, is a value judgment. It is whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society.

*Id.*

12. *See, e.g., id.* at 437 (“[U]pon a proper regulatory view of the fourth amendment and its implementing exclusionary rule, there is no necessary relationship between the violation of an individual’s fourth amendment rights and exclusion of evidence.”).

13. *See id.* at 409 (proposing “a requirement that police discretion to conduct search and seizure activity be tolerably confined by either legislation or police-made rules and regulations, subject to judicial review for reasonableness”).

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legal history, shortly after the Supreme Court applied the exclusionary rule to the states, a seismic shift that promptly called into question both the search-and-seizure practices of local police *and* the libertarian orientation of the pre-*Mapp* federal Fourth Amendment cases. When I first read *Perspectives* in the mid-1980s I was convinced that the unification of the state and federal law would lead inexorably to the triumph of the normative perspective on Fourth Amendment scope and the “regulatory perspective” on Fourth Amendment content. The historical perspective on scope, and the “atomistic perspective” on content, were, I thought, destined for the ashcan of history.

Part III considers some quite recent cases about the scope of the Fourth Amendment to show that while the historical perspective has made something of a comeback, it has returned in a form subtle enough to peacefully coexist with an approach based on contemporary social norms. Part IV makes a parallel point about recent rulings on Fourth Amendment content and remedies. The Court’s retreat from the full reach of some of its bright-line rules, and curtailment of the exclusionary rule, arguably suggest a reversion to atomism. This view, however, is implausible. The overall trend is toward the regulatory perspective. The Court is tweaking, not abandoning, the body of rules it has made. On the remedial side, institutional reform injunctions give a glimpse of what the final triumph of the regulatory perspective might look like.

Both historicism and an occasional reversion to standards, then, may be not only compatible with contemporary values and bright-line rules, but necessary means to the end of decent regulation of police whose necessary work, which always threatened the underclass with violence, now also threatens the elite with the pervasive maintenance of digital dossiers. The Justices are unlikely to adopt Fourth Amendment doctrine, whether premised on historical or contemporary values, that renounces any application to police use of high-tech surveillance and big data. Nor are they likely to adopt Fourth Amendment doctrine that gives the police imprecise guidance about when warrants are required and about the limits of warrantless actions.

Historical rhetoric will do more to destabilize pre-information-age precedents than to deregulate hi-tech investigations. Standards will reappear not to replace the corpus of rules but to save the corpus from perverse synergies. I see historicism and atomism less as rivals than as accomplices in the

project of adapting the law to our present circumstances. As all roads once led to Rome, all perspectives now lead to giving the Fourth Amendment a broad scope and a regulatory content.

In the fifth stage, I propose two concrete reforms to advance this overall project. First, rather than consult history, which if examined honestly and rigorously so often proves to be indecisive, or judicial intuition, which is vagrant and unprincipled, I suggest we ask, to the extent we can, the people themselves about their reasonable expectations of privacy. If the government fails to establish an online privacy registry where citizens can opt out of the assumption of risks much current doctrine imputes to them, the courts should hold that the assumption-of-risk doctrine has no application.

Second, Congress should go beyond the Rodney King Law—42 U.S.C. § 14141—that authorizes the Department of Justice to sue police departments for structural injunctions when the police department has engaged in a pattern or practice of constitutional violations. The early empirical evidence on these decrees is promising. Congress should build on this foundation by authorizing and funding the Justice Department to certify police departments for compliance, not just sue them for noncompliance. Any Congress willing to approve such a policy could find powerful incentives to encourage local departments to seek certification for best practices.

These proposals are but examples of how we might advance progress toward Fourth Amendment doctrine based on values widely shared across time and among persons, articulated as rules and enforced with the goal of future compliance. That progress is likely to continue whatever the precise reforms that move it forward.

Time may falsify my prophecy. In that case, Professor Amsterdam would have framed the issues for half a century without the vindication of practical success. *Perspectives on the Fourth Amendment* would still be ranked among the masterpieces of legal scholarship for just that—for framing deep and abiding issues with immense learning, acute analysis, and exquisite rhetoric.

## I. ANATOMY OF A CLASSIC

What makes *Perspectives* so exemplary? In the first place, *Perspectives* is a great law review article in part because it is not really a law review article at all. It is the text of three lectures sponsored by the Holmes Devise. They read much as they

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must have sounded to their original audience—vigorously argued but scrupulously fair-minded, glittering with wit, erudition, and occasional flights of righteous passion.

In the published version, this breathtaking intellectual cavalry charge is reinforced by the infantry, 598 notes strong. There may be an error somewhere among them, but I have never found one. Many of those notes reference collections or summaries of other sources, and I am quite confident, based on the depth of the other notes, that Amsterdam had read all the sources summarized or compiled. Even today this would be an extraordinary body of research. Assembled as it was in the days of index cards, photocopies, and typewriters, it is little short of astounding.

So *Perspectives* remains a captivating read supported by deep research. Countless law review articles, early and late, fail to achieve that much. But we expect still more from scholarship said to set a standard of excellence for decades. We expect an original argument that adds value, even if we as readers conclude that the argument is, in some or even all respects, mistaken. If you finish reading something in your field and realize that you will never think about your field as you have before, then you have just finished reading a classic.

For me, *Perspectives* passed this litmus test not once, but at least four separate times. First, *Perspectives* previewed an extended critique of the Supreme Court's jurisprudence with a remarkably acute, generous, and prescient analysis of the challenges faced by the Supreme Court in expounding the amendment.<sup>14</sup> Amsterdam recognized that the Court is a committee, that cannot always openly articulate all the reasons for its decisions, and that must decide particular cases based largely on the pull of their facts when these may not yet be, if ever they shall be, ripe for translation into general doctrinal formulations.

I say "prescient" because *Perspective's* prolegomenon on the difficulties of Supreme Court decision-making adumbrated a considerable body of justly celebrated future scholarship. Does not Amsterdam's account of the Fourth Amendment as the camel produced by a committee tasked with designing a horse resonate with Judge Easterbrook's application of Arrow's impossibility theorem to the Supreme Court<sup>15</sup>—published a

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14. See *id.* at 350–52.

15. Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982).

decade later in the *Harvard Law Review*?

Consider Amsterdam on the Court's obligation to decide concrete cases in the context of rapid technological and social change:

The Supreme Court ordinarily must decide the case before it. It must do so even though it is not prepared to announce the new principle in terms of comparable generality with the old, still less to say how much the old must be displaced and whether or how the old and new can be accommodated. If the Court declines to give birth to the new principle, it will never acquire the experience or the insight to answer these latter questions. If it attempts to answer them at the moment of the new principle's birth, it is not likely to answer them wisely.<sup>16</sup>

Does this not resonate with Cass Sunstein's analysis of "judicial minimalism,"<sup>17</sup> published a quarter of a century later by the Harvard University Press?

Second, in discussing his first two questions on the reach of the Fourth Amendment and constitutional methodology, Amsterdam brilliantly mediated between a narrow focus on the specific abuses inspiring the amendment—general warrants and writs of assistance—and an unconstrained equation of "reasonable" with modern values. He rejected exclusive reliance on specific practices because he correctly understood writs of assistance and general warrants as examples of a larger class, which might not have drawn the specific animosity of the founders only by the turn of the chances of class or politics. Does this not resonate with Professor Jed Rubenfeld's distinction between "founding era application understandings" and "founding era no application understandings,"<sup>18</sup> published thirty years later in the *Yale Law Journal*?

Amsterdam rejected a narrow focus on writs of assistance and general warrants. He said, "Growth is what statesmen expect of a Constitution."<sup>19</sup> He thought instead the amendment authorized and required posterity to determine the content of "unreasonable searches and seizures" by "our own lights"<sup>20</sup> bearing in mind the abuses that inspired, but did not delimit, the constitutional provision.

The ultimate question, plainly, is a value judgment. It is whether, if the particular form of surveillance practiced by the police is permitted

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16. *Perspectives*, *supra* note 1, at 352.

17. CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).

18. Jed Rubenfeld, *The Paradigm-Case Method*, 115 *YALE L.J.* 1977, 1982–90 (2006).

19. *Perspectives*, *supra* note 1, at 399.

20. *Id.* at 401.

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to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society.<sup>21</sup>

Third, Amsterdam beautifully penetrated the baseline problem in the assumption-of-risk cases. He said that the Court's holding that we trust informants at our own risk reflected

a notion of privacy or security that is entirely unworldly, as though these were absolute instead of relative things. The difference between the risk of faithlessness that we all run when we choose our friends and the risk of faithlessness that we run when government foists a multiplying army of bribed informers on us may well be a matter of degree; but of such degrees is liberty or its destruction engineered.<sup>22</sup>

This characterization of privacy as both agent-relative and scalar continues to resonate in the literature.<sup>23</sup>

Fourth, Amsterdam advanced the logical but strikingly original claim that the regulatory perspective's focus on future police conduct implied extending the exclusionary rule to evidence gathered legally as well as illegally, when the prospect of legal seizure gives law enforcement agents strong incentives to search illegally in future cases. Would we see today lawsuits like the *Floyd* litigation in New York,<sup>24</sup> if the Supreme Court had bitten the regulatory bullet and held that guns, but not illegal drugs, found during the course of *Terry* stops-and-frisks could be used in evidence? And does not Amsterdam's proposal to cabin stop-and-frisk by excluding drugs found during lawful searches for guns resonate with the leading alternative in the literature to put reasonable limits on computer searches—Orin Kerr's suggestion that the time may come for eliminating the plain view

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21. *Id.* at 403.

22. *Id.* at 407.

23. See David Alan Sklansky, *Too Much Information: How Not To Think About Privacy and the Fourth Amendment*, 102 CALIF. L. REV. 1069, 1110 (2014).

[Robert] Post usefully describes privacy not as a thing that people have but as a set of "social norms that define the forms of respect that we owe to each other," norms that are part of "the decencies of civilization." One implication of this view is that privacy is relational: the privacy that you have, want, or need vis-à-vis me may differ from the privacy that you have, want, or need vis-à-vis a third party. That is one reason why the Supreme Court has been wrong to declare that an individual can have no "legitimate expectation of privacy" in anything shared voluntarily with someone else—and one reason the Court has been right to ignore that principle when it protects, for example, the privacy of a telephone call.

*Id.*

24. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 667 (S.D.N.Y. 2013) (imposing a structural reform injunction on the New York City Police Department).



doctrine in digital search cases,<sup>25</sup> published thirty-three years later in the *Harvard Law Review*?

## II. PERSPECTIVES IN PERSPECTIVE

So *Perspectives* beautifully and prophetically framed the entire landscape of Fourth Amendment issues. Put abstractly those issues are today what they were then. What government practices constitute “searches” and “seizures”? What features of “searches and seizures” makes them reasonable or “unreasonable”? And when officers commit an “unreasonable” search or seizure, what remedy or sanction should follow the constitutional violation?

These questions bubble up to appellate courts in the context of their particular times. In 1974 legal, political, and technological developments raised new Fourth Amendment questions and called into question answers previously given. The principal legal development was the application of the Fourth Amendment exclusionary rule to the states by *Mapp v. Ohio* in 1961.<sup>26</sup> *Mapp* made Supreme Court rulings on the limits of law enforcement applicable not just to cases prosecuted in the federal courts but to every criminal case throughout the country.<sup>27</sup>

The federal law enforcement system was a small sliver of overall American policing. In 2001, the earliest year for which I have found statistics broken down for arrests by federal agents, and after considerable growth in the relative size of the federal system, there were more than thirteen million total arrests, less than 1% of them by federal agents for federal crimes.<sup>28</sup> What had

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25. Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 HARV. L. REV. 531, 583 (2005) (describing the case for abolishing the plain view doctrine in computer searches as premature but adding that “[a]bolishing the plain view exception may become an increasingly sound doctrinal response to the new dynamics of digital evidence collection and retrieval”). Recently Professor Kerr, without repudiating the prospect of excepting digital searches from the plain view doctrine, suggested that it may be more attractive to characterize the Fourth Amendment issue as the reasonableness of continuing seizures. See Orin S. Kerr, *Executing Warrants for Digital Evidence: The Case for Use Restrictions on Nonresponsive Data*, 48 TEX. TECH L. REV. 1, 22 (2015) (“[P]erhaps the key question raised by the execution of computer warrants is whether use of nonresponsive data renders the ongoing seizure of the data unreasonable rather than whether the plain view exception applies to digital evidence.”).

26. 367 U.S. 643 (1961).

27. *Id.* at 655.

28. UNIV. OF ALBANY, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 389 tbl.4.34 (2003), <http://www.albany.edu/sourcebook/pdf/t434.pdf> (finding federal agencies made a total of 118,896 arrests for federal offenses); Press Release,

been, prior to *Mapp*, a constitutional regime applicable to a handful of FBI and Treasury agents was transposed on to a vastly larger nationwide system dominated by urban police departments.

The technological and political developments were intertwined. As the technology of electronic surveillance became more sophisticated and less expensive,<sup>29</sup> domestic politics became polarized even by today's standards.<sup>30</sup> What the left saw as dissent the right saw as subversion. J. Edgar Hoover, who had overseen extensive warrantless electronic surveillance for political purposes, died in office as Director of the FBI in 1972.<sup>31</sup> Richard Nixon, who also superintended warrantless eavesdropping for political purposes, was reelected that November after the arrest of his operatives attempting to bug Democratic Party offices at the Watergate Hotel in June.<sup>32</sup>

These developments already had drawn the attention of the Supreme Court. In 1968, the *Terry* decision attempted to fit the square peg of urban street patrol into the round hole of the Fourth Amendment.<sup>33</sup> The result was a sort of search-and-seizure light, in which temporary detention for investigation and incidental protective search could be justified without warrant given facts that, although suspicious, fell short of probable cause.<sup>34</sup>

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Fed. Bureau of Investigation, Crime in the U.S. 2001 (Oct. 28, 2002), <https://www.fbi.gov/news/pressrel/press-releases/crime-in-the-united-states-2001-1> ("Law enforcement made an estimated 13.7 million arrests for criminal offenses (excluding traffic violations) in 2001, a 2.1-percent decline from the 2000 estimated total.")

29. See *Audiotechnics, New Detection Equipment (1960)*, MURRAY ASSOC., [http://www.spybusters.com/History\\_1960\\_Audiotechnics.html](http://www.spybusters.com/History_1960_Audiotechnics.html) (last visited Mar. 28, 2016) (exhibiting a 1960 ad for surveillance equipment including "midget pocket dictograph" and "double pen register and listening unit").

30. See, e.g., TODD GITLIN, *THE SIXTIES: YEARS OF HOPE, DAYS OF RAGE* 285–88 (1993).

31. See, e.g., Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083, 1132 (2002) ("As fears of Communism escalated and the authority to engage in electronic surveillance increased, widespread abuses began to occur. Hoover substantially abused his wiretapping authority by extensively wiretapping FBI critics, individuals whose views he disliked, and the enemies of his political allies.").

32. The first Article of Impeachment approved by the House Judiciary Committee charged Nixon with the cover-up of the burglary. The second charged, *inter alia*, abuse of electronic surveillance by the FBI and Secret Service. See *Articles of Impeachment*, WATERGATE.INFO, <http://watergate.info/impeachment/articles-of-impeachment> (last visited Apr. 2, 2016).

33. *Terry v. Ohio*, 392 U.S. 1 (1968).

34. See *Michigan v. Summers*, 452 U.S. 692, 698 n.7 (1981).

In 1967 the *Katz* decision famously brought interception of telephone communications under the rubric of Fourth Amendment “searches.”<sup>35</sup> Pre-*Katz* decisions held that the employment of informants was not a “search,” even when this involved entry of private premises by fraud.<sup>36</sup> What then of the case where the informant, his spying not subject to the Fourth Amendment, wears a hidden microphone that transmits the suspect’s every word to agents monitoring, perhaps recording, it from a remote location? In 1971, the Court held that electronic monitoring did not convert spying into a “search” subject to the warrant requirement.<sup>37</sup>

Against this background the various themes in *Perspectives* made a great deal of sense. Legislative default left regulation of police practices to the courts. The volume of ordinary criminal cases raising Fourth Amendment issues, after incorporation, demanded the articulation of doctrine as concrete bodies of categorical rules rather than leaving police and lower courts to guess about how the overall mantle of reasonableness applied in, literally, millions of cases. Surveillance technology, an indispensable law-enforcement tool prone to nefarious political abuse, had to be subjected to similar discretion-limiting doctrinal rules. And these rules would have made no difference unless they were backed

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In upholding the “frisk” employed by the officer in that case, the Court assumed, without explicitly stating, that the Fourth Amendment does not prohibit forcible stops when the officer has a reasonable suspicion that a crime has been or is being committed. See 392 U.S., at 32–33 (Harlan, J., concurring); *id.* at 34 (White, J., concurring). In *Adams v. Williams*, 407 U.S., at 146, the Court made explicit what was implicit in *Terry*:

“A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.”

*Id.*

35. *Katz v. United States*, 389 U.S. 347, 359 (1967) (holding that concealing a microphone on a telephone booth constitutes a Fourth Amendment “search”).

36. See *Hoffa v. United States*, 385 U.S. 293, 302–03 (1966) (holding that recruiting a close friend to spy on the suspect does not constitute a Fourth Amendment “search”); *Lewis v. United States*, 385 U.S. 206, 206–07, 212 (1966) (holding that undercover officer’s entry of suspect’s home by misrepresenting identity does not constitute a Fourth Amendment “search”); *Lopez v. United States*, 373 U.S. 427, 438 (1963) (holding that secret recording of conversation by one known by the suspect to be a government agent does not constitute a Fourth Amendment “search”).

37. *United States v. White*, 401 U.S. 745, 753–54 (1971) (holding that the secret recording of an undercover agent’s conversation with a suspect, including in suspect’s home, does not constitute a Fourth Amendment “search”).

by a remedial scheme that gave strong incentives for compliance in future cases.

One more tribute must be laid at the feet of *Perspectives*. It predicted, and may have encouraged, the Supreme Court's quiet but emphatic shift away from the historicism of *Olmstead* and the atomism of *Boyd*. For almost four decades following *Perspectives*, the Court indeed saw the scope of the Fourth Amendment through a normative rather than historical lens, and the content of the Fourth Amendment through a regulatory rather than atomistic perspective.<sup>38</sup>

This can be hard to see because the majority of Justices on the Burger and Rehnquist Courts held quite different values than Professor Amsterdam's. They nonetheless approached the meaning of "searches" from a normative viewpoint, and the meaning of "unreasonable" with a forward-looking focus on bright-line rules. Regarding scope, such cases as *Miller*<sup>39</sup> and *Smith*<sup>40</sup> extending the assumption-of-risk doctrine to bank rec-

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38. As Professor Sklansky rightly notes, the framework established by *Katz* was "firmly ahistoric." Sklansky, *supra* note 4, at 146; *see also* Dripps, *supra* note 5, at 343–44.

The basic methodology of balancing, which runs through the Burger Court's Fourth Amendment cases, is essentially legislative in form. One might argue that in this case, constitutional text delegates this sort of rule-making authority to the courts (a position I myself endorse), but if one were to design an analytical framework for the very purpose of provoking the charge of legislating from the bench, you could not do much better than a framework that calls upon courts to issue rules based on a balancing of interests.

The troubling subjectivity of interest-balancing did not induce a political outcry, probably because the Court was balancing interests with a thumb on the scales in favor of law enforcement. However, it did induce a reaction within the Court itself. Justice Scalia, rebelling against the subjectivity of rule-making based on interest-balancing, argued that the Court should consult founding-era common-law practice as a guide to Fourth Amendment interpretation.

Dripps, *supra* note 5, at 343–44 (footnotes omitted).

39. *United States v. Miller*, 425 U.S. 435, 446 (1976) (holding that a subpoena for suspect's bank records supported only by representation that the records were relevant to an ongoing criminal investigation did not violate suspect's Fourth Amendment rights). A subsequent statute, the Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401–3422 (2012), provided that the government notify the customer that it had ordered the customer's records, with notice and an opportunity to move to quash. The governing standard for subpoenas remained mere relevance, and § 3409 permits the government to delay notice by a showing that notice would endanger the investigation.

40. *Smith v. Maryland*, 442 U.S. 735, 745 (1979) (holding that warrantless use of a pen register to record numbers of suspect's outgoing calls does not violate Fourth Amendment). Congress responded by requiring law enforcement agents to obtain a court order before using either a pen register or a "trap and

ords and pen registers made no reference to the foundational abuses of general warrants and writs of assistance. The *Katz* formula became the preface to the application of contemporary values by a conservative judiciary.<sup>41</sup> Citizens have no reasonable expectation of privacy against subpoenas for their bank or credit card records because the Justices, not the founders, approved of such methods of law enforcement.

With respect to content the Court acknowledged the need for rules as early as the *Robinson* decision in 1974.<sup>42</sup> With respect to inventory searches of impounded vehicles, the Court held that otherwise legal searches violate the Fourth Amendment unless conducted pursuant to police-promulgated administrative rules.<sup>43</sup> In general, however, the Court responded to the need for rules and legislative abdication by deriving specific rules from the general language of the Fourth Amendment. Searches incident to arrest could extend to all effects on the person<sup>44</sup> or in the pas-

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trace” device, but, as in the aftermath of *Miller*, the orders are issued on a showing of relevance rather than reasonable suspicion or probable cause. See 18 U.S.C. § 3121 (2012).

41. See *Miller*, 425 U.S. at 442 (stating that in *Katz* the Court emphasized that “[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection” (citation omitted) (quoting *Katz v. United States*, 389 U.S. 347 (1967))); *id.* (“We must examine the nature of the particular documents sought to be protected in order to determine whether there is a legitimate ‘expectation of privacy’ concerning their contents.”); see also *Smith*, 442 U.S. at 739 (“In determining whether a particular form of government-initiated electronic surveillance is a ‘search’ within the meaning of the Fourth Amendment, our lodestar is *Katz v. United States* . . . .” (alterations in original) (footnote omitted) (citation omitted)).

42. *United States v. Robinson*, 414 U.S. 218, 235 (1973) (“[O]ur more fundamental disagreement with the Court of Appeals arises from its suggestion that there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest. We do not think the long line of authorities of this Court dating back to *Weeks*, or what we can glean from the history of practice in this country and in England, requires such a case-by-case adjudication.”).

43. See *Florida v. Wells*, 495 U.S. 1, 4 (1990) (“Our view that standardized criteria, or established routine must regulate the opening of containers found during inventory searches is based on the principle that an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence.” (citations omitted)).

44. See *Robinson*, 414 U.S. at 236 (“Since it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that [Officer] Jenks did not indicate any subjective fear of the respondent or that he did not himself suspect that respondent was armed. Having in the course of a lawful search come upon the crumpled package of cigarettes, he was entitled to inspect it; and when his inspection revealed the heroin capsules, he was entitled to seize them . . .”).

senger compartment of an arrested motorist's vehicle,<sup>45</sup> even when the specific facts suggested no danger to police or the possibility of recovering evidence that might otherwise be lost. The vehicle exception to the warrant requirement extended to any vehicle actually mobile, even when the vehicle is parked under police surveillance across the street from an open courthouse.<sup>46</sup> That exception extends to any effect within the vehicle, however temporarily and coincidentally present there.<sup>47</sup> If we leave aside irreducibly fact-sensitive determinations of probable cause and reasonable suspicion, the main area of Fourth Amendment reasonableness doctrine based on the "totality of the circumstances" is the voluntariness, and scope, of consent searches.<sup>48</sup>

Indeed no Justice has called for analyzing Fourth Amendment reasonableness in the totality of circumstances in each case. Rules are favored, and the dispute among Justices in Fourth Amendment reasonableness cases turns on the desirabil-

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45. See *New York v. Belton*, 453 U.S. 454, 460 (1981), *abrogated by Arizona v. Gant*, 556 U.S. 332 (2009).

In order to establish the workable rule this category of cases requires, we read *Chimel's* definition of the limits of the area that may be searched in light of that generalization. Accordingly, we hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.

It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach.

*Id.* (footnotes omitted) (citations omitted).

46. See *California v. Carney*, 471 U.S. 386, 404 (1985) (Stevens, J., dissenting) ("In this case, the motor home was parked in an off-the-street lot only a few blocks from the courthouse in downtown San Diego where dozens of magistrates were available to entertain a warrant application. . . . In the absence of any evidence of exigency in the circumstances of this case, the Court relies on the inherent mobility of the motor home to create a conclusive presumption of exigency." (footnote omitted)).

47. See *Wyoming v. Houghton*, 526 U.S. 295, 302 (1999) ("When there is probable cause to search for contraband in a car, it is reasonable for police officers—like customs officials in the founding era—to examine packages and containers without a showing of individualized probable cause for each one. A passenger's personal belongings, just like the driver's belongings or containers attached to the car like a glove compartment, are 'in' the car, and the officer has probable cause to search for contraband *in* the car.").

48. See, e.g., *United States v. Drayton*, 536 U.S. 194, 206–07 (2002) ("The Court has rejected in specific terms the suggestion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search. . . . Instead, the Court has repeated that the totality of the circumstances must control, without giving extra weight to the absence of this type of warning.").

ity of one rule or another.<sup>49</sup> Like the scope of “searches and seizures,” moreover, the content of these rules was derived from contemporary values and pragmatic policy considerations, rather than by analogy to historical practice. When the opinions on reasonableness did refer to history, they made it clear that history might inform, but did not control, the decisions.<sup>50</sup>

The law of Fourth Amendment remedies has followed a similar regulatory path. From the *Calandra* decision in 1974, the Court treated the exclusionary rule as justified solely by prospective deterrence.<sup>51</sup> Such exceptions as those for standing and good-faith reliance on warrants or statutes followed from the improbability of deterring future police violations.<sup>52</sup> The doctrines of qualified immunity and interlocutory appeal in tort suits against the police followed from the same regulatory perspective. The risk of suit is thought to discourage lawful but borderline police actions, calling for both qualified immunity<sup>53</sup> and

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49. See, e.g., *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 56–57 (1991) (holding that a presumption of unconstitutional warrantless arrest arises after forty-eight hours of detention without presentment to a judicial officer); *id.* at 68 (Scalia, J., dissenting) (“The data available are enough to convince me, however, that certainly no more than 24 hours is needed.”).

50. See, e.g., *United States v. Robinson*, 414 U.S. 218, 230 (“We would not, therefore, be foreclosed by principles of *stare decisis* from further examination into history and practice in order to see whether the sort of qualifications imposed by the Court of Appeals in this case were in fact intended by the Framers of the Fourth Amendment or recognized in cases decided prior to *Weeks*. Unfortunately such authorities as exist are sparse.”).

51. *United States v. Calandra*, 414 U.S. 338, 347 (1974) (“Instead, the rule’s prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures: ‘The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.’” (citation omitted)).

52. See *id.* at 348 (“This standing rule is premised on a recognition that the need for deterrence and hence the rationale for excluding the evidence are strongest where the Government’s unlawful conduct would result in imposition of a criminal sanction on the victim of the search.”); see also *United States v. Leon*, 468 U.S. 897, 921 (1984) (“Penalizing the officer for the magistrate’s error [in issuing a warrant without probable cause], rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.”).

53. See, e.g., *Anderson v. Creighton*, 483 U.S. 635, 646 (1987) (“The general rule of qualified immunity is intended to provide government officials with the ability ‘reasonably [to] anticipate when their conduct may give rise to liability for damages.’ Where that rule is applicable, officials can know that they will not be held personally liable as long as their actions are reasonable in light of current American law.” (alteration in original) (citation omitted)); *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982) (“As recognized at common law, public officers require this protection to shield them from undue interference

interlocutory review when immunity is denied.<sup>54</sup> Immunity and interlocutory review reduce that risk by leaving some victims of unconstitutional police action without any remedy at all.<sup>55</sup>

*Perspectives* argued for pursuing the regulatory model to the logical conclusion of suppressing evidence lawfully obtained when exclusion was necessary to deter illegal conduct in future cases.<sup>56</sup> The Justices have balked at this. The inevitable discovery exception to the exclusionary rule has the practical effect of sanitizing illegal searches.<sup>57</sup> The plain view doctrine, including the *Terry*-frisk “plain feel” analogue,<sup>58</sup> unconstrained by any in-

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with their duties and from potentially disabling threats of liability.”).

54. See *Mitchell v. Forsyth*, 472 U.S. 511 (1985) (holding that the denial of a motion for summary judgment based on qualified immunity is an appealable pre-trial collateral order); *id.* at 525–26 (“At the heart of the issue before us is the question whether qualified immunity shares this essential attribute of absolute immunity—whether qualified immunity is in fact an entitlement not to stand trial under certain circumstances. The conception animating the qualified immunity doctrine . . . is that ‘where an official’s duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken “with independence and without fear of consequences.” . . . [T]he ‘consequences’ with which we were concerned in *Harlow* are not limited to liability for money damages; they also include ‘the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service.’ Indeed, *Harlow* emphasizes that even such pretrial matters as discovery are to be avoided if possible, as ‘[i]nquiries of this kind can be peculiarly disruptive of effective government.’” (citations omitted)).

55. For example, when police execute a search warrant issued without probable cause, they violate the search victim’s Fourth Amendment rights, but under *United States v. Leon*, 468 U.S. 897 (1984), the evidence will not be suppressed absent an objectively unreasonable belief that probable cause exists. See *Malley v. Briggs*, 475 U.S. 335, 344 (1986) (“[T]he same standard of objective reasonableness that we applied in the context of a suppression hearing in *Leon*, defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest.” (citations omitted)); *cf.* *Leon*, 468 U.S. at 960 (Stevens, J., concurring and dissenting) (“The Court assumes that the searches in these cases violated the Fourth Amendment, yet refuses to apply the exclusionary rule because the Court concludes that it was ‘reasonable’ for the police to conduct them. In my opinion an official search and seizure cannot be both ‘unreasonable’ and ‘reasonable’ at the same time.”).

56. See *Perspectives*, *supra* note 1, at 437 (“My legal justification is that, upon a proper regulatory view of the fourth amendment and its implementing exclusionary rule, there is no necessary relationship between the violation of an individual’s fourth amendment rights and exclusion of evidence.”).

57. For example, “inevitable discovery” during an “inventory search” has rescued evidence otherwise inadmissible under *Arizona v. Gant*. See, e.g., Scott R. Grubman, *Bark with No Bite: How the Inevitable Discovery Rule Is Undermining the Supreme Court’s Decision in Arizona v. Gant*, 101 J. CRIM. L. & CRIMINOLOGY 119, 161 n.389 (2011) (listing cases).

58. *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993) (“We think that this



advertent discovery requirement,<sup>59</sup> likewise encourages subjecting innocent people to speculative stops.<sup>60</sup> In short, the Court has tolerated *illegal* police conduct to encourage *legal* police conduct, but has refused to condemn *legal* police conduct to discourage *illegal* conduct.

So from 1974 until the turn of the millennium the Court adopted Amsterdam's normative and regulatory perspectives, but applied them so as to limit the scope, and relax the content, of the Fourth Amendment. The worldviews of individual Justices surely played some part in this. The increase in violent crime in the 70s and 80s, coupled with the increasingly pervasive sense that drug crimes, so often the offense of arrest in Fourth Amendment cases, were morally equivalent to violent crimes, also surely played a part. I turn now to some portentous changes in Fourth Amendment law since the advent of the new millennium.

### III. WINDS OF CHANGE: FOURTH AMENDMENT SCOPE

Broadly speaking, Professor Amsterdam contrasted a narrowly historical judicial approach to the Fourth Amendment's scope with a more generally historical, and more openly normative, judicial approach. "Searches and seizures" should be seen not solely as violations of individual rights but as instances of police practices that if "permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society."<sup>61</sup> If the Fourth Amendment

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[plain view] doctrine has an obvious application by analogy to cases in which an officer discovers contraband through the sense of touch during an otherwise lawful search.").

59. See *Horton v. California*, 496 U.S. 128, 130 (1990) ("We conclude that even though inadvertence is a characteristic of most legitimate 'plain-view' seizures, it is not a necessary condition.").

60. Police use of stop-and-frisk as a pretext was recognized as early as *Perspectives* itself, where Amsterdam, after quoting the statement "[p]olice power exercised without probable cause is arbitrary" from the AACP LDF brief in *Terry*, wrote "[a]nyone who has witnessed the administration on the streets or in a trial court of the stop-and-frisk powers that the Supreme Court subsequently validated knows that this most dire of predictions proved to be an understatement." *Perspectives*, *supra* note 1, at 395. For more recent evidence, see, for example, *Floyd v. City of New York*, No. 08 Civ. 1034, 2013 WL 4046209 (S.D.N.Y. Aug. 12, 2013); Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 CRIMINOL-OGY & PUB. POL'Y 315 (2004) (finding that 30% of observed *Terry* stops violated Fourth Amendment even when coding borderline cases as legal).

61. *Perspectives*, *supra* note 1, at 403.

were deemed applicable, he favored a forward-looking regulatory perspective over the retrospective atomistic perspective.<sup>62</sup>

In the years after *Perspectives* the empty *Katz* formula governed the definition of “searches,” and reasonableness was determined by pragmatic balancing of contemporary interests expressed as generally pro-government bright-line rules. A working majority of the Court held a very different vision than Professor Amsterdam’s of when, if surveillance were “permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society.”<sup>63</sup>

Cases in the new millennium have departed from this pattern. A rival to the pro-law-enforcement understanding of *Katz* has emerged, in the form of a historical understanding of the baseline set by *Katz*.<sup>64</sup> The old notion of search as trespass has resurfaced as a supplement to this marriage of *Katz* with originalism.<sup>65</sup> The Justices likewise have qualified the bright-line rules they developed to define the boundaries of reasonable and unreasonable searches. No longer may police automatically search vehicles incident to arrest of the occupant,<sup>66</sup> or pry into the cell phone of a suspect taken into custody.<sup>67</sup>

For those used to the steady drumbeat of prosecution wins in Fourth Amendment cases during the last quarter of the twentieth century, the list of important cases won by the defense and lost by the government is, well, an arresting development. Yet changes in personnel have not wrought major changes in the Court’s collective center of ideological balance. Apparently the combination of interlocking safe-harbor rules for the police and increasingly powerful surveillance techniques has inspired something of a comeback for the civil liberties side of the balance.

The question of Fourth Amendment scope is logically prior to the question of Fourth Amendment reasonableness. So let us examine changing technology’s pressure on doctrine about the scope of “searches and seizures” before I turn to the evolutionary forces working on the definition of reasonableness. I start with the emergence of Justice Scalia’s historical test, then describe

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62. See *supra* notes 9–12 and accompanying text.

63. *Perspectives*, *supra* note 1, at 403.

64. See *infra* text at note 99.

65. See *infra* notes 72–74 and accompanying text.

66. See *infra* note 183 and accompanying text.

67. See *infra* notes 184–85 and accompanying text.

how the Court has resurrected trespass analysis to evade grappling with the application of the *Katz* test to the pervasive monitoring modern technology makes possible. The trespass dodge, however, is only temporary. Lower courts are hearing challenges to pervasive location surveillance, accomplished without any trespass. Whether considered from a historical or a contemporary vantage point, these cases are likely to lead to major modifications of the assumption-of-risk and third-party doctrines.

A. KYLLO AND THE NEW HISTORICISM

As the twenty-first century opened, the contemporary values approach was challenged by a new historicism in *Kyllo v. United States*.<sup>68</sup> Federal agents obtained a warrant to search Kyllo's home for marijuana based on a showing of probable cause that included evidence collected by a thermal imager. The imager detected infrared radiation emanating from the home and created a picture of intense heat sources inside. These heat sources might be perfectly legal, such as a pottery kiln or indoor lights used to grow rare orchids. They might also be produced by indoor grow lights used to grow marijuana.

The agents obtained their warrant based on the infrared images and other evidence. Kyllo moved to suppress the evidence found through the use of the thermal imager. If use of the imager were classified as a "search" of Kyllo's home, it would have been a search based on questionable probable cause and the unquestionable absence of a warrant.

The case was hard, because the technology revealed details of life inside the home by reading radiation that the homeowner, knowingly or unknowingly, generated without any pressure by government agents. Justice Stevens applied the assumption-of-risk cases and would have held that there was no search.<sup>69</sup> Justice Stevens, however, wrote for the dissenters.

Justice Scalia's majority opinion saw the new technology as a threat to founding-era values:

[O]btaining by sense-enhancing technology any information regarding the home's interior 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

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68. 533 U.S. 27 (2001).

69. *Id.* at 41 (Stevens, J., dissenting) ("There is, in my judgment, a distinction of constitutional magnitude between 'through-the-wall surveillance' that gives the observer or listener direct access to information in a private area, on the one hand, and the thought processes used to draw inferences from information in the public domain, on the other hand.").

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.<sup>70</sup>

The imager provided information about the home that government agents could not have learned in 1791 without a physical entry.

It would be a mistake to equate Justice Scalia's trespass test as equating Fourth Amendment searches, one for one and jot for jot, with actionable trespasses under the common law, whether vintage 1791 or vintage 2013.<sup>71</sup> Justice Scalia's historicism is not the extreme position criticized in *Perspectives*, the position—rejected, as *Perspectives* pointed out, not just by *Katz* but by *Boyd* back in the nineteenth century<sup>72</sup>—that the Amendment condemns only forcible home invasions under general warrants.

Rather, Justice Scalia aims to “assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.”<sup>73</sup> That is indeed a historical approach, but one very much in the spirit of *Boyd* and celebrated by Professor Amsterdam.<sup>74</sup> As police technology advances, translating how its use might have been viewed at the founding, when professional police departments themselves were an unimagined institution, turns more and more on the values we impute to the founders. As Professor Amsterdam pointed out, there is a standing temptation to impute one's own

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70. *Id.* at 34–35 (majority opinion) (citation omitted) (footnote omitted).

71. See Sklansky, *supra* note 4, at 188 (“*Kyllo* asks a different question about the past: not whether the challenged government conduct would have constituted an illegal search or seizure at common law, but whether the conduct, if constitutionally unregulated, would ‘shrink the realm of . . . privacy . . . that existed when the Fourth Amendment was adopted.’” (footnote omitted)).

72. See *Perspectives*, *supra* note 1, at 364–65.

73. *Kyllo*, 533 U.S. at 28.

74. See *Boyd v. United States*, 116 U.S. 616, 635 (1886) (“Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance.”).

values to the framers.<sup>75</sup> In Fourth Amendment cases, at least, the line between originalism and the living constitution has begun to blur.<sup>76</sup>

B. *JONES, JARDINES* AND THE CURRENT TRUCE BETWEEN *KATZ* AND THE NEW HISTORICISM

The two recent trespass-based decisions—*Jones v. United States*<sup>77</sup> and *Florida v. Jardines*<sup>78</sup>—do more to reinforce convergence than to suggest the distinctiveness of contemporary and historical perspectives.

Antoine Jones [was the target of a federal narcotics investigation.] . . . [A]gents installed a GPS tracking device on the undercarriage of the Jeep while it was parked in a public parking lot. Over the next 28 days, the Government used the device to track the vehicle's movements, and once had to replace the device's battery when the vehicle was parked in a different public lot in Maryland. By means of signals from multiple satellites, the device established the vehicle's location within 50 to 100 feet, and communicated that location by cellular phone to a Government computer. It relayed more than 2,000 pages of data over the 4-week period.<sup>79</sup>

The agents had obtained a warrant but the government conceded that the surveillance just described exceeded the warrant's limits on the location and length of the monitoring.<sup>80</sup>

In one of those committee decisions Professor Amsterdam described, the Court unanimously held that the use of the GPS tracking device on the suspect's vehicle was a "search" subject to the Fourth Amendment warrant requirement. Harmony on decision accompanied cacophony on rationale.<sup>81</sup> Justice Scalia, in a majority opinion joined without separate comment by Chief Justice Roberts, Justice Kennedy, and Justice Thomas, con-

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75. See *Perspectives*, *supra* note 1, at 400 ("To be sure, the framers appreciated the need for a powerful central government. But they also feared what a powerful central government might bring, not only to the jeopardy of the states but to the terror of the individual. When I myself look back into that variegated political landscape which no observer can avoid suffusing with the color of his own concerns, the hues that gleam most keenly to my eye are the hues of an intense sense of danger of oppression of the individual.").

76. Indeed, as I have argued elsewhere, the more sophisticated the originalism the more closely it resembles openly normative accounts. See Donald A. Dripps, *Responding to the Challenges of Contextual Change and Legal Dynamism in Interpreting the Fourth Amendment*, 81 MISS. L.J. 1085, 1128–31 (2012).

77. 132 S. Ct. 945 (2012).

78. 133 S. Ct. 1409 (2013).

79. *Jones*, 132 S. Ct. at 948.

80. *Id.* at 948 n.1.

81. See *Perspectives*, *supra* note 1, at 350.

cluded that *placing the device on the suspect's vehicle* amounted to a trespass requiring a specific warrant.<sup>82</sup> Justice Alito, joined by Justices Ginsburg, Kagan, and Breyer, applied the *Katz* formula and concluded that the length and detail of the surveillance violated prevailing expectations, and would be a search even if the same information were acquired by the government without physical trespass.<sup>83</sup> Justice Sotomayor joined the Scalia opinion, making a majority, but filed a separate opinion strongly hinting her sympathy for Justice Alito's approach.<sup>84</sup>

Justice Scalia deployed the *Katz*-plus-trespass formula again in *Florida v. Jardines*.<sup>85</sup> Acting on an uncorroborated tip, police approached the Jardines house accompanied by a drug-sniffing dog. The dog alerted and, after lunging about on a leash, sat down on the porch at the front door, indicating that the strongest point source of the incriminating scent was there. Based on the dog's behavior, a judge issued a warrant to search the house. Marijuana plants were found inside.

Twice previously the Court had ruled that the use of dogs to detect the odor of illegal drugs emanating *from vehicles* was not a "search."<sup>86</sup> This holding reflected the view that because the dog provides its human handlers with an opaque, binary indication of "drugs present" or "no drugs present" the dog does not invade any "reasonable expectation of privacy." In the later of these precedents, *Illinois v. Caballes*, Justice Stevens wrote for the majority:

Official conduct that does not "compromise any legitimate interest in privacy" is not a search subject to the Fourth Amendment. We have held that any interest in possessing contraband cannot be deemed

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82. See *Jones*, 132 S. Ct at 949 ("The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted.")

83. See *id.* at 958 (Alito, J., concurring) ("I would analyze the question presented in this case by asking whether respondent's reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove.")

84. See *id.* at 955 (Sotomayor, J., concurring) ("[T]he trespassory test applied in the majority's opinion reflects an irreducible constitutional minimum: When the Government physically invades personal property to gather information, a search occurs. The reaffirmation of that principle suffices to decide this case."); *id.* ("I agree with Justice Alito that, at the very least, 'longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.'"(cross-reference omitted)).

85. 133 S. Ct. 1409 (2013).

86. See *Illinois v. Caballes*, 543 U.S. 405 (2005); *United States v. Place*, 462 U.S. 696 (1983).

“legitimate,” and thus, governmental conduct that *only* reveals the possession of contraband “compromises no legitimate privacy interest.”<sup>87</sup>

The dog sniff, on this account, is a “magic bullet.” It reveals the commission of crime and nothing else.

*Caballes* approved the use of the dog during an otherwise lawful traffic stop. In *Jardines* a five-to-four majority held that the use of the dog on private premises, unlike by the side of the road, is a “search” requiring a warrant *ex ante*.<sup>88</sup> Justice Scalia delivered a majority opinion joined by Justices Thomas, Kagan, Ginsburg, and Sotomayor. Justice Scalia characterized leading the dog on to the porch as a trespass under general law.<sup>89</sup> Justice Kagan filed a separate opinion, joined by Justices Ginsburg and Sotomayor, arguing that use of the dog to detect drugs in homes transgressed the *Katz* reasonable expectation of privacy standard.<sup>90</sup>

Chief Justice Roberts, Justice Kennedy, and Justice Breyer joined the dissent of Justice Alito. Justice Alito argued that under *Katz* there is no reasonable expectation of privacy in odors emanating from the home,<sup>91</sup> and criticized Justice Scalia’s trespass theory as unsupported by legal authority.<sup>92</sup> Justice Alito cited *Caballes*, but—like Justice Kagan’s concurring opinion—was silent as the Sphinx about the magic bullet theory that provided the foundation for *Caballes*.<sup>93</sup>

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87. *Caballes*, 543 U.S. at 408–09 (citation omitted).

88. *See Jardines*, 133 S. Ct. at 1418–19 (“The government’s use of trained police dogs to investigate the home and its immediate surroundings is a ‘search’ within the meaning of the Fourth Amendment.”).

89. *See id.* at 1417 (“Thus, we need not decide whether the officers’ investigation of *Jardines*’ home violated his expectation of privacy under *Katz*. One virtue of the Fourth Amendment’s property-rights baseline is that it keeps easy cases easy. That the officers learned what they learned only by physically intruding on *Jardines*’ property to gather evidence is enough to establish that a search occurred.”).

90. *See id.* at 1418 (Kagan, J., concurring) (“The Court today treats this case under a property rubric; I write separately to note that I could just as happily have decided it by looking to *Jardines*’ privacy interests.”).

91. *Id.* at 1424 (Alito, J., dissenting) (“I see no basis for concluding that the occupants of a dwelling have a reasonable expectation of privacy in odors that emanate from the dwelling and reach spots where members of the public may lawfully stand.”).

92. *Id.* (“[T]he real law of trespass provides no support for the Court’s holding today. While the Court claims that its reasoning has ‘ancient and durable roots,’ its trespass rule is really a newly struck counterfeit.” (cross-reference omitted)).

93. All Justice Alito said about *Caballes* was that the Court there had rejected an argument “very similar” to that made by Justice Kagan’s concur-

As Professor Amsterdam perceived forty years ago, indeterminacy is both the strength and the weakness of the *Katz* test.<sup>94</sup> He saw no escape from judicial value judgments and came down in favor of the libertarian strands in American tradition.<sup>95</sup> Justice Alito makes different judgments and can point to different strands. Even Justice Alito, however, sees the old evil of general warrants in technology's power to collect, store, and process information otherwise open to public view only in isolated fragments.

Now it seems clear that a majority of the current Justices would deem trespass-free surveillance, absent some patina of consent, to be a "search" requiring a warrant *ex ante*. If government agents followed a suspect's public movements by aerial surveillance, using a miniature drone the suspect cannot detect, we need only add together the Sotomayor and Alito opinions in *Jones* to make a majority. Nor should we exclude the very real possibility that Justice Scalia and/or Justice Thomas would find such surveillance inconsistent with "that degree of privacy against government that existed when the Fourth Amendment was adopted."<sup>96</sup>

In *Jones*, Justices Scalia, Thomas and Sotomayor preferred to rule on the narrow trespass-to-chattels ground, rather than decide the broader reasonable-expectation-of-privacy ground. This seems anachronistic. As Justice Alito pointed out, what seems normatively troubling about the surveillance of Jones was not planting the tracking device on his jeep.<sup>97</sup> Were police tailing a suspect at night to stick a small piece of reflective tape on the rear bumper of the suspect's car, there would be a trespass but only a very minor infringement of privacy. What was troubling about *Jones* was the length and detail of the location information acquired by the government.

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rence. Justice Alito did not distinguish between odors evidencing only contraband inside the home and those evidencing, for example, Thanksgiving dinner. *Id.* at 1424–25.

94. See *Perspectives*, *supra* note 1, at 385 ("In the end, the basis of the *Katz* decision seems to be that the fourth amendment protects those interests that may justifiably claim fourth amendment protection.").

95. See *supra* note 11.

96. *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

97. See *United States v. Jones*, 132 S. Ct. 945, 961 (2012) (Alito, J., dissenting) ("[T]he Court's reasoning largely disregards what is really important (the use of a GPS for the purpose of long-term tracking) and instead attaches great significance to something that most would view as relatively minor (attaching to the bottom of a car a small, light object that does not interfere in any way with the car's operation).").



C. KATZ, HISTORY, AND TRESPASS-FREE SURVEILLANCE

It seems improbable that any Justice, let alone a majority, has any interest in going back to *Olmstead's* strict trespass test.<sup>98</sup> Justice Scalia described the test as *Olmstead's* trespass test *plus* the *Katz's* reasonable expectation of privacy test.<sup>99</sup> Justice Sotomayor openly stated her sympathy for Justice Alito's *Katz* analysis.<sup>100</sup> So when trespass-free pervasive location surveillance reaches the Court, the government will be most unlikely to fend off the warrant requirement on the ground that there was no physical intrusion.

These trespass-free surveillance cases are on their way. Cell phone site tower records provide significant but imprecise information about the physical location of a suspect's cell phone.<sup>101</sup> Government collection of these records by court order, supported by a lesser standard than probable cause, are now the subject of conflicting rulings in the lower courts.<sup>102</sup>

The government can distinguish *Jones* in at least three ways. First, unlike in *Jones*, there is no physical trespass to chattels. Like the beepers in the *Knotts* and *Karo* cases,<sup>103</sup> the suspect knowingly took possession of his cell phone. Indeed, un-

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98. *Olmstead v. United States*, 277 U.S. 438, 465 (1928) (holding that wiretapping is not a "search," and stating: "The language of the amendment cannot be extended and expanded to include telephone wires, reaching to the whole world from the defendant's house or office.").

99. See, e.g., *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) ("[T]hough *Katz* may add to the baseline, it does not subtract anything from the Amendment's protections 'when the Government *does* engage in [a] physical intrusion of a constitutionally protected area . . . .").

100. See *Jones*, 132 S. Ct. at 955 (Sotomayor, J., concurring) ("As Justice Alito incisively observes, the same technological advances that have made possible nontrespassory surveillance techniques will also affect the *Katz* test by shaping the evolution of societal privacy expectations.").

101. For a primer on how the phone's signals to the towers can indicate the location of the phone, see Phil Locke, *Cell Tower Triangulation—How It Works*, WRONGFUL CONVICTIONS BLOG (June 1, 2012), <http://www.wrongfulconvictionsblog.org/2012/06/01/cell-tower-triangulation-how-it-works>.

102. See *United States v. Davis*, 785 F.3d 498, 511 (11th Cir. 2015) (en banc) (holding no reasonable expectation of privacy in cell phone site tower data); accord *In re U.S. Historical Cell Site Data*, 724 F.3d 600, 615 (5th Cir. 2013). *Contra United States v. Graham*, 796 F.3d 332, 355–57 (4th Cir. 2015) *reh' en banc granted*, 624 Fed. App'x 75 (4th Cir. 2015).

103. See *United States v. Karo*, 468 U.S. 705 (1984) (holding that a warrant is required to monitor a concealed tracking device while the device is inside a private premises and revealing the continued presence of the device therein); *United States v. Knotts*, 460 U.S. 276 (1983) (holding no reasonable expectation of privacy against concealment of a tracking device inside a package so long as the package was in a public space where it might be observed).

like the suspect who receives a package with a concealed transmitter, the suspect may well be aware of the phone's positioning capability.

This distinction seems unconvincing. Based on the Alito and Sotomayor opinions in *Jones*, it seems probable that at least five Justices see the "search" in the surveillance, not the trespass. The *Kyllo* founding-era expectations test probably would not necessarily lead to a different conclusion. Justice Scalia's test calls upon the Court to "assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted."<sup>104</sup> Every term is important, including "against government."

Technology permitted some monitoring of movements. A snoop with a spyglass on a hill could observe public movements within a radius of several miles. But the technology was limited. Such spying could only be done in daylight and was limited to the line of sight. Bloodhounds might track a fugitive even by night, but only if given a source scent and even then it was only a matter of time before the dogs lost the scent. Nor could baying hounds track a suspect's every move without alerting the suspect to the surveillance.

More importantly, the primitive technology of surveillance had no professional operatives. Professional urban police forces arose in the United States only fifty years after ratification of the Fourth Amendment.<sup>105</sup> Who would have watched from the hillside, or handled the dogs, for twenty-eight days, around the clock? No one.

Drawing this kind of analogy between modern institutions and technology and founding-era institutions and technology is at best an inexact process.<sup>106</sup> Those who undertake it inevitably will be drawn to analogies that comport with their own values and experience. As Professor Amsterdam put it, "the values

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104. *Kyllo v. United States*, 533 U.S. 27, 28 (2001).

105. *See, e.g.*, SAMUEL WALKER & CHARLES M. KATZ, *THE POLICE IN AMERICA* 87–113 (5th ed. 2004) (describing the formation of the first American municipal police departments in the 1830s and 1840s).

106. *Compare* *United States v. Jones*, 132 S. Ct. 945, 951 n.3 ("[The concurrence] posits a situation that is not far afield—a constable's concealing himself in the target's coach in order to track its movements. 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."), *with id.* at 958 n.3 (Alito, J., concurring) ("[T]his would have required either a gigantic coach, a very tiny constable, or both—not to mention a constable with incredible fortitude and patience.").

which one finds in the history of the Bill of Rights are ineluctably one's own."<sup>107</sup> We can, by dint of considerable research, determine particular details of many founding-era practices. Justice Scalia's test, however, looks to the degree of privacy those practices protected, a far less determinate question. As Justice Alito pointed out, Justice Scalia's bypassing privacy by focusing on trespass seems "artificial,"<sup>108</sup> and it would be odd for a Justice to embrace an artificial theory to reach a result contrary to powerful anterior moral or legal commitments.

So the government would be well advised to advance the two other lines of plausible distinction between cell phone location surveillance and *Jones*. Unlike the tracking device in *Jones*, directional site tower data do not pinpoint location with GPS accuracy.<sup>109</sup> Many modern phones have GPS capability,<sup>110</sup> but the current crop of cases do not involve GPS location data.<sup>111</sup>

The distinction has some force. Government awareness of the neighborhood you are in is less sinister than government awareness of the house you are in. Reasonable minds may differ, but to some even area surveillance will call to mind the monitoring of probationers and registered sex offenders rather than what any private person might casually observe.

Moreover, this second point of distinction is at best temporary. Many phones now track GPS location.<sup>112</sup> At least some providers apparently store this information.<sup>113</sup> So if there is a constitutional distinction between government tracking of the

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107. *Perspectives*, *supra* note 1, at 400.

108. *Jones*, 132 S. Ct. at 958 (Alito, J., concurring).

109. *See, e.g., Locke*, *supra* note 101 ("Using cell tower triangulation (3 towers), it is possible to determine a phone location to within an area of 'about' ¼ square mile.").

110. *See, e.g., id.* ("Some of the newest cell phones can actually report a GPS location, and this is quite accurate, and doesn't rely on the cell towers at all.").

111. *See, e.g., United States v. Graham*, 796 F.3d 332, 350 (4th Cir. 2015) ("Unlike GPS data, the [district] court found, CSLI 'can only reveal the general vicinity in which a cellular phone is used.'").

112. *See, e.g., Caitlin E. Rice, Police in My Pocket: The Need for Fourth Amendment Protection for Cellular Telephone Tracking*, 38 CHAMPION 36, 37 (2014) ("Smartphones receive signals from a constellation of GPS satellites roaming the skies. After the phone receives the signals, its GPS chip calculates the phone's precise longitude and latitude, typically within 10 meters." (footnotes omitted)).

113. *See id.* ("The type of application software running on the phone dictates whether the GPS location is sent to the network (or any other third party)." (footnote omitted)).

suspect's neighborhood and his precise coordinates, that distinction will have a short shelf-life.

The third line of distinction, then, may be the most important. The compelled disclosure of records *by the communications provider* inflicts no tangible injury on the suspect. The suspect cannot reasonably be ignorant that the provider keeps these records. A robust application of the assumption-of-risk or third-party doctrines would lead to permitting the government to exploit the service provider's records without any judicial authorization or antecedent suspicion. If it isn't a "search" or a "seizure" the Fourth Amendment just doesn't apply. The suspect would have no right to complain even of a government theft by night of the provider's records.

There are, however, powerful reasons to doubt that the Court will follow the third-party doctrine to the bitter end. The bitter end would be ruling that *content information* in e-mails and text messages—all known by the suspect to be stored on the provider's servers—can be accessed by government without warrant or even suspicion. The lower federal courts have refused to go so far, however logical the application of *Smith* and *Miller* might be.<sup>114</sup> The site tower cases may raise a lesser pri-

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114. See *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010). In *Warshak* the defense moved to suppress stored e-mails, including content, obtained by an order under the Stored Communications Act (SCA) for disclosure by the ISP of e-mails more than six months old supported by a showing of articulable suspicion rather than probable cause. The Court held the SCA unconstitutional insofar as it authorized compelled disclosure of e-mail content without a traditional warrant:

If we accept that an email is analogous to a letter or a phone call, it is manifest that agents of the government cannot compel a commercial ISP to turn over the contents of an email without triggering the Fourth Amendment. An ISP is the intermediary that makes email communication possible. Emails must pass through an ISP's servers to reach their intended recipient. Thus, the ISP is the functional equivalent of a post office or a telephone company. As we have discussed above, the police may not storm the post office and intercept a letter, and they are likewise forbidden from using the phone system to make a clandestine recording of a telephone call—unless they get a warrant, that is. It only stands to reason that, if government agents compel an ISP to surrender the contents of a subscriber's emails, those agents have thereby conducted a Fourth Amendment search, which necessitates compliance with the warrant requirement absent some exception.

See *id.* at 286 (citations omitted).

*Warshak* has become the leading case. See Orin S. Kerr, *The Next Generation Communications Privacy Act*, 162 U. PA. L. REV. 373, 400 (2014) ("*Warshak* has been adopted by every court that has squarely decided the question. The case law is not entirely settled, as only one federal court of ap-

vacy concern, but that privacy concern can be dismissed on grounds of the third-party doctrine only by inviting the government's claim of a like right to access communications content stored by the provider.

These non-trespass tracking cases illustrate the convergence of a contemporary values approach to *Katz* and a historical approach. Both approaches lead to Professor Amsterdam's conclusion: "[T]he analysis of these cases in terms of voluntary assumption of risk is wildly beside the point. The fact that our ordinary social intercourse, uncontrolled by government, imposes certain risks upon us hardly means that government is constitutionally unconstrained in adding to those risks."<sup>115</sup>

From a contemporary perspective, government has different motives, and greater resources, than private parties. To share information even with dozens of private firms is different from sharing it with a government that might be just as interested in suppressing dissent, or catering to popular prejudice against outgroups, as in preventing and punishing crime.

One plausible barometer of contemporary values is California's new Electronic Communications Privacy Act.<sup>116</sup> The Act requires traditional warrants to obtain envelope, content, or location data from providers.<sup>117</sup> The state's subpoena power over content, envelope, and location data applies to senders or recipients of the communication and owners of the digital devices in-

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peals has squarely addressed the issue. But the trend in the case law is to recognize fairly broad Fourth Amendment protection, backed by a warrant requirement, for stored contents such as emails.").

115. *Perspectives*, *supra* note 1, at 406. Will Baude and James Stern recently have defended a "positive law model" of the threshold "search" category. William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. (forthcoming May 2016) (arguing that courts should eschew the reasonable expectations of privacy analysis and instead "ask whether government officials have engaged in an investigative act that would be unlawful for a similarly situated private actor to perform"). Their article deserves more consideration than the constraints of space and time permit here. I confine myself to observing that their model is not necessarily opposed to treating privacy as scalar or government as special. The government's special responsibilities, and special dangers, might be accounted for under the rubric of reasonableness.

116. S.B. 178, 2015 Leg. (Cal. 2015), [https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201520160SB178](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB178).

117. *See id.* § 1546.1(a) ("Except as provided in this section, a government entity shall not do any of the following: (1) Compel the production of or access to electronic communication information from a service provider. (2) Compel the production of or access to electronic information from any person or entity other than the authorized possessor of the device."); *see also id.* § 1546.1(c) (authorizing discovery by, *inter alia*, wiretap order or search warrant).

volved.<sup>118</sup> These “first parties” can respond to subpoenas by claiming Fifth Amendment privilege, which requires immunizing production and its fruits, including the content of the documents, unless the government can show that the government knew the existence and/or location of the documents with “reasonable particularity”<sup>119</sup> before the subpoena.

Under the Act, the government can issue subpoenas to providers for subscriber information,<sup>120</sup> but not for envelope, location, or content information.<sup>121</sup> With familiar exceptions for consent<sup>122</sup> and emergencies,<sup>123</sup> the statute requires a particularized warrant to obtain provider records of message content, envelope information, and physical location data from anyone other than a sender, recipient, or owner of a device.<sup>124</sup> In substance, the Act repudiates the third-party doctrine as it pertains to electronic communications devices.

Not only was the Act adopted in the state with the largest, and an exceedingly diverse, population. Because the California Constitution requires a two-thirds majority of both houses of the legislature to pass any bill extending the exclusionary rule, the Act reflects a balance acceptable to a supermajority of this polity.<sup>125</sup> Justice Sotomayor is very far from alone in believing the

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118. *Id.* § 1546.1(i) (“This section does not limit the authority of a government entity to use an administrative, grand jury, trial, or civil discovery subpoena to do any of the following: (1) Require an originator, addressee, or intended recipient of an electronic communication to disclose any electronic communication information associated with that communication. (2) Require an entity that provides electronic communications services to its officers, directors, employees, or agents for the purpose of carrying out their duties, to disclose electronic communication information associated with an electronic communication to or from an officer, director, employee, or agent of the entity. (3) Require a service provider to provide subscriber information.”).

119. *See* *United States v. Ponds*, 454 F.3d 313, 322 (D.C. Cir. 2006) (“[T]he Supreme Court understands the contents of the documents to be off-limits because they are a derivative use of the compelled testimony regarding the existence, location, and possession of the documents. As stated by this court in *Hubbell*: ‘If the government did not have a reasonably particular knowledge of subpoenaed documents’ actual existence, let alone their possession by the subpoenaed party, and cannot prove knowledge of their existence through any independent means, *Kastigar* forbids the derivative use of the information contained therein against the immunized party.” (citation omitted)).

120. S.B. 178 § 1546.2(i)(3).

121. *Id.* § 1546.1(a).

122. *Id.* § 1546.1(c)(3), (4).

123. *Id.* § 1546.1(h).

124. *Id.* § 1546.1(b).

125. *Id.* at pmb1.

third-party doctrine is due for reconsideration.<sup>126</sup> Even if the federal courts decline to view a state statute as an index of social norms, the federal courts are likely to share the values behind a statute so widely supported.

The historical test points in the same direction. Begin with the assumption-of-risk doctrine. The eighteenth-century household commonly included a floating cast of domestic servants, whether owned or hired. The servants could hide little from their masters, and the masters no more from the servants.

Even at the apex of the social pyramid, the whole life of a Southern planter or a Northern merchant was to his valet an open book.<sup>127</sup> Thomas Jefferson described the duties of his valet (first Jupiter, then Bob Hemings) as “to shave, dress, and follow me on horseback.”<sup>128</sup> “Until Jefferson left for France in 1784,

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126. *Cf.* *United States v. Jones*, 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring) (“More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties.”). Prefacing his defense of the doctrine, Orin Kerr admits:

The third-party doctrine is the Fourth Amendment rule scholars love to hate. It is the *Lochner* of search and seizure law, widely criticized as profoundly misguided. Decisions applying the doctrine “top[] the chart of [the] most-criticized fourth amendment cases.” Wayne LaFare asserts in his influential treatise that the Court’s decisions applying it are “dead wrong” and “make[] a mockery of the Fourth Amendment.” The verdict among commentators has been frequent and apparently unanimous: The third-party doctrine is not only wrong, but horribly wrong. Even many state court judges have agreed. Over a dozen state Supreme Courts have rejected the doctrine under parallel provisions of their state constitutions.

Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 563–64 (2009) (footnotes omitted).

127. Aaron Wolfe described the relationships between enslaved body servants and their masters in colonial Williamsburg as follows:

The valets and body servants and man and maid servants always shared a much more close relationship with their masters than those would have necessarily since those kinds of body servants would have slept at the foot of the masters bed. They would have helped them get dressed. They would have been privy to a lot more information about the master and the mistress. Not only from their conversations but from what they heard between each other, but what they heard about them. Because, you know, when Peyton Randolph would have had a sit down with Patrick Henry that their manservants would have been in that room and so they were privy to a lot more information than most enslaved folks would have been.

*Harsh World, This World*, COLONIAL WILLIAMSBURG PAST & PRESENT PODCAST (Nov. 28, 2011), <http://podcast.history.org/2011/11/28/harsh-world-this-world>.

128. *Biographic Entry on Robert Hemings*, MONTICELLO, <https://monticello.org/site/plantation-and-slavery/robert-hemings> (last visited Mar. 28, 2016).

Bob accompanied him everywhere.”<sup>129</sup> It is said that Washington’s valet, Billy Lee, “perhaps knew George Washington as well as anyone could.”<sup>130</sup> In a letter to Abigail, John Adams referenced the quip that “no man is a hero to his wife or valet de chambre.”<sup>131</sup>

The risk of indiscreet servants was widely recognized.<sup>132</sup> Ben Franklin supposed his Paris valet to be a spy.<sup>133</sup> Edward Bancroft, Franklin’s secretary in Paris, apparently really was a spy.<sup>134</sup>

But these risks did not translate into a government right to the same information as economic and technological circumstances required sharing within the household. Just because a homeowner assumed the risk that gossiping (or testifying)<sup>135</sup> servants would disclose all that happened under the roof did not mean that the king’s men could break in and see what the servants already knew. The same men who lived with inescapable human monitors of uncertain loyalty risked their lives to throw off perceived abuses that prominently included writs of assistance and general warrants.

The founders had the same agent-relative view regarding the privacy of correspondence. In a pre-typewriter age, a prominent citizen, or a successful business, would rely on amanuenses

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129. *Id.*

130. *Biographic Entry on Billy Lee*, MOUNT VERNON, <http://www.mountvernon.org/education/for-students/meet-people-from-the-past/billy-lee> (last visited Mar. 28, 2016).

131. Letter from John Adams to Abigail Adams (Jan. 14, 1797), reprinted in *LETTERS OF JOHN ADAMS AND OF MRS. ADAMS* 240, 240–41 (Charles Francis Adams ed., 1841).

132. See J. JEAN HECHT, *THE DOMESTIC SERVANT CLASS IN EIGHTEENTH-CENTURY ENGLAND* 81 (1956) (“Not the least harassing of these [annoyances on the part of masters] was the propensity of servants to retail their masters’ business.”); BRIDGET HILL, *SERVANTS: ENGLISH DOMESTICS IN THE EIGHTEENTH CENTURY* 91 (1996) (“If earlier employers had resented servants telling tales about the family to the outside world, now their concern about servants spying on them and gossiping became almost paranoid.”).

133. WALTER ISAACSON, *BENJAMIN FRANKLIN: AN AMERICAN LIFE* 336 (2003).

134. See, e.g., THOMAS J. SCHAEFER, *EDWARD BANCROFT: SCIENTIST, AUTHOR, SPY* xiv (2011).

135. Domestic servants sometimes brought, or testified in, suits against their masters. See *THE EXPERIENCE OF DOMESTIC SERVICE FOR WOMEN IN EARLY MODERN LONDON* (Paula Humphrey ed., 2011) (collecting depositions of servants in ecclesiastical courts); HECHT, *supra* note 132, at 79–80 (noting servants sued masters for excessive use of force). These are English sources, which, presumably, have some parallels with servants, but not slaves, in the colonies. *Id.*



to prepare much original outgoing correspondence and still more of the retained copies.<sup>136</sup> The senders, moreover, would be working in similar social circumstances. Much of *their* correspondence also would have been exposed to scribes and couriers.

The pre-Revolutionary postal service “was so slow and dear that no one used it if he could find other means of sending his letters.”<sup>137</sup> It wasn’t private either. By 1775 British agents monitored transatlantic correspondence and “it had become common knowledge for anyone writing transatlantic letters that they were without privacy.”<sup>138</sup> Intra-American correspondence sent through the official post was equally insecure.<sup>139</sup> Even for mundane domestic correspondence sent through friends or servants, there simply was no way to send a letter without risk that it would be read, covertly, by someone other than the intended recipient.<sup>140</sup> Yet as soon as the colonists won independence and set up their own postal system, they guaranteed by law the privacy of letters transmitted through it.<sup>141</sup> Risks are relative, and the substantial danger to the privacy of correspondence posed by

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136. See, e.g., W.T. BAXTER, *THE HOUSE OF HANCOCK: BUSINESS IN BOSTON 195* (1964) (“In addition to his store, Thomas [Hancock] had a ‘compting room.’ When he grew rich, the routine work of this office was put into the hands of clerks (though John at one point complains, ‘Am reduced at the last Moment to write my own Letters’”(footnote omitted)); *id.* (outgoing mail was roughly drafted by Thomas or John, then “a clerk would make a fair copy for dispatch”); *id.* at 196 (“In the case of foreign letters, a copy was also made in the letter book.”).

137. *Id.* at 197.

138. KONSTANTIN DIERKS, *IN MY POWER: LETTER WRITING AND COMMUNICATIONS IN EARLY AMERICA* 215 (2009).

139. See Amy C. Desai, *Wiretapping Before the Wires: The Post Office and the Birth of Communications Privacy*, 60 *STAN. L. REV.* 553, 564 (“In short, by 1773, the Americans clearly worried, and had good reason to worry, that loyalist postmasters would intercept and read their letters, a frightening prospect when much of what they were doing likely constituted treason.” (footnote omitted)).

140. See Cathy Hellier, *Physical, Intellectual, Biographical: Our Ideas of Privacy and Their Evolution* (2012), <http://www.history.org/foundation/journal/winter13/privacy.cfm?showSite=mobile> (last visited Apr. 2, 2016).

Sending a letter raised colonial Americans’ concerns about privacy. The safest conveyance was usually a friend or relation, but everyone knew it was possible to open a letter by carefully pulling up the wax seal. A busybody could quickly heat the back of the seal enough to melt the wax a bit and then reseal the letter discreetly.

*Id.*

141. See Desai, *supra* note 139, at 565–66 (explaining that the Continental Congress, in 1782, required warrants to open letters, and the first U.S. Congress did likewise in 1792).

private parties was not to be aggravated by allowing the government an equal right to pry.

The third-party doctrine departs slightly from the assumption-of-risk doctrine. In the assumption-of-risk cases government agents collect information directly from the suspect that private snoops *might* have obtained by similar methods.<sup>142</sup> When, however, the suspect voluntarily provides information to a third party—typically but not necessarily a business from which the suspect buys goods or services—the government can obtain the suspect’s information from the third party rather than directly from the suspect.

When the government subpoenas the provider’s records to reconstruct the suspect’s location, the government acquires information that a private party not only could have, but did, collect, with the consent of the suspect. To the extent the consumer has no way to opt-out of sharing with the government what she shares with the provider, the data collected are indistinguishable from the government acquiring location data directly by using a site simulator to collect the signals directly. The threat to privacy is larger, however, because the cost (to the government) of collecting the information is negligible. The provider has the data, a computer can do the triangulation, and only a court order based on *Terry*-type suspicion is required even if the provider refuses to cooperate with law enforcement.

The opinions in *Smith* and *Miller* say nothing about the history of the Fourth Amendment. Instead, they simply plugged pro-government values into the normative *Katz* test. For Justice Powell, author of *Miller*, permitting the government to inspect at will records the government requires banks to keep of consumer transactions was *not* “destructive”—to quote Professor Amsterdam—of any “interests of privacy and security that are indispensable to a free society.”<sup>143</sup> In that age of interest-balancing, none of the Justices asked how the founders would have thought about the case.

The only search warrant allowed by common law was the warrant for stolen goods. Warrants for papers were condemned unequivocally.<sup>144</sup> A warrant for papers possessed by A for use in

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142. See, e.g., *California v. Greenwood*, 486 U.S. 35 (1988) (holding that police combing through garbage that a suspect left outside the home for collection was not a search).

143. *Perspectives*, *supra* note 1, at 409.

144. *Entick v. Carrington* (1765) 95 Eng. Rep. 807, 807–08; see Donald A. Dripps, “Dearest Property”: *Digital Evidence and the History of Private “Pa-*

the prosecution of B was as void as any other warrant for papers. It is true that if, say, John Entick's papers showed evidence of crimes by someone else, say the printer John Almon, only Entick, and not Almon, could recover damages. The likely damages, however, were so substantial that Entick's secrets would have been as safe against seizure under warrant in Almon's hands as in his own. In the founding era, the risk against criminal discovery of papers entrusted to a third party was betrayal by the third party, not government seizure.

What about subpoenas? In civil litigation, the parties could sue in equity to compel disclosure of books and papers.<sup>145</sup> There was no parallel action in criminal cases, on the ground that equity would never enforce a penalty or a forfeiture.<sup>146</sup> In criminal cases the common law refused to enforce any subpoena for the papers of the target of the investigation.<sup>147</sup> Any number of people—secretaries, clerks, couriers, domestic servants—might have

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*pers*” as *Special Objects of Search and Seizure*, 103 J. CRIM. L. & CRIMINOLOGY 49 (2013); Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 VA. L. REV. 869 (1985).

145. See, e.g., JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 1485, at 1017 (W.E. Grigsby ed., 1884) (“Another defect of a similar nature was the want of a power in the courts of common law to compel the production of deeds, books, writings, and other things, which are in the custody or power of one of the parties, and were material to the right, title, or defence of the other.”). Blackstone criticized this cumbersome procedure. See 3 WILLIAM BLACKSTONE, COMMENTARIES \*382–83. The Judiciary Act of 1789 authorized federal courts hearing common law cases to compel discovery of books and papers on the same terms as chancery. Federal Judiciary Act, ch. 20, § 15 (1789); see also Michael E. Wolfson, *Addressing the Adversarial Dilemma of Civil Discovery*, 36 CLEV. ST. L. REV. 17, 23–25 (1988) (describing how American states originally followed English civil discovery practice, which was cumbersome and limited).

146. See, e.g., STORY, *supra* note 145, § 1494, at 1021 (“[C]ourts of equity will not allow discovery in aid . . . of a criminal prosecution; or of a penal action; or of a suit in its nature partaking of such a character; or in a case involving moral turpitude; for it is against the genius of the common law to compel a party to accuse himself; and it is against the general principles of equity to aid in the enforcement of penalties or forfeitures.”).

147. See *Rex v. Cornelius* (1744) 93 Eng. Rep. 1133, 1134; *Regina v. Mead* (1703) 92 Eng. Rep. 119; *Rex v. Worsenham* (1701) 91 Eng. Rep. 1370; see also *Roe v. Harvey* (1769) 98 Eng. Rep. 302, 305; *King v. Heydon* (1762) 96 Eng. Rep. 195 (K.B.); *Rex v. Purnell* (1748) 96 Eng. Rep. 20. For a review of the English cases decided before American independence, see Richard A. Nagareda, *Compulsion “To Be a Witness” and the Resurrection of Boyd*, 74 N.Y.U. L. REV. 1575, 1620–23 (1999); see also CHRISTOPHER SLOBOGIN, PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT 145 (2007) (explaining the constitutional law governing first-party and third-party subpoenas).

read the papers. A subpoena in the name of the King was nonetheless unenforceable.

The common-law rule against target subpoenas in criminal cases might, or might not, have extended to third-party subpoenas. Given the extreme Whig antagonism to *warrants* for papers, it seems unlikely that a subpoena doing the same work as a warrant would be regarded differently. A warrant for third-party papers was as void as one for first-party records, and the officers just as liable in trespass in the former as in the latter case. The rule against target subpoenas in criminal cases, however, was related to the privilege against self-incrimination and the testimonial incapacity of defendants at trial. So we can speculate that Founding-era common law did, or did not, include security against third-party subpoenas. The evidence we have does not foreclose either speculation.

*The King v. Purnell* was the leading pre-independence English precedent refusing to order production of documents in a criminal case.<sup>148</sup> Purnell was Vice Chancellor of Oxford. In that capacity he had disciplined some students who, under the influence of alcohol, had praised James Stuart, the pretender to the Crown worn by George II.<sup>149</sup> A supporter of King George, the Reverend Bracow, confronted these students, and the ensuing fracas was broken up by the arrival of the University Proctor.

Bracow then demanded that Purnell punish the students. Purnell wrote the incident off as “young fellows getting in liquor” and delayed the offenders’ degrees for one year.<sup>150</sup> Bracow demanded expulsion and Purnell refused. A criminal prosecution of the students for “drinking the health of the Pretender” followed, and the seditious students were sentenced, *inter alia*, to two years in prison.<sup>151</sup>

The King’s Attorney General filed an information against Purnell, charging dereliction of his duties as Vice Chancellor and as a justice of the peace.<sup>152</sup> Before trial, the Crown sought an order “directed to the proper officers of the university to permit their books, records and archives to be inspected, in order to

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148. Subsequent references are to the longer report of the decision, *Purnell*, 96 Eng. Rep. at 20, which is taken from Blackstone’s *Reports*.

149. The fullest account of the brouhaha can be found in GEORGE BIRKBECK HILL, DR. JOHNSON: HIS FRIENDS AND HIS CRITICS 68–72 (1878).

150. See *id.* at 70–71. Purnell added to the one-year suspensions an assignment to prepare a translation in Latin. *Id.*

151. See HILL, *supra* note 149, at 71–72.

152. See *Purnell*, 96 Eng. Rep. at 20.

furnish evidence against the vice chancellor.”<sup>153</sup> Apparently the University statutes required the Vice Chancellor to expel the offenders.<sup>154</sup> So the order sought by the Crown would have required Purnell, in his official capacity, to produce documents uttered in the distant past. These might incriminate him by proving the duty he was accused of neglecting, but they included no factual assertions by anyone.

Attorneys for the prosecution argued that since the documents could not incriminate the University, Purnell could be ordered to produce them.<sup>155</sup> The court rejected this argument, but said nothing about a subpoena to a person other than the target of the prosecution, to produce documents uttered by the target and entrusted to the third party. Blackstone’s report includes a note suggesting that the prosecutors could easily have obtained the statutes; for example, the University archivist in “whose keeping the original is, might have been compelled to have attended with it at the trial.”<sup>156</sup> But this again is not on point, for the archivist did not obtain the statutes from Purnell.

*Purnell* and similar cases provide historical support for the Fifth Amendment act-of-production doctrine, but shed little if any light on the Fourth Amendment third-party doctrine. The common law clearly provided that the protection provided to the target by the *Purnell* line of cases was not lost when the documents were entrusted to an attorney for the purpose of obtaining professional advice.<sup>157</sup> Cases decided on the basis of professional privilege, however, do not speak to the limits of the power to compel production of unprivileged communications.

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153. *Id.*

154. One of the students, Luxmore, fled from the scene, defying the Proctor’s formal order to stay, “*siste per fidem.*” HILL, *supra* note 149, at 70 n.2. The university statutes provided expulsion for this delict. *Id.*

155. See *Purnell*, 96 Eng. Rep. at 22 (“It is not desired that the vice-chancellor but the public officer should produce them: should he prove to be the public officer, that is no reason against the motion; for it does not respect him as defendant, but as public officer.” (argument of Attorney General Ryder)); *id.* at 23 (“The university is not accused; the university may therefore very safely produce their books.” (argument of R. Lloyd for the Crown)).

156. *Id.* at 23. The note suggests that, given the various different ways the university statutes might have been obtained, the motion to compel was “an excuse for dropping a prosecution, which could not be maintained: and it was accordingly dropped immediately after, having cost the defendant to the amount of several hundred pounds.” *Id.*

157. See, e.g., *Rex v. Dixon* (1765) 97 Eng. Rep. 1047. In *Dixon*, Peach, a suspected forger, left papers with his attorney, Dixon. A grand jury issued a subpoena to Dixon, and the court ruled that Dixon could not be compelled to surrender the papers. *Id.* at 1047–48.

There is one instance of a grand jury subpoena duces tecum in a criminal investigation served on a third party for books or papers before the advent of the telegraph in the middle the nineteenth century. John Marshall, presiding over the circuit court hearing the treason prosecution of Aaron Burr, famously issued a subpoena to President Jefferson, directing the President to turn over a letter from General Wilkinson accusing Burr.<sup>158</sup> Note, however, that Wilkinson really did intend to deliver his letter *to the government* as distinct from, say, a lawyer. Note also that it was *the defense*, not the government, Marshall saw as entitled to discovery of documents *already in the hands of the government*.

The common-law rule regarding subpoenas for documents held by third parties entrusted with information from the target is therefore unknown and perhaps unknowable.<sup>159</sup> The very paucity of sources, however, suggest that even were a third-party subpoena enforceable as a matter of law, prosecutors were not seeking third-party documents on a routine basis. It follows that the risk of government-compelled disclosure of confidences held by third parties was not a risk to which the founding generation would have adverted.

After the Civil War, the Supreme Court declared in *Ex parte Jackson* that postal inspectors could not open mail without a warrant.<sup>160</sup> At the same time, lower federal courts enforced grand jury subpoenas to Western Union officials for specific telegrams in support of criminal investigations.<sup>161</sup> The telegraph cases were

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158. *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807).

159. The telegraph cases from the late nineteenth century cite no precedents for third-party subpoenas in criminal cases. The probable explanation is that there were no such precedents because prosecutors did not seek third-party subpoenas until the telegraph cases themselves.

160. 96 U.S. 727 (1877) (“Letters, and sealed packages subject to letter postage, in the mail can be opened and examined only under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one’s own household. 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.”). Jackson challenged his conviction for violating a federal statute prohibiting sending lottery materials through the mail. The Court rejected his challenges to the constitutionality of the statute but went out of its way to announce the warrant requirement for mail. Perceived excesses in enforcing anti-pornography laws may have motivated this move. See Wesley MacNeil Oliver, *America’s First Wiretapping Controversy in Context and as Context*, 34 HAMLINE L. REV. 205, 214–15 (2011).

161. See, e.g., *United States v. Babcock*, 24 F. Cas. 908 (C.C.E.D. Mo. 1876).

thought to be different from sealed envelopes committed to the post.<sup>162</sup> *Boyd*, after it came down, was distinguished because the investigation focused on “the conduct of the parties who sent or received the telegrams, and not the relation of the telegraph company to the alleged violations of law involved in the act of transmitting the telegrams between the parties.”<sup>163</sup>

The telegram cases announce the third-party doctrine much in its modern form. There are two reasons, however, to discount them as authority for the modern doctrine. First, in context, the nineteenth-century telegram cases actually operated very much like a particularized warrant. From the perspective of current law, it is difficult to perceive an important but counterintuitive detail—the government’s inability to obtain a search warrant for typical telegrams. In *Jackson* the mail at issue had contained an illegal solicitation to buy lottery chances and so was contraband (just as was obscenity, the other major object of nineteenth century postal inspectors).<sup>164</sup> Ergo the Court’s recognition that the mail might be opened with a warrant is, in context, in no conflict with *Boyd*’s latter pronouncement that warrants for papers of evidentiary value only were prohibited by the Fourth Amendment.

Telegrams were different. Some might be instrumentalities of crime, i.e., co-conspirator statements. After *Boyd* the Supreme Court went to extremes to characterize papers found at the crime scene as instrumentalities.<sup>165</sup> Even so, certainly many, and probably most, telegrams of interest to the government would be non-criminal communications, “mere evidence.”

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162. See Desai, *supra* note 139, at 583:

In short, at the very time at which the Court determined that the Fourth Amendment prevented the government from opening sealed letters in *Ex parte Jackson*, other courts were explicitly rejecting challenges to subpoenas for telegrams, challenges that were based on analogizing the two communications media. *Ex parte Jackson* can thus best be seen as implicitly recognizing specific institutional attributes of the post office.

163. *In re Storrer*, 63 F. 564, 566 (N.D. Cal. 1894).

164. *Ex parte Jackson*, 96 U.S. at 736–37.

165. See *Marron v. United States*, 275 U.S. 192 (1927). Prohibition agents executed a warrant to raid a speakeasy. The warrant did not authorize any seizure of papers, criminal or otherwise. The agents seized business ledgers and utility bills linking one of the defendants to the business. The Court’s holding that the business ledger, equivalent to a modern drug dealer’s pay-owe sheets, were forfeitable instrumentalities seems sensible. Including the utility bills seems a long reach, although presumably operating a saloon without heat or light would be more difficult than otherwise. *Id.* at 193–94, 199.

For example, a telegram might contradict a defendant's later claim of alibi.

So no court would issue a warrant to seize a sender's copy of a letter (or a telegram) or the recipient's delivered copy of a letter (or a telegram). Issuing a subpoena, in a criminal case, to the sender or recipient was barred by the common law (and, under *Boyd*, by the Constitution). Unlike mail, however, the telegraph positively required human operators to access and advert to the content of the message.<sup>166</sup> Western Union, unlike the post office, retained copies for business purposes. It followed that the third-party subpoena offered an end-run around the ancient rule against warrants for papers.

Today the inflexible ban on warrants for papers is behind us.<sup>167</sup> We have an option the nineteenth-century judges did not, i.e., to permit government access to third-party records subject to procedural safeguards for the consumer as well as the service provider. Indeed the nineteenth-century telegram cases went down this path a considerable distance. To be enforceable against Western Union, the subpoena had to be as particular as the circumstances permitted.<sup>168</sup> The telegram cases suggest judges going as close to approving a particularized warrant for papers as they could without running afoul of *Entick* and *Boyd*.<sup>169</sup>

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166. See, e.g., DAVID HOCHFELDER, *THE TELEGRAPH IN AMERICA 1832–1920*, at 177 (2012) (“[T]elegrams were mediated forms of communication, requiring sending and receiving operators and messengers for delivery . . . this structure [made] secrecy and dialogue difficult.”).

167. See *Andressen v. Maryland*, 427 U.S. 463 (1976) (equating evidentiary documents with evidentiary chattels); see also FED. R. CRIM. P. 41 (authorizing seizures of documents and computer files).

168. See, e.g., *Ex Parte Brown*, 72 Mo. 83, 94 (1880) (the “spirit” of Missouri constitution’s search and seizure provision requires that subpoena for papers “shall at least give a reasonably accurate description of the paper wanted, either by its date, title, substance or the subject it relates to”); *id.* (“To permit an indiscriminate search among all the papers in one’s possession for no particular paper, but some paper, which may throw some light on some issue involved in the trial of some cause pending, would lead to consequences that can be contemplated only with horror, and such a process is not to be tolerated among a free people.”); see also *In re Storrer*, 63 F. at 568 (“The subpoena now under consideration calls for the production of telegrams, describing them with such particularity as appears to be practicable; and, under all the circumstances, I think they are sufficiently described to indicate, to an ordinarily intelligent person, the particular communications required.”); Oliver, *supra* note 160, at 230 (“Courts across the country began to require the sort of specificity for telegram subpoenas required in Missouri.” (footnote omitted)).

169. See, e.g., *In re Storrer*, 63 F. at 568 (“[T]he telegraphic messages were probably the effective means of carrying out their [the target’s] unlawful purposes.”). Note Judge Morrow’s characterization of the telegrams as “probably”



That doesn't translate into a Fourth Amendment regime with *no limits* on third-party subpoenas.

The second point about the telegram cases is related to the first. Those cases were seen for what they were, i.e., authorizing the functional equivalent of warrants for papers, by formidable critics. Chief among these was Judge Cooley, who gave this nascent third-party doctrine both barrels in his treatise on the Constitutional Limitations.<sup>170</sup> Cooley dismissed the telegraph operator's access to content as an undesired necessity;<sup>171</sup> saw no distinction between opening mail and disclosing telegrams;<sup>172</sup> nor (anticipating *Boyd*) any distinction between warrants and subpoenas, including, Judge Cooley said, third-party subpoenas.<sup>173</sup> In 1880, the House Committee on Revision of the Laws introduced a bill that would have "secure[d] to telegrams the same sanctity as now protects letters by mail."<sup>174</sup> The bill never

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instrumentalities, which could be seized under warrant even under *Boyd*.

170. THOMAS M. COOLEY, TREATISE ON THE CONSTITUTIONAL LIMITATIONS 372-73 n.2 (5th ed. 1883).

171. *Id.* at 373 n.2:

[The telegraph] is used as a means of correspondence, and as a valuable, and in many cases, indispensable, substitute for the postal facilities; and the communication is made, not because the party desires to put the operator in possession of facts, but because transmission without it is impossible. It is not voluntary in any other sense than this, that the party makes it rather than deprive himself of the benefits of this great invention and improvement.

172. *Id.*:

[W]hat good reason can be given why the postmaster should not be made subject to the process of subpoena for a like purpose, and compelled to bring the correspondence which passes through his hands into court, and open it for the purposes of evidence?

173. *Id.* Were it not for the decided cases, Judge Cooley thought:

[T]he public could not be entitled to a man's private correspondence, whether obtainable by seizing it in the mails, or by compelling the operator of the telegraph to testify to it, or by requiring his servants to take from his desks his private letters and journals, and bring them into court on *subpoena duces tecum*. Any such compulsory process to obtain it seems a most arbitrary and unjustifiable seizure of private papers; such an "unreasonable seizure" as directly condemned by the Constitution.

*Id.*

174. See H.R. REP. NO. 1262, at 1 (1880). According to a press account, the proposed legislation provided:

Section 1. That all telegraph messages delivered to any telegraph company availing itself of Title 65 of the Revised Statutes and copies thereof made by such company at the place of destination, or at any intermediate point, shall be deemed to be private papers of the senders and receivers of such messages, and shall be protected from unreasonable search and seizure, and from production as evidence in individual and legislative proceedings to the same extent as letters sent

passed, but the Committee recommendation shows it had considerable support. Whether to embrace the telegram cases (none decided by the Supreme Court), or their critics, is, as Professor Amsterdam foresaw, a normative choice rather than a doctrinal inevitability.

So the modern third-party doctrine, by denying any Fourth Amendment protection to consumers, goes beyond *permitting* warrants for papers, which was the functional objective of the judges deciding the telegram cases. In any event, there seems very little normative distinction between mail and telegrams. The sanctity of the former, like the vulnerability of the latter, was the product of a normative judgment from which some thoughtful jurists forcefully disagreed.

Return now to the cell phone site tower cases. From a normative perspective of the sort defended by Professor Amsterdam, the issue is whether government access to pervasive physical location data on less than a particularized warrant is a risk that law-abiding citizens *ought to assume* when they rely on technology that is practically indispensable in social life. From an originalist perspective like Justice Scalia's test in *Kyllo* and *Jones*, a perspective rightly abstracted from specific founding-era practices, the question is whether routine government access to pervasive physical location data is consistent with the privacy expected by a generation that rebelled against a government that resorted to writs of assistance and general warrants. Query, at the end of the day, how different might be the answers flesh-and-blood judges give to these two questions?

#### IV. WINDS OF CHANGE: RULES AND REASONABLENESS

##### A. RULES VERSUS STANDARDS: *GANT* AND *RILEY*

Just as the Court generally followed Professor Amsterdam's focus on contemporary norms in assessing the scope of the Fourth Amendment, the Court generally has articulated the doc-

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by the United States mail.  
H.R. 5101, 46th Cong. (1880), reprinted in *Inviolability of Telegrams*, N.Y. DAILY TRIB., Jan. 11, 1880, at 5. Title 65 granted telegraph companies the right to run wires on public lands. The bill therefore covered Western Union, which by that time was virtually a monopolist.

The reference to "private papers" makes the nineteenth century dilemma clear. The common law, reinforced by the Fourth Amendment, prohibited any warrant for papers that were not stolen or contraband. The sponsors of the bill wanted to bring telegrams within the ambit of this prohibition, while the judges enforcing subpoenas for telegrams wanted to avoid this result.

trinal content of the Fourth Amendment in terms of rules rather than standards. Some recent departures from the model of rules are more superficial than substantial.

The central topic of the Fourth Amendment rules-and-standards debate has been the doctrine of search incident to arrest. Founding-era common law dealt extensively, albeit uncertainly, with the legality of warrantless arrests. It shed no light on incidental search power, and pre-*Mapp* cases by turns forbade and permitted extensive search of private premises incident to arrest.<sup>175</sup>

After *Mapp*, search-incident doctrine became about ten times as important as before, because it practically operated on about ten times as many arrests as before. Professor Amsterdam was joined by Professor LaFave<sup>176</sup> in calling for the Court to set clear rules for the practice. The Court had begun to do that, first by authorizing the thorough search of the person, including all personal effects, in all cases of lawful arrest.<sup>177</sup> It then authorized a similar thorough search of the passenger compartment of an arrested motorist's vehicle, including any effects inside.<sup>178</sup> The police enjoyed this search-incident power even when the facts of the particular case suggested no risk of armed resistance or loss of evidence of the crime of arrest.

The new millennium opened with a display of extreme devotion to the need for rules. In *Atwater v. City of Lago Vista*<sup>179</sup> the majority upheld arrest, transport to the station, booking, and post-arrest detention for the offense of not buckling Atwater's children into their seatbelts. No jail time was authorized for punishment of the offense. Nonetheless the Court, troubled by the indeterminacy of the exceptions that would have accompanied a

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175. See *United States v. Rabinowitz*, 339 U.S. 56 (1950) (authorizing search incident to arrest of premises under control of suspect at time of arrest); *Trupiano v. United States*, 334 U.S. 669 (1948) (prohibiting search of a home incident to arrest absent exigent circumstances preventing application for a search warrant); *Harris v. United States*, 331 U.S. 145 (1947) (upholding an extensive home search incident to arrest, without a search warrant); *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931) (holding police search of safe or desk drawers incident to arrest unconstitutional absent search warrant); *Marron v. United States*, 275 U.S. 192 (1927) (allowing search of business following arrest at home).

176. See Wayne R. LaFave, "Case-By-Case Adjudication" Versus "Standardized Procedures": *The Robinson Dilemma*, 1974 S. CT. REV. 127 (arguing a prohibition must be clear and avoid too much flexibility).

177. See *United States v. Robinson*, 414 U.S. 218, 230 (1973).

178. See *New York v. Belton*, 453 U.S. 454 (1981).

179. 532 U.S. 318 (2001).

no-jail, no-arrest rule, held the warrantless arrest not “unreasonable.”<sup>180</sup>

The rule authorizing arrest for non-jailable misdemeanors, like the rules authorizing thorough search of person and vehicles incident to arrest, was not itself without plausible justification. The combination of these rules, together with the doctrine of *Whren v. United States*<sup>181</sup> that otherwise lawful traffic enforcement is not made unconstitutional by a subjective motive to search for illegal drugs, was intolerable.<sup>182</sup> If it was not indeed intolerable, it was not long tolerated.

In two recent cases the Court curtailed the search-incident power. *Arizona v. Gant* cut back on the *Belton* rule by holding that once the suspect has been physically restrained, further search of the vehicle requires specific facts suggesting *Terry*-type suspicion to seek evidence of the crime of arrest.<sup>183</sup> In *Riley v. California*,<sup>184</sup> the Court qualified *Robinson* by holding that when police seize cell phones incident to arrest any search of the information stored on the phone amounts to an intrusion on a separate enclave of privacy.<sup>185</sup> Absent exigent circumstances, the po-

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180. *See id.* at 347:

But we have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review. . . . Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made. Courts attempting to strike a reasonable Fourth Amendment balance thus credit the government’s side with an essential interest in readily administrable rules.

(citations omitted) (footnote omitted).

181. 517 U.S. 806 (1996).

182. *See, e.g., Dripps, supra* note 5, at 393–94 (characterizing *Whren, Belton* and *Atwater* as the Supreme Court’s “iron triangle”).

183. *Arizona v. Gant*, 556 U.S. 332, 355 (2009) (Alito, J., dissenting) (“[T]he Court adopts a new two-part rule under which a police officer who arrests a vehicle occupant or recent occupant may search the passenger compartment if (1) the arrestee is within reaching distance of the vehicle at the time of the search or (2) the officer has reason to believe that the vehicle contains evidence of the offense of arrest.”).

184. 134 S. Ct. 2473 (2014).

185. *Id.* at 2495 (“The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.”).

lice need to obtain a warrant before searching a cell phone found on the suspect or in the suspect's vehicle after arrest.

These developments suggest the maturation of a rule-based regime rather than a systemic reversion to general standards. The combination of *Atwater*, *Whren*, and *Belton* called for some sort of recalibration. Any system of court-made rules will generate this sort of synergy. It follows that a commitment to rules implies a commitment to revisiting those rules in light not just of technological changes, like cell phones, but of the evolution of constitutional doctrine itself.

*Riley* illustrates the necessarily dynamic character of a rule-based regime. Digital technology meant that the *Robinson* and *Belton* rules empowered the police to invade a much larger sphere of private life than before. The Court's response was not to fall back on a general standard. Chief Justice Roberts's majority opinion explicitly rejected the government's appeal to adopt the *Gant* standard for searching phones without warrants based on *Terry*-type suspicion to find evidence of the crime of arrest.<sup>186</sup>

*Riley* notably did not disturb the *Robinson* and *Belton* rules for intimate but non-digital personal effects.<sup>187</sup> Incident to arrest the police may search papers found on the suspect's person.<sup>188</sup> They need to obtain a warrant to search a cell phone, even though the information on the phone may be less private in a given case. The *Robinson* rule remains under-inclusive of privacy, and over-inclusive of law-enforcement, interests. The *Riley* rule is over- and under-inclusive in the opposite way. Both, however, are rules rather than standards.

#### B. FOURTH AMENDMENT REMEDIES

The bright-line-rule regime clearly reflects the regulatory perspective defended by *Perspectives*. The Supreme Court's jurisprudence of Fourth Amendment remedies has worked from the same regulatory perspective, at least half-way. The Court repeatedly has held that the police may violate the Fourth Amendment without triggering either the exclusionary rule or liability for damages.<sup>189</sup> The Court has done so out of fear that

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186. *Id.* at 2492 ("At any rate, a *Gant* standard would prove no practical limit at all when it comes to cell phone searches.").

187. *See id.* at 2484 ("*Robinson's* categorical rule strikes the appropriate balance in the context of physical objects . . .").

188. *See, e.g.,* *United States v. Rodriguez*, 995 F.2d 776 (7th Cir. 1993) (upholding seizure and copying of an address book incident to arrest).

189. *See, e.g.,* *Malley v. Briggs*, 475 U.S. 335, 344 (1986); *United States v.*

penalizing the police for illegal but border-line actions would inhibit lawful police actions in future cases.

The long line of cases recognizing good-faith-reliance exceptions to the exclusionary rule is one manifestation of the regulatory perspective. The judge-made doctrine of qualified immunity for actions brought under section 1983 or *Bivens* is another. If Fourth Amendment remedies were about restoring the atomistic spheres of privacy and autonomy violated by unreasonable searches and arrests, the police would not be given these free passes.

Now the Court has indeed applied the regulatory perspective in a way that suggests hostility to Fourth Amendment rights rather than concern for vigorous action consistent with that Amendment in future cases. The rejection of target standing to invoke the exclusionary rule is an obvious case in point.<sup>190</sup> At least so far as the public reasoning of the opinions goes, however, the Court's remedial jurisprudence reflects regulatory rather than atomistic values.<sup>191</sup>

This is not likely to change so long as the substantive law is articulated as an evolving body of judge-made rules. If the body of Fourth Amendment rules needs both to provide guidance to police and lower courts, and to evolve in light of technological changes and the interaction of the various rules themselves, the Court must be willing to modify the rules on a regular basis. *Gant* and *Riley* are illustrative.

So the ruling in *Davis v. United States*<sup>192</sup> extending the good-faith-reliance exception to the exclusionary rule to police reliance on local court precedent, reflects this need for ongoing reevaluation of substantive doctrine. If a pro-defense change in doctrine, like the *Gant* decision, undid the convictions of a great many guilty criminals secured by police compliance with the then-prevailing bright-line rules, there would be considerable reluctance among the Justices to decide the next case, say, *Riley*, in favor of the defense.

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Leon, 468 U.S. 897 (1984).

190. See, e.g., *United States v. Padilla*, 508 U.S. 77 (1993) (per curiam) (rejecting the doctrine of co-conspirator standing).

191. See, e.g., *Rakas v. Illinois*, 439 U.S. 128, 134 n.3 (1978) ("The necessity for a showing of a violation of personal rights is not obviated by recognizing the deterrent purpose of the exclusionary rule.").

192. 131 S. Ct. 2419 (2011).

The troubling feature of *Davis* is not denying the individual defendant the benefit of exclusion.<sup>193</sup> From the regulatory perspective the exclusion of the evidence found in Gant's car is, as to Gant, an arbitrary windfall justified by future consequences. The trouble is ensuring a stream of genuine cases-and-controversies to enable the Supreme Court to monitor the substantive law.

The search in *Riley* took place before the California Supreme Court ruled that there was no cell-phone exception to *Robinson* and *Belton*.<sup>194</sup> The companion case, *Wurie*, was one of first impression in the First Circuit Court of Appeals.<sup>195</sup> The open question is whether *Davis*, over time, will make such cases so hard to find that the law ossifies. The regulatory perspective ultimately calls for permitting the Court to change Fourth Amendment law prospectively. Whether the Court can find a legitimate way to reverse the conviction before it, but not others still pending on direct review, remains to be seen.

In one context the Court has flatly refused to follow the regulatory perspective. When police perform a protective search for weapons under *Terry*, and coincidentally find illegal drugs, the Court has approved receiving the evidence under the "plain feel" doctrine.<sup>196</sup> *Perspectives* logically argued that the fruits of at least some *lawful* searches should be excluded to discourage *unlawful* searches in future cases.<sup>197</sup> While the Court has accepted this logic when it involves admitting evidence illegally seized, it has rejected it in the parallel context of lawful examples of practices likely to be unlawful in many other instances.

This final bulwark of the atomistic perspective has been undermined, not by the Supreme Court, but by federal district courts issuing institutional reform injunctions against urban police departments. The Rodney King law authorizes the Justice Department to sue departments characterized by a "pattern or

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193. See, e.g., Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077, 1080–81 (2011) ("The exclusionary rule for changing law is critical to the development of Fourth Amendment law, and its costs are relatively modest.").

194. See *People v. Diaz*, 244 P.3d 501 (Cal. 2011) (rejecting the cell phone exception to search incident to arrest authority); *People v. Riley*, No. D059840, 2013 WL 475242 (Cal. Ct. App. Feb. 8, 2013) (stop and search took place on August 22, 2009).

195. See *Wurie v. United States*, 728 F.3d 1, 13 (1st Cir. 2013) (the government did not raise the good-faith exception in district court, and this "is not a case in which an intervening change in the law made the good-faith exception relevant only after the district court issued its opinion").

196. See *Terry v. Ohio*, 392 U.S. 1 (1968).

197. See *Perspectives*, *supra* note 1.

practice” of constitutional violations, and to obtain injunctive relief to remedy the “pattern or practice.”<sup>198</sup>

The effect of these consent decrees is to outlaw police actions that of themselves do not violate the Fourth Amendment. For example, nothing in the Fourth Amendment jurisprudence requires police to file reports of *Terry* stops, or maintain a 24/7 reception line for complaints of police misconduct, or to wear body cameras, or to cooperate with an independent monitor. Consent decrees may include any of these requirements as a way to prevent constitutional violations in other cases.<sup>199</sup>

Civil-rights insiders may trivialize these consent decrees as exotic interventions by a DOJ office with far fewer resources than there are lawless police departments. There is some truth to this characterization.<sup>200</sup> It is eye-opening, however, that Professor Stephen Rushin has estimated that the departments that have been subjects of a formal DOJ investigation under § 14141 serve and protect twenty percent of the country’s entire population.<sup>201</sup>

Moreover, suits by the Justice Department now are being supplemented by private class actions. The *Floyd* litigation add-

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198. 42 U.S.C. § 14141 (2012).

199. See, e.g., *United States v. City of Detroit*, No. 03-72258, ¶ 45 (E.D. Mich. June 12, 2003) (“The DPD shall require written documentation of all investigatory stops and frisks by the end of the shift in which the police action occurred. The DPD shall review all investigatory stops and frisks and document on an auditable form those unsupported by reasonable suspicion within 24 hours of receiving the officer’s report.”); *Summary of Remedial Opinion and Order in Floyd, et al. v. City of New York*, CTR. FOR CONSTITUT. RTS., <http://www.ccrjustice.org/sites/default/files/assets/files/Remedy%20Decision%20Summary%20-%20Final.pdf> (last visited Mar. 28, 2016) (in a private class action suit against NYPD, a remedial order includes an independent monitor and police body-camera pilot program).

200. See, e.g., Rachel A. Harmon, *Promoting Civil Rights Through Proactive Policing Reforms*, 62 STAN. L. REV. 1, 15–16 (2009):

Although public information available about the Justice Department’s § 14141 enforcement practice so far is incomplete, there have been at least thirty-three § 14141 full investigations of police departments: seven of these investigations resulted in a consent decree filed in federal court, seven more resulted in a memorandum of agreement between the United States and the police department, and twelve investigated departments received only a technical assistance or investigative findings letter from the Justice Department. The other seven did not result in any public action.

(footnote omitted).

201. Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1347–48 (2015) (“Today, nearly one in five Americans is served by a law enforcement agency that has been subject to a Department of Justice (DOJ) investigation via § 14141.” (footnote omitted)).



ed the population of the five boroughs to the number whose local department is under a federal court consent decree.<sup>202</sup> The *Melendres* suit adds the Maricopa County Sheriff's office.<sup>203</sup>

These consent decrees implement the regulatory perspective *a l'outrance*. The police department itself is intimately involved in preparing the decree, with the opportunity to present its case to DOJ under § 14141<sup>204</sup> or to the court in a citizen's class action. The output is not precisely what Professor Amsterdam proposed, but the actual function of modern institutional reform litigation is very similar to the police rule-making he envisioned.

The early returns are positive. The empirical evidence that is now available and continues to be gathered suggests that consent decrees can improve police compliance with constitutional requirements.<sup>205</sup> Doubts remain about the sustainability of reform after the period of immediate federal supervision expires.<sup>206</sup>

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202. See *Floyd v. City of New York*, 959 F. Supp. 2d 668 (S.D.N.Y. 2013) (remedial order); *Floyd v. City of New York*, 283 F.R.D. 153 (S.D.N.Y. 2012) (liability findings).

203. *Melendres v. Arpaio*, 784 F.3d 1254 (9th Cir. 2015) (affirming the district court's class certification, liability finding, and remedial order, including retraining and independent monitoring).

204. See *Rushin*, *supra* note 201, at 1372–74 (describing negotiations between “stakeholders” and the DOJ).

205. See *id.* at 1418 (“[G]iven the empirical evidence that SRL can effectively reduce patterns and practices of misconduct, there is a strong argument for increasing the number of SRL cases each year.”); see also Joshua Chanin, *On the Implementation of Pattern or Practice Police Reform*, 15 CRIMINOLOGY CRIM. JUST. L. & SOC'Y 38, 51 (2014):

The DOJ's pattern or practice initiative requires affected jurisdictions to implement a series of complex, protracted reforms in order to reach compliance with the federal law. The weight of both theory and practical experience suggest that such an undertaking will be fraught with challenges and likely to end in failure. Such has not been the case in the vast majority of jurisdictions that have come under federal oversight, including four of the five examined here. The implementation system—defined by the legal authority under which the implementation proceeds; independent oversight; and well-resourced, highly motivated organizations that are typically led by reform-minded chiefs—is indeed both unique and effective.

206. See *Rushin*, *supra* note 201, at 1410–11; see also Joshua Chanin, *Examining the Sustainability of Pattern or Practice Police Misconduct Reform*, 18 POLICE Q. 163, 185 (2015), <http://pqx.sagepub.com/content/early/2014/11/25/1098611114561305> (“The best evidence on the DOJ's pattern or practice initiative suggests that after implementing mandated reforms, affected departments will likely possess a stronger, more capable accountability infrastructure, more robust training, and a set of policies that reflect national best practices.”); *id.* (“The resultant organizational changes are not self-sustaining; implementation does not in and of itself guarantee meaningful, institutionalized change.”).

Whether Congress and the Department of Justice maintain and perhaps increase the resources available to enforce the Rodney King law is conjectural. Whether the Supreme Court permits private suits to go forward by relaxing the justiciability barriers erected in older cases is conjectural. The current record, however, suffices to establish that our society could follow through on the regulatory approach to the Fourth Amendment, should it choose to do so.

## V. TWO PROPOSALS FOR REFORM

I close by suggesting that serious consideration be given to two reforms that would move us still further along the path of aligning the scope of the Fourth Amendment with contemporary values and its content with the regulatory perspective. The first of these is the possibility of asking the people themselves, rather than the Justices or the framers, about reasonable expectations of privacy. The second is to expand the institutional reform concept beyond suits for systemic noncompliance by creating a mechanism for the Justice Department to certify police departments for systemic compliance, together with incentives for departments to obtain that certification.

### A. TAKING *KATZ* SERIOUSLY: THE CASE FOR ONLINE OPT-OUTS

Whether we side with Justice Scalia's *Kyllo* test by seeking the degree of privacy approved by the founders, or Justice Harlan's *Katz* test asking whether modern "society" recognizes a reasonable expectation of privacy, we are likely to be troubled about the subjectivity of the inquiry. As Professor Amsterdam knew, one's views of the values behind the drafting choices of the framers is unlikely to be inconsistent with one's own first-order value preferences. And it has become something of a cliché to point out that when the Justices say "society" they mean "us."

The same technology that poses so many vexing threats to personal privacy and to the construction of principled constitutional doctrine also offers opportunities. We need not indulge the fiction that corporate privacy policies nested inside online adhesion contracts reflect actual customary expectations. The internet now enables millions of people to signal their preferences, and to alter those signals, instantaneously and at very low cost.

For example, a new generation of utility meters, so-called "smart meters," enable power providers to receive hour-by-hour information about power usage from each consumer. This information could enable the utilities to provide more efficient ser-

vice, but it can also reveal details of life inside the home.<sup>207</sup> Some utilities have responded to privacy concerns by enabling customers to opt out of smart-meter service.<sup>208</sup>

Consider the government's position that the third-party doctrine justifies accessing subscriber information on a *Terry* showing. The argument is that having entrusted information to the ISP or telecom provider, the individual has no grievance under either *Katz* or a trespass theory when the government forces the third party to share the data. As we have seen this is dubious under the historical approach and unattractive to many as a contemporary matter. But why should we ask the Justices to make the normative judgment for us?

It would be entirely possible for the government to maintain a website devoted to recording individual expectations of privacy. Suppose the Stored Communications Act were amended to authorize accessing subscriber information on reasonable suspicion, *provided* the government established an online opt-out system by which individuals could put themselves on either a "full consent" or a "warrant only" list. The default would be the current law's requirement of a traditional warrant to access content, and the *Terry* standard for accessing envelope and subscriber information. Before granting an order to compel disclosure by the third party, a court would have to check the warrant list to be sure that the consumer has not opted out of the reasonable-suspicion regime.

We have one informed guess about where "society" thinks the balance might be struck—the legislative judgment expressed in the SCA. It follows that the legislature's guess makes a rational place to establish the default rule. When, however, the constitutionality of the legislature's decision depends on individuals voluntarily assuming the risk that their disclosures will pass through to the government, the legislature can only guess about what people actually expect. If we cared about actual risk assumption we would ask people directly.

I assume that almost no one would visit a government website to register themselves as "full consent" targets. I expect that

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207. See, e.g., Christina Nunez, *Who's Watching? Privacy Concerns Persist as Smart Meters Roll Out*, NAT'L GEOGRAPHIC (Dec. 14, 2012), <http://news.nationalgeographic.com/news/energy/2012/12/121212-smart-meter-privacy> (discussing technology that monitors energy use).

208. See, e.g., *SmartMeter Opt-Out Program*, PAC. GAS & ELEC., <http://www.pge.com/en/myhome/customerservice/smartmeter/optout/index.page> (last visited Mar. 28, 2016).

many but not most would bother to register as “warrant only” targets. The practical opportunity to opt out, however, would make the silence of the majority a much better indicator of assumed risk than the guesswork of Justices deciding cases framed by the exclusionary rule.

The (very) hypothetical statute has an important implication for constitutional doctrine in the courts. A government that easily could but does not provide an opt out is in a much weaker position to claim assumption of risk. One can imagine a Supreme Court ruling declaring the SCA unconstitutional because application of the third-party doctrine depends on a genuine opt out. This very limited retreat from *Miller* and *Smith* not only makes good sense. It would also justify a narrow judicial intervention that would force the hand of Congress. Congressional action might provide a comprehensive reform package that would avert further constitutional rulings.<sup>209</sup>

#### B. TOWARD REGULATORY REMEDIES: CERTIFICATION FOR COMPLIANCE

On the regulatory view the exclusionary rule is justified by the incentives it gives police to comply with the Fourth Amendment. Where they are in effect, consent decrees cut to the chase. They provide direct mechanisms for disciplining noncompliance, either by punishing violations as a contempt by the department or by directly requiring investigation and where justified by the facts appropriate discipline of individual officers. If we see in these decrees the ultimate expression of the regulatory perspective, we might well consider encouraging this sort of police-community rule-making under federal oversight to ensure compliance with constitutional requirements. I have a tentative proposal in that direction.

Suppose Congress authorized (and funded) the Justice Department not just to sue police departments for patterns of violations, but to advise and cooperate with departments that voluntarily sought to adopt best-practices regulations, with independent monitoring and enforcement provisions.<sup>210</sup> The De-

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209. The California Electronic Privacy Act is one example of plausible legislation. S.B. 178, 2015 Leg. (Cal. 2015).

210. It might well be that best practices include police rulemaking to cabin discretion, while the content of those rules might vary from one department to another. Professor Amsterdam called for just such an approach. As Barry Friedman and Maria Ponomarenko point out, police discretion is an extreme outlier from American public law’s general insistence on legality, transparency, and accountability. Barry Friedman & Maria Ponomarenko, *Democratic*

partment could certify for systemic compliance, just as it can now sue for systemic noncompliance. The effect would be to replicate consent decrees *without* litigation.

Local political forces might well focus on a department's refusal to seek certification for a best-practices compliance program. A Congress persuaded in the age of Ferguson that the Rodney King law was not enough, informed by empirical evidence on successful compliance policies in departments under a court order, could find any number of ways to encourage voluntary participation by local departments in a certification program.<sup>211</sup> A very small incentive would be making certification of a department a condition of providing military hardware under the 1033 and 1122 programs, which make military equipment available to police departments either free or at the federal government's cost.<sup>212</sup> Much stronger incentives can be imagined.

For example, Congress might insist that qualified immunity be earned, rather than bestowed indiscriminately by the courts. A statute conditioning officer eligibility for the immunity defense on DOJ certification of the officer's department would cost Congress no more money than the cost of the certification program itself. Cities, counties, and police departments all but universally indemnify their officers.<sup>213</sup> Lawyers for these employers of police could be counted on to make clear to elected officials the potentially very high price of failing to obtain certification for compliance. In this way we might finally see the full realization of the regulatory perspective as a system of rules made in consultation

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*Policing*, 90 N.Y.U. L. REV. 1827 (2015). A certification program could motivate departments to undertake transparent rulemaking of the sort they suggest.

211. Congress commonly conditions federal funds on some sort of *ex ante* certification. For example, under the Higher Education Act, federal financial aid is only available to students attending accredited institutions. See Higher Education Act, 20 U.S.C. §§ 1070–1099 (2006).

212. See, e.g., Rachel Harmon, *Federal Programs and the Real Cost of Policing*, 90 N.Y.U. L. REV. 870, 924–27 (2015) (describing 1033 and 1122 programs).

213. See Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 937 (2014):

Although I do not know for certain whether my findings are consistent with the practices in all jurisdictions nationwide, the eighty-one jurisdictions in my study are broadly representative in size, location, agency type, indemnification policy, and indemnification procedure. My findings therefore at least support the presumption that officers across the country, in departments large and small, are virtually always indemnified.

with the police and with effective administrative machinery to enforce these regulations.

### CONCLUSION

This Article has tried to trace how the Supreme Court has largely, but not entirely, embraced the “perspectives on the Fourth Amendment” favored by Professor Amsterdam. Civil liberties indeed have suffered when the contemporary values of the Justices have put security before liberty. So too civil liberties have suffered when the rules announced by the Court are over-inclusive of legitimate security interests and under-inclusive of legitimate privacy interests. Yet the case law professes the aim of securing police compliance with prevailing social norms. The recent resurgence of historicism, and of trespass analysis, is more a reflection of, rather than a departure, from this prevailing template.

Trespass-free surveillance cases, and a thorough empirical canvass of institutional reform litigation, will soon shed more light on just how far we are prepared to follow Professor Amsterdam’s “perspectives.” If we witness a definite reversion to narrow historicism and retrospective atomism, I will have misapprehended the long arc of history. *Perspectives on the Fourth Amendment* would still count as a masterpiece of legal scholarship, one that framed informed thinking about a critical body of constitutional law for more than forty years.

I believe the true test of legal scholarship was captured by H.L.A. Hart when he wrote, of Jeremy Bentham, that even “where he fails to persuade, he still forces us to think.”<sup>214</sup> Long ago Professor Amsterdam persuaded me on many matters. On others he has been forcing me to think for many years. I have advanced some of those thoughts today in a spirit of homage.

For I agree with Professor Amsterdam that

when we seek to understand the Supreme Court’s difficulties in grappling with the fourth amendment, we observe the Court in the throes of one of its noblest labors. That labor is to be the instrument by which a free society imposes on itself the seldom welcome, sometimes dangerous, always indispensable restraints that keep it free.<sup>215</sup>

If any further words of mine are to be added, let them be these four: Re-read. Re-think. Revere. Repeat.

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214. H.L.A. HART, *ESSAYS ON BENTHAM: JURISPRUDENCE AND POLITICAL THEORY* 39 (1982).

215. *Perspectives*, *supra* note 1, at 353.