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## The Political Fourth Amendment

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## THE POLITICAL FOURTH AMENDMENT

THOMAS P. CROCKER\*

### ABSTRACT

*The Political Fourth Amendment builds on Justice Ginsburg's recent dissent in Herring v. United States to argue for a "more majestic conception" of the Fourth Amendment focused on protecting political liberty. To put the point dramatically, we misread the Fourth Amendment when we read it exclusively as a criminal procedure provision focused entirely on either regulating police or protecting privacy. In order to see the Fourth Amendment as contributing to the Constitution's protections for political liberty, and not simply as an invitation to regulate police practice, we must take seriously the fact that the Fourth Amendment's textual purpose is to secure a "right of the people," which places it textually alongside the First, Second, and Ninth Amendments that similarly seek to protect the "right[s] of the people." Narratives focused on regulating police or protecting privacy each risk blinding us to the Fourth Amendment's broader constitutional setting. By looking at the historical origins of the Fourth Amendment in relation to substantive First Amendment concerns, and examining the textual significance of protecting a "right of the people," this Article argues that the two dominant narratives overlook a central political purpose of the Fourth Amendment. The political Fourth Amendment seeks to protect the political liberties of*

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*the sovereign “People.” Focused exclusively on protecting privacy by regulating police practice, current Fourth Amendment doctrine offers no protection to anything a person knowingly exposes to others, a hazard in an era of electronic social networking. Reading the Fourth Amendment back into the Constitution makes available new grounds for the Constitution’s relevance in an age of pervasive electronic surveillance.*

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#### INTRODUCTION

We live in a world of increased government surveillance of both public and private spheres of our lives, despite past warnings of possible future harm. Writing in dissent from the Supreme Court’s confidential informant cases, Justice Douglas warned that the “privacy and dignity of our citizens is being whittled away by sometimes imperceptible steps.”<sup>1</sup> As a consequence of technological developments, we risk creating “a society in which government may intrude into the secret regions of man’s life at will.”<sup>2</sup> As the sphere of life held private from government surveillance

1. *Osborn v. United States*, 385 U.S. 323, 343 (1966) (Douglas, J., dissenting).

2. *Id.* Justice Douglas also notes that police employed peepholes to spy in men’s bathrooms to try to discover homosexuals, while intruding into very private regions of one’s life. *Id.* at 342–43; see David Alan Sklansky, “*One Train May Hide Another*”: Katz, Stonewall, and the Secret Subtext of *Criminal Procedure*, 41 U.C. DAVIS L. REV. 875, 880 (2008) (“Homosexuality and its policing . . .

shrinks, Justice Douglas observed that a time may come “when the most confidential and intimate conversations are always open to eager, prying ears. When that time comes, privacy, and with it liberty, will be gone.”<sup>3</sup>

Impassioned dissents provide good prose, but may not always provide clarity of thought. Indeed, sounding the totalitarian bugle in a post–Cold War era may ring a bit disharmonious. This era has produced vast new technologies enabling many new means of intimate conversation among friends. These technological tools are familiar to us all. E-mail, text messaging, electronic social networking, and wireless mobile communication devices allow us many different ways to keep track of our friends and associates. The problem that provides continuing relevance to Justice Douglas’s dissent is that under current Fourth Amendment doctrine, all of these tools are constitutionally available to “eager, prying ears,”<sup>4</sup> because none of them involves attempts by the speaker to keep information private—that is, secret.

Under the “third-party” doctrine, a person loses Fourth Amendment protections over anything she knowingly exposes to another person.<sup>5</sup> The Supreme Court “consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.”<sup>6</sup> As Chief Justice Roberts articulated the doctrine, “[i]f an individual shares information, papers, *or places* with another, he assumes the risk that the other person will in turn share access to that information or those papers *or places* with the government.”<sup>7</sup> This doctrine extends to features of everyday life, such as the numbers one dials on the phone,<sup>8</sup> the transactions one conducts with a bank,<sup>9</sup> or the location one conveys to onlookers when in public.<sup>10</sup> Because under the third-party doctrine the Fourth Amendment protects only the privacy of information or activities

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were an important part of the background against which the Court constructed the modern constitutional law of the criminal process.”)

3. See *Osborn*, 385 U.S. at 354 (Douglas, J., dissenting).

4. *Id.* By contrast, delivery of sealed mail is unavailable to prying eyes. See *Ex parte Jackson*, 96 U.S. 727, 733 (1878) (“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.”).

5. See, e.g., *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979).

6. *Id.*

7. *Georgia v. Randolph*, 547 U.S. 103, 128 (2006) (Roberts, C.J., dissenting). Regarding shared common areas, the Court has stated that co-occupants have “assumed the risk that one of their number might permit [a] common area to be searched.” *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974).

8. See *Smith*, 442 U.S. at 743.

9. *United States v. Miller*, 425 U.S. 435, 443 (1976).

10. See *United States v. Knotts*, 460 U.S. 276, 281–82 (1983).

withheld from others, the Court construes much of everyday life as no longer undisclosed, and therefore fully available to government officials. Although scholars have widely criticized this doctrine,<sup>11</sup> it readily follows from the Court's narrow construction of privacy as what remains undisclosed. In a robust socially networked world, Fourth Amendment privacy by itself may offer little constitutional guidance or protection.<sup>12</sup>

We face a constitutional dilemma. Either we accept the existing limited, and increasingly irrelevant, Fourth Amendment protections for privacy, or we must seek to reinvigorate the Fourth Amendment by seeing how it functions within a more comprehensive constitutional framework.<sup>13</sup> This Article argues that the Fourth Amendment makes a distinctive contribution to a broader constitutional framework aimed at protecting political liberty.

Justice Douglas's dissent is noteworthy because he recognizes the interrelation between privacy, dignity, and liberty. So far, the primary melody of Fourth Amendment protections has sounded in privacy alone, with dignity and liberty interests playing only an occasional background note.<sup>14</sup> Yet liberty fits more comfortably within a Constitution whose

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11. See, e.g., Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974); Sherry F. Colb, *What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119, 123 (2002) (criticizing the Court for "equating risk-taking with inviting exposure and equating limited-audience with whole-world self-exposure"); Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CALIF. L. REV. 1593, 1635 (1987) ("A view of the world that recognizes the essential interconnectedness of people and the importance of intimacy and sharing is foreign to the atomistic social theory underlying the Court's present doctrine."); Daniel J. Solove, *Fourth Amendment Codification and Professor Kerr's Misguided Call for Judicial Deference*, 74 FORDHAM L. REV. 747, 753 (2005) ("The third party doctrine presents one of the most serious threats to privacy in the digital age."); see also Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society"*, 42 DUKE L.J. 727, 732 (1993) (employing surveys to reveal "societal understandings" of privacy and finding that "some of the Court's conclusions . . . may be well off the mark"). But see Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 564 (2009) (defending the third-party doctrine).

12. See Donald L. Doernberg, *"Can You Hear Me Now?": Expectations of Privacy, False Friends, and the Perils of Speaking Under the Supreme Court's Fourth Amendment Jurisprudence*, 39 IND. L. REV. 253, 284 (2006) ("The harm that the Amendment protects against is the loss of the sense of security that inevitably accompanies the idea that no matter where one is, and no matter what one does, the government may be listening or watching.").

13. Posing a similar question, Jack Balkin asks: "The question is not whether we will have a surveillance state in the years to come, but what sort of surveillance state we will have. Will we have a government without sufficient controls over public and private surveillance, or will we have a government that protects individual dignity and conforms both public and private surveillance to the rule of law?" Jack M. Balkin, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1, 3-4 (2008).

14. See James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1213-14 (2004).

purpose is to “secure the Blessings of Liberty” for “We the People.”<sup>15</sup> Liberty is realized in public as well as private, collectively as well as individually, creating the space for “the People” to exercise their sovereign power. Moreover, the Fourth Amendment looks very different when read alongside the First, Second, and Ninth Amendments, all of which protect “right[s] of the people,” than when it is read among the criminal process provisions of the Fifth and Sixth Amendments, which focus on rights of “the accused” or “a person.” Read in light of the Amendments protecting political liberty, we can more easily see the Fourth Amendment’s role within a scheme of ordered liberty designed for political purposes.<sup>16</sup> The ability to see the Fourth Amendment in this light is obscured by prevailing doctrine.

Current Fourth Amendment jurisprudence governing searches contains two contrasting narratives, one focused on regulating police and the other on protecting privacy.<sup>17</sup> Sometimes the two narratives coordinate; regulation of police can be privacy protecting. At other times the narratives diverge. Two recent Supreme Court decisions illustrate the divergence. In *Arizona v. Gant*, a five-to-four majority of the Supreme Court placed limitations on the search incident to an arrest near an automobile, citing the imperative of protecting privacy interests.<sup>18</sup> A vigorous dissent, citing the need to provide bright-line rules to guide police practice, failed to mention the value of privacy at all.<sup>19</sup> In *Herring v. United States*, a different five-to-four majority held that the exclusionary rule did not apply to searches based on negligent records maintained by state officials, emphasizing the minimal deterrent effect for police misconduct, while also failing to consider relevant privacy interests.<sup>20</sup> Writing in dissent, Justice Ginsburg altered the usual Fourth Amendment narrative, focusing not on the privacy implications of the search and seizure, but on the liberty interests at stake.<sup>21</sup> Here, Justice Douglas’s equating of Fourth Amendment liberty with privacy interests is recast in a new jurisprudential light. By reading the Fourth Amendment to protect liberty, Justice Ginsburg opens up the possibility of protecting the public

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15. U.S. CONST. pmb1.

16. The modern development of the Fourth Amendment was focused on vindicating the “freedom implicit in the concept of ordered liberty.” *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (quotation omitted).

17. See *infra* notes 36–51 and accompanying text.

18. 129 S. Ct. 1710, 1720, 1723–24 (2009).

19. *Id.* at 1726–32 (Alito, J., dissenting).

20. 129 S. Ct. 695, 704 (2009).

21. *Id.* at 706–07 (Ginsburg, J., dissenting).

and political lives of individuals who have chosen not to remain secreted away from others. In so doing, protections for political liberty may sweep more broadly than the Court's current protections for privacy. Constitutional discourse that moves beyond the twin narratives of regulating police and protecting privacy allows us to see how the Fourth Amendment protects popular sovereignty and public association, in addition to private life.

Put dramatically, we misread the Fourth Amendment when we read it to protect no more than a "reasonable expectation of privacy," as the Court has done since *Katz v. United States*.<sup>22</sup> Privacy is no doubt an important constitutional value, protected not only by the Fourth Amendment, but also by the due process clauses of the Fifth and Fourteenth Amendments.<sup>23</sup> But privacy exclusiveness ignores a "more majestic conception"<sup>24</sup> of the Fourth Amendment that protects a political "right of the people" to organize community life free from pervasive government surveillance and interference. Similar problems arise when scholars and courts view the Fourth Amendment primarily as a special provision of constitutional criminal procedure designed to regulate police practice.<sup>25</sup> As Akhil Amar argues, by reading the Fourth Amendment as part of a special group of criminal procedure provisions, "we miss . . . how the Fourth Amendment connects up with the rest of the Constitution."<sup>26</sup> Yet despite the severity of his criticism of other scholars, Amar persists in reading the Fourth Amendment in the context of constitutional criminal procedure.<sup>27</sup> He

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22. 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

23. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992) (protecting "a promise of the Constitution that there is a realm of personal liberty which the government may not enter"); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

24. *Herring*, 129 S. Ct. at 707 (Ginsburg, J., dissenting) (quoting *Arizona v. Evans*, 514 U.S. 1, 18 (1995) (Stevens, J., dissenting)).

25. This Article is not alone in observing the existence of a problematic gap between Fourth Amendment doctrine and other constitutional provisions. See, e.g., Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 200 (1993) ("Along with the other provisions of the Bill of Rights linked to the criminal justice system, the [F]ourth [A]mendment has been consigned to a category labeled 'criminal procedure' that is generally treated as distinct from 'constitutional law.'") (footnote omitted).

26. AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 2* (1997).

27. Regarding the purported widespread misreading of the Fourth Amendment, Amar claims that "Fourth Amendment case law is a sinking ocean liner—rudderless and badly off course—yet most scholarship contents itself with rearranging the deck chairs." *Id.* To put us back on course, Amar provides functional solutions rooted in different textual readings for the same criminal procedure questions: when may state officials conduct searches, how should criminal trials view tainted evidence, and what remedies should be available for illegal police conduct? *Id.* at 31–45. These are important questions. They are, however, focused on regulating police conduct through court procedure, not on the articulation of constitutional values through which additional remedies may be possible.

focuses on its reasonableness requirement to govern police practice, contests reliance on the exclusionary rule in criminal proceedings, and finds a remedy for unreasonable searches and seizures in the right to civil juries protected by the Seventh Amendment.<sup>28</sup> These considerations all fit comfortably within the first principles of criminal procedure. If this is as far as the Amendment “connects up with the rest of the Constitution,” then we fail to see how the Fourth Amendment furthers core constitutional principles of political liberty sharing a textual mandate to protect a “right of the people.”

“We the People” sought both active participation in political life and negative constraints on government interference. Benjamin Constant emphasized this difference between the “liberty of the ancients” and the “liberty of the moderns,” separating collective political participation from individual civil freedom.<sup>29</sup> Isaiah Berlin makes a related distinction between positive and negative theories of liberty, emphasizing the potential for conflict between freedom from constraint and freedom of self-fulfillment.<sup>30</sup> Although these two forms of liberty can pull in different directions, political liberty requires both freedom from unwarranted government intrusion into spheres of our lives, as well as public and political interaction among “the People.”<sup>31</sup> The Bill of Rights reflects both these aspects of liberty. The Fifth Amendment privilege against self-incrimination protects a right to keep information to oneself, while the First Amendment right of assembly protects shared public political activity.<sup>32</sup> Above all, political liberty requires a particular kind of security in the dignity of one’s person and the integrity of one’s interactions with others.<sup>33</sup> Privacy, as that which is withheld from others, sounds primarily

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28. *See id.* at 30–31. Elsewhere, Amar has argued that “[i]nstead of being studied holistically, the Bill has been chopped up into discrete chunks of text, with each bit examined in isolation.” Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1131 (1991).

29. *See* BENJAMIN CONSTANT, *The Liberty of the Ancients Compared with That of the Moderns*, in POLITICAL WRITINGS 309–28 (Biancamaria Fontana trans. & ed., 1988).

30. *See* ISAIAH BERLIN, *Two Concepts of Liberty*, in FOUR ESSAYS ON LIBERTY 118–72 (1969); *see also* ISAIAH BERLIN, *THE CROOKED TIMBER OF HUMANITY: CHAPTERS IN THE HISTORY OF IDEAS* 12–13 (Henry Hardy ed., Alfred A. Knopf 1991) (1990) (“[L]iberty—without some modicum of which there is no choice and therefore no possibility of remaining human as we understand the word—may have to be curtailed in order to make room for social welfare, to feed the hungry, to clothe the naked, to shelter the homeless, to leave room for the liberty of others, to allow justice or fairness to be exercised.”).

31. *See* STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 6 (2005) (advancing “a democratic theme—‘active liberty’—which resonates throughout the Constitution”).

32. *See* U.S. CONST. amends. I, IV.

33. This security is a structural feature of our Constitution’s design. “Political liberty in a citizen is that tranquility of spirit which comes from the opinion each one has of his security, and in order for



within the narrow theme of negative liberty. Full protection of political liberty requires more. To say how much more invites a more complete interaction with this longstanding political theory debate.<sup>34</sup> For present purposes, it should suffice to notice that constitutional provisions such as the First Amendment do more than constrain government, but provide the tools necessary for fulfilling “the People’s” democratic aspirations. “Political liberty” is a placeholder for constitutional values that sweep more broadly than narrow conceptions of privacy to encompass our interpersonal and public lives made vulnerable to oppressive state interference. Neither exclusive focus on protecting privacy nor regulating police—the two dominant Fourth Amendment narratives—adequately reflects the Constitution’s pervasive purpose to secure political liberty.<sup>35</sup>

If the Constitution from the preamble onward seeks to protect liberty, then what does the Fourth Amendment contribute that is distinctive? All of the Amendments, as well as the structural features of the Constitution, seek in some way to establish a government that secures and promotes the liberty of persons. What is the Fourth Amendment’s distinctive contribution if it is not to protect privacy and regulate the institutions, such as the modern police, most likely to invade a person’s privacy? Political liberty is multifaceted. Among other features, it requires both the opportunity and ability to assemble, speak, and petition; it requires substantive protections for intimate aspects of “the People’s” lives; it requires official process to accord with principles of fairness; and it requires governing officials to respect “the People’s” security in their persons and homes against unreasonable searches and seizures. The Fourth Amendment protects this latter facet of liberty, enabling freedom of

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him to have this liberty the government must be such that one citizen cannot fear another citizen.” CHARLES DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 157 (Anne M. Cohler et al. trans. & eds., Cambridge Univ. Press 1989) (1750); see also Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1514 (1991) (examining the “link between constitutional structure and liberty”).

34. Although the differences can be more complicated, on the side of negative liberty, one finds works such as THOMAS HOBBS, *LEVIATHAN* 91, 145–54 (Richard Tuck ed., Cambridge Univ. Press 1996) (1651) and F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* (1960). On the side of positive liberty, one finds works such as JEAN JACQUES ROUSSEAU, *Of The Social Contract*, in *THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS* 78–80 (Victor Gourevitch trans. & ed., Cambridge Univ. Press 1997) (1762) and 2 CHARLES TAYLOR, *What’s Wrong with Negative Liberty*, in *PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS* 211–29 (1985).

35. Other scholars have also expressed growing skepticism about the dominant privacy paradigm. See Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 356 (1998) (“[T]he essential attribute of the right to be secure is the ability of the individual to exclude the government from intruding.”); Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 104 (2008) (arguing that the Fourth Amendment “should stop trying to protect privacy”).

movement and social interaction in private and in public, secure from arbitrary search and seizure. The problem is that the Supreme Court has lost sight of how the Fourth Amendment fits into a broader political liberty framework, as it has increasingly focused on protecting a narrow conception of privacy and regulating everyday police practice. Although I purposefully leave the contours of “political liberty” vague, public interaction and coordination between persons require protection for these basic liberties—ones that enable both self-determination and collective interaction.<sup>36</sup> Fourth Amendment liberty protects public associations in addition to private life. Fourth Amendment liberty protects forms of social interaction otherwise subject to stultifying surveillance and pervasive interference.<sup>37</sup> Finally, Fourth Amendment liberty allows us to see how rights against search and seizure coordinate with rights to speak and assemble.

In what follows, Part I examines the contrasting narratives of regulating police and protecting privacy, reading the Fourth Amendment in light of parallel First Amendment rationales. I argue that Justice Ginsburg’s reorientation of the Fourth Amendment toward protecting the liberty of “the People” to live free from unwarranted government intrusion into their lives fits well with First Amendment protections for freedom of speech against the state censor. Part II traces the Fourth Amendment’s central value as protecting liberty from its origins in seditious libel cases. These origins provide a close connection with First Amendment interests, focusing on the liberty of individual persons as well as “the People.” Part III argues that the Fourth Amendment’s protection of a “right of the people” is textually significant and mostly ignored or misread by scholars and courts. The Fourth Amendment speaks in the voice of the sovereign “People,” protecting a “right of the people,” and provides security in the plural, preserving “the People” in “their . . . houses.” These linguistic

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36. I want to avoid having to set priorities among the constitutionally protected liberties. Instead, my goal is to demonstrate the important and overlooked value of a broader conception of Fourth Amendment liberty ignored when we focus on protecting privacy (and regulating police practice). In this context, John Rawls claims that “[t]he worth of one such liberty normally depends upon the specification of the other liberties.” JOHN RAWLS, *A THEORY OF JUSTICE* 178 (rev. ed. 1999). If government can seize a person’s papers at will, then the worth of free speech would be greatly diminished.

37. Focusing on political liberty also emphasizes the shared and social multiplicity on which a vibrant political body relies. Focusing on privacy tends to emphasize the normalizing influence of the state for individuals. As Jed Rubenfeld states well, “[t]he danger, then, is a particular kind of creeping totalitarianism, an unarmed *occupation* of individuals’ lives. That is the danger of . . . a society standardized and normalized, in which lives are too substantially or too rigidly directed.” Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 784 (1989).

choices are not accidents of drafting. They place the Fourth Amendment as much in the company of the First Amendment as they do other criminal process provisions. As this Article argues, textual placement of protecting a “right of the people” indicates a political purpose better suited to protecting liberty than privacy alone. In light of the Supreme Court’s opinion in *Lawrence v. Texas*, Part IV argues that we have a model of reading the Constitution in light of its broader purpose of preserving and protecting political liberty. Rather than reading the Amendment as an exclusive invitation to create doctrinal regulations for police practice, *Lawrence* suggests how Fourth Amendment values coordinate with constitutionally pervasive protections for liberty, transcending narrow doctrinal frameworks. Finally, this Article argues that the Fourth Amendment should be read back into the Constitution to play an available role in securing public democratic participation and to address pressing issues raised by increased capacities for intrusive government surveillance.

#### I. TWO VISIONS OF FOURTH AMENDMENT PURPOSE: PROTECTING PRIVACY AND REGULATING POLICE

The Fourth Amendment provides: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”<sup>38</sup> There is a lot packed into this one Amendment, but the basic modern doctrinal framework is fairly straightforward. Most searches and many seizures must be authorized in advance by a warrant issued by a neutral magistrate on a showing of probable cause.<sup>39</sup> A central purpose behind the Fourth Amendment doctrine is to protect privacy. The Supreme Court has explained: “The purpose of the Fourth Amendment is to prevent unreasonable governmental intrusions into the privacy of one’s person, house, papers, or effects. The wrong condemned is the unjustified

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38. *Id.*

39. *Illinois v. Gates*, 462 U.S. 213 (1983); *Payton v. New York*, 445 U.S. 573 (1980); *Mincey v. Arizona*, 437 U.S. 385, 393–94 (1978) (“[W]arrants are generally required to search a person’s home or his person unless ‘the exigencies of the situation’ make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment.”); *Katz v. United States*, 389 U.S. 347, 357 (1967) (“[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” (footnotes omitted)).

governmental invasion of these areas of an individual's life."<sup>40</sup> This simple statement belies the complexity of the general framework with its many exceptions and permutations. Privacy is not the lone purpose animating the Fourth Amendment doctrine. Regulating police practice is also a core purpose driving doctrinal developments, as the Court makes clear that "[a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront."<sup>41</sup>

Fourth Amendment doctrine makes very specific judgments about where, when, what, and how police may investigate. The Supreme Court has resolved whether police may examine paper bags located in cars,<sup>42</sup> crumpled cigarette packages found in coat pockets,<sup>43</sup> garbage placed for disposal by the city,<sup>44</sup> the heat emanating from a house,<sup>45</sup> and greenhouses observed from the airspace above.<sup>46</sup> The Supreme Court has further resolved whether police may examine records revealed to third parties,<sup>47</sup> whether they may listen to conversations among cohorts,<sup>48</sup> and whether they may become undercover informants in a group or association.<sup>49</sup> With answers to these questions and more, the Court has fashioned a doctrine to regulate police behavior in order to protect privacy. As more outrageous police behavior—torture,<sup>50</sup> forced stomach pumping,<sup>51</sup> and unwarranted home invasion<sup>52</sup>—has yielded to constitutional regulation, criminal procedure has become more refined and judicial guidance more difficult to apply. Recognizing this, the Court often attempts to simplify constitutional rules, mindful of "the difficulties created for courts, police, and citizens by an ad hoc, case-by-case definition of Fourth Amendment standards to be

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40. *United States v. Calandra*, 414 U.S. 338, 354 (1974); *see also Illinois v. Lafayette*, 462 U.S. 640, 648 (1983); *New York v. Belton*, 453 U.S. 454, 458 (1981).

41. *Dunaway v. New York*, 442 U.S. 200, 213–14 (1979).

42. *See Florida v. Jimeno*, 500 U.S. 248, 249 (1991).

43. *See United States v. Robinson*, 414 U.S. 218, 236 (1973).

44. *See California v. Greenwood*, 486 U.S. 35, 37 (1988).

45. *See Kyllo v. United States*, 533 U.S. 27, 40 (2001).

46. *See Florida v. Riley*, 488 U.S. 445, 452 (1989); *California v. Ciraolo*, 476 U.S. 207, 213–14 (1986) ("Any member of the public flying in this airspace who glanced down could have seen everything that these officers observed.").

47. *See United States v. Miller*, 425 U.S. 435 (1976).

48. *See United States v. White*, 401 U.S. 745, 747 (1971); *see also Lopez v. United States*, 373 U.S. 427, 440 (1963); *On Lee v. United States*, 343 U.S. 747, 757–58 (1952).

49. *See Hoffa v. United States*, 385 U.S. 293 (1966).

50. *See Brown v. Mississippi*, 297 U.S. 278 (1936).

51. *See Rochin v. California*, 342 U.S. 165 (1952).

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

applied in differing factual circumstances . . . [that make] it difficult for the policeman to discern the scope of his authority.”<sup>53</sup> The twin goals of protecting privacy and regulating police sometimes complement each other, but at other times operate in significant tension. How the Supreme Court addresses this tension shapes the everyday experience of constitutional values.

### A. *Protecting Privacy*

Whether police officers are entitled to look in a particular place, listen to a particular conversation, or intrude generally into the affairs of others depends upon what activities and places the Court considers private. The accepted narrative of how privacy came to dominate Fourth Amendment jurisprudence begins with Justice Brandeis’s dissent in *Olmstead v. United States*,<sup>54</sup> a case first confronting the constitutionality of using wiretaps to eavesdrop on telephone conversations. Although the Court found no constitutional violation, Justice Brandeis exhorted:

The makers of our Constitution . . . conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.<sup>55</sup>

Rather than focusing on the property interest at stake, Justice Brandeis sought to shape a privacy right to be free from unjustified government intrusion. Despite Brandeis’s effort, property interests continued to predominate until the Supreme Court confronted another occasion when police recorded a telephone conversation.<sup>56</sup> Modern Fourth Amendment doctrine derives from the Court’s determination in *Katz v. United States* that police may not conduct electronic surveillance of a private telephone booth conversation without prior judicial authorization.<sup>57</sup> The Court

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53. *Oliver v. United States*, 466 U.S. 170, 181 (1984) (citations omitted).

54. *Olmstead v. United States*, 277 U.S. 438 (1928), *overruled by* *Katz v. United States*, 389 U.S. 347 (1967), *and* *Berger v. New York*, 388 U.S. 41 (1967).

55. *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting).

56. *See* *Goldman v. United States*, 316 U.S. 129, 134–35 (1942) (reasoning no Fourth Amendment violation because no trespass occurred while securing the listening apparatus); Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 809–15 (2004) (arguing that property law considerations still dominate Fourth Amendment jurisprudence).

57. 389 U.S. 347, 351 (1967).

declared that “the Fourth Amendment protects people, not places”<sup>58</sup> and resolved that persons receive Fourth Amendment protection against government searches only when they have a “reasonable expectation of privacy.”<sup>59</sup> This standard evolved into a judicial inquiry that balances the nature of the government need against the degree of privacy intrusion, only if the place where police look remains private. As *Katz* stated, “[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.”<sup>60</sup>

If there is no reasonable expectation of privacy, then police do not conduct a “search” for constitutional purposes when they engage in investigatory inspections. “Search” is not defined by the purposes and actions of the police, but by the physical location or the social expectation of the targeted object or person. Under the *Katz* framework, if a person publicly exposes an item, then it receives no constitutional protection.<sup>61</sup> Telephone numbers conveyed to a service provider,<sup>62</sup> financial transactions relayed through financial institutions,<sup>63</sup> garbage left on the street,<sup>64</sup> and activities on one’s property visible to others<sup>65</sup> all share a common feature: they have been publicly exposed and thus receive no privacy protection. Public exposure is not the same as widespread exposure. Sharing a conversation or information with a single person suffices to vitiate privacy protections.<sup>66</sup>

Once privacy becomes the focus of Fourth Amendment protection and searches are defined in terms of what is withheld from public exposure, much of everyday social life occurs outside constitutional purview. What is more, the Court instructs that in engaging in everyday social commerce, individuals must assume the risk that government officials may freely obtain information about them from the people with whom they interact.<sup>67</sup>

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58. *Id.*

59. *Id.* at 360 (Harlan, J., concurring).

60. *Id.* at 351 (majority opinion).

61. *Id.* at 360 (Harlan, J., concurring).

62. *See Smith v. Maryland*, 442 U.S. 735 (1979).

63. *See United States v. Miller*, 425 U.S. 435 (1976).

64. *See California v. Greenwood*, 486 U.S. 35 (1988).

65. *See United States v. Dunn*, 480 U.S. 294, 304–05 (1987) (concluding that peering into a barn outside the curtilage of the house in open fields does not constitute a search); *Oliver v. United States*, 466 U.S. 170, 179 (1984) (“[O]pen fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance.”).

66. Privacy need not extend as far as a person’s private garden when viewed from above. *See California v. Ciraolo*, 476 U.S. 207, 215 (1986); *see also* Catherine Hancock, *Justice Powell’s Garden: The Ciraolo Dissent and Fourth Amendment Protection for Curtilage-Home Privacy*, 44 SAN DIEGO L. REV. 551 (2007) (discussing Justice Powell’s *Ciraolo* dissent).

67. The Court declared: “[T]he Fourth Amendment does not prohibit the obtaining of

The Supreme Court admonishes: “It is well settled that when an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities, and if that occurs the Fourth Amendment does not prohibit governmental use of that information.”<sup>68</sup> Repeatedly, the Court has rejected challenges to warrantless police searches of shared spaces and information, so long as the person with shared access consents.<sup>69</sup> A multitude of social and commercial transactions involve sharing spaces and information, rendering individuals constitutionally unprotected, and police constitutionally unconstrained, despite what social expectations people may actually have.<sup>70</sup> In this analytic framework, privacy as secret, or undisclosed, is conceptually distinct from what is public, as that which is accessible by or known to others. Individual persons most clearly retain their privacy when they are alone at home.<sup>71</sup> When individuals venture out into public in the company of others, becoming one amongst other people, they must assume the risks that attend the loss of many Fourth Amendment protections.

In contrast to actions that involve sharing information, spaces, and possessions with others, activities within the home receive the highest protection.<sup>72</sup> A warrantless search of a home violates the Constitution, at

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information revealed to a third party and conveyed by him to Government authorities.” *Smith*, 442 U.S. at 744 (quoting *United States v. Miller*, 425 U.S. 435, 443 (1976)). Chief Justice Roberts describes this third-party doctrine this way: “The common thread in our decisions upholding searches conducted pursuant to third-party consent is an understanding that a person ‘assume[s] the risk’ that those who have access to and control over his shared property might consent to a search.” *Georgia v. Randolph*, 547 U.S. 103, 134 (2006) (Roberts, C.J., dissenting) (quoting *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974)).

68. *United States v. Jacobsen*, 466 U.S. 109, 117 (1984).

69. *See, e.g.*, *United States v. Matlock*, 415 U.S. 164, 171 (1974) (holding that officers need only “show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected”); *Frazier v. Cupp*, 394 U.S. 731, 740 (1969) (upholding search of a duffel bag pursuant to consent by a third party).

70. *See* CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT* 108 (2007) (arguing that the Supreme Court is misguided in equating “Fourth Amendment privacy with the assumption-of-risk and public-exposure concepts”).

71. Chief Justice Roberts articulated the very narrow conception of privacy at work in the assumption-of-risk rationale: “To the extent a person wants to ensure that his possessions will be subject to a consent search only due to his *own* consent, he is free to place these items in an area over which others do *not* share access and control, be it a private room or a locked suitcase under a bed.” *Randolph*, 547 U.S. at 135 (Roberts, C.J., dissenting).

72. The Court has emphatically declared the central importance of privacy in the home. *See* *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (“We have said that the Fourth Amendment draws ‘a firm line at the entrance to the house.’ That line, we think, must be not only firm but also bright.” (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980)); *Payton*, 445 U.S. at 589 (“The Fourth Amendment protects the individual’s privacy in a variety of settings. In none is the zone of privacy

least with regard to the homeowner.<sup>73</sup> Such searches are forbidden because the intimate details of home life form the paradigm of privacy—a space that personally excludes its inhabitants from public view and politically creates a limit to the exercise of state authority.<sup>74</sup> As the Court has noted, the “physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.”<sup>75</sup>

Even in the home, privacy does not create an absolute barrier to police intrusion. Activities shared with other people, even when in the home, may receive less or even no protection.<sup>76</sup> Persons who unwittingly invite undercover agents into the home have no expectation of privacy,<sup>77</sup> nor do temporary houseguests lacking a sufficient social connection to the host, even when the homeowner’s Fourth Amendment rights are violated.<sup>78</sup> Nonetheless, the Court maintains the position that the Constitution “draws . . . [a] firm but also bright”<sup>79</sup> line at the threshold of the home.<sup>80</sup> As Stephanie Stern argues, this exclusive focus on the home often leads the

more clearly defined than when bounded by the unambiguous physical dimensions of an individual’s home.”).

73. Speaking of Fourth Amendment rights, the Court has declared that “[a]t the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.” *Silverman v. United States*, 365 U.S. 505, 511 (1961); see also Stephanie M. Stern, *The Inviolable Home: Housing Exceptionalism in the Fourth Amendment*, 95 CORNELL L. REV. 905, 912–13 (2010). But see *Minnesota v. Carter*, 525 U.S. 83, 90–91 (1998) (holding that a temporary occupant of another’s home has no expectation of privacy against government intrusions).

74. Politically speaking, the Court has recognized “the ancient adage that a man’s house is his castle” and that “[t]he poorest man may in his cottage bid defiance to all the forces of the Crown.” *Miller v. United States*, 357 U.S. 301, 307 (1958) (quotation omitted). Regarding the Court’s recognition of the personal and intimate nature of privacy in the home, see Jeannie Suk, *Is Privacy a Woman?*, 97 GEO. L.J. 485 (2009).

75. *United States v. U.S. District Court (Keith)*, 407 U.S. 297, 313 (1972).

76. See *Carter*, 525 U.S. at 90–91 (holding that a temporary social guest without sufficient social attachment to the homeowner has no expectation of privacy).

77. See *Lewis v. United States*, 385 U.S. 206, 211 (1966) (“But when . . . the home is converted into a commercial center to which outsiders are invited for purposes of transacting unlawful business, that business is entitled to no greater sanctity than if” carried out in public.).

78. See *Carter*, 525 U.S. at 90–91. But see *Minnesota v. Olson*, 495 U.S. 91, 98 (1990) (holding that an overnight guest “has a legitimate expectation of privacy in his host’s home”).

79. *Kyllo v. United States*, 533 U.S. 27, 40 (2001); see also *United States v. Karo*, 468 U.S. 705, 716 (1984) (“Indiscriminate monitoring of property that has been withdrawn from public view would present far too serious a threat to privacy interests in the home to escape entirely some sort of Fourth Amendment oversight.”).

80. See *Payton v. New York*, 445 U.S. 573, 601 (1980) (stressing “the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic”). The home plays an important Fourth Amendment role. See *Kyllo*, 533 U.S. at 37 (distinguishing enhanced surveillance in *Dow Chem. Co. v. United States*, 476 U.S. 227 (1986) because it did not intrude on the “sanctity of the home”); *Wilson v. Layne*, 526 U.S. 603, 609–10 (1999) (emphasizing English roots for protecting the sanctity of the home); *Keith*, 407 U.S. at 313 (“[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed . . .”).



Court to ignore the privacy of intimate associations in other places.<sup>81</sup> Focusing privacy exclusively on the home is also inconsistent with the Court's claim in *Katz v. United States* that "the Fourth Amendment protects people, not places."<sup>82</sup>

After *Katz*, privacy became an analytic focus for Fourth Amendment doctrine. As the Court made clear: "The purpose of the Fourth Amendment is to prevent unreasonable governmental intrusions into the privacy of one's person, house, papers, or effects. The wrong condemned is the unjustified governmental invasion of these areas of an individual's life."<sup>83</sup> Yet, privacy is not the only, nor at times the primary, doctrinal focus. In order to uncover the latent protections for the security and liberty provided by the Fourth Amendment, it is instructive to see how the Court constructs a different narrative of the Fourth Amendment. In order to protect privacy, the Supreme Court must fashion conduct rules to regulate police behavior.<sup>84</sup> When discussing conduct rules applicable to police practice, the Court's principal narrative shifts. Choice of narrative drives substantive outcomes, as the contrast between *Arizona v. Gant*<sup>85</sup> and *Herring v. United States*<sup>86</sup> illustrates. Because of the factual complexity and multiplicity of situations that police officers face, the Court has often been hesitant to impede police investigations with rigorous restraints, opting at times for rules easily administered by police, though offering less protection for privacy.<sup>87</sup>

### B. Regulating Police

The Fourth Amendment is a blunt instrument to wield when regulating complex social situations and police practices.<sup>88</sup> As constitutional rules of

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81. See Stern, *supra* note 73, at 908.

82. 389 U.S. 347, 351 (1967).

83. *United States v. Calandra*, 414 U.S. 338, 354 (1974).

84. See Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 627–28 (1984) (arguing that often there is a difference between the conduct rules directed at specific actors and the rules of decision a court applies).

85. 129 S. Ct. 1710 (2009).

86. 129 S. Ct. 695 (2009).

87. See, e.g., *United States v. Ross*, 456 U.S. 798, 821 (1982) ("[N]ice distinctions between . . . glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand." (footnote omitted)).

88. See Jon B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL'Y 315, 331 (2004) (finding that thirty percent of searches in empirical study of medium-sized city were unconstitutional); Bernard E. Harcourt, *Unconstitutional Police Searches and Collective Responsibility*, 3 CRIMINOLOGY & PUB. POL'Y 363, 375 (2004) ("We decide what to criminalize and enforce, and in the very process, we allow

criminal procedure have become more refined, and simultaneously contested, judges and scholars have focused more attention on how the Fourth Amendment might regulate police most effectively. For example, one scholar employs four models for explaining Fourth Amendment doctrine, because “[t]he Supreme Court has not and cannot adopt a single test for when an expectation is ‘reasonable’ because no one test effectively and consistently distinguishes the more troublesome police practices that require Fourth Amendment scrutiny from the less troublesome practices that do not.”<sup>89</sup> Institutionally, Supreme Court doctrine must guide not only police practice, but also lower courts who must assess a large number of constitutional challenges to particular instances of police investigatory conduct.<sup>90</sup> Aware of this fact, the Supreme Court in *New York v. Belton* made clear that “Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities.”<sup>91</sup> *Belton*’s subject matter, as well as the subsequent case history, illustrates both the complexity and the regulatory purpose of search and seizure doctrine.

### 1. From *Belton* to *Gant*

*Belton* involved routine enforcement of traffic speed limits.<sup>92</sup> A New York state police officer stopped a car for speeding, smelled marijuana, made an arrest, and searched the car incident to arrest. During the search of the car interior, the trooper found a jacket belonging to a passenger and,

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other forms of deviance to flourish. Unconstitutional police searches are, tragically, but one perfect example. . . . [W]e let loose discretionary policing, and we inevitably produce a certain amount—a predictable amount—of improper searches . . .”).

89. Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 506 (2007). He further explains that the four models of Fourth Amendment doctrine help the Court “more accurately identify police practices needing regulation.” *Id.* at 526.

90. Speaking for two bodies—the police and lower courts—means that Court opinions must provide both decision rules to guide courts and conduct rules to guide police. See Dan-Cohen, *supra* note 84, at 627–28. The problem is that these two are not always aligned. The Supreme Court’s standing doctrine holds that an individual can complain only of violations of her Fourth Amendment rights, not the violation of another person’s rights, even when the evidence used against her was obtained from the violation of the other person’s rights. See, e.g., *United States v. Payner*, 447 U.S. 727 (1980); *Rakas v. Illinois*, 439 U.S. 128 (1978). The problem, as Carol Steiker observes, is that when “the police ‘hear’ the Court’s decision rules and thus are able to predict the likely legal consequences of their unconstitutional behavior, they may see little reason to continue to obey conduct rules that are consistently unenforced.” Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2543 (1996).

91. 453 U.S. 454, 458 (1981) (quoting Wayne R. LaFare, “Case-By-Case Adjudication” *Versus “Standardized Procedures”*: *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 141 (1974)).

92. 453 U.S. at 455.

upon searching through its pockets, found cocaine. Answering in the affirmative, the Court considered whether the Fourth Amendment permitted police to conduct a warrantless search of the interior of the stopped car, including any containers found in the interior, incident to the arrest of an occupant.<sup>93</sup> The Court relied on precedent articulating the need to protect officer safety and the need to protect easily destroyed evidence as the central rationales for allowing warrantless searches of vehicles incident to arrest.<sup>94</sup> Citing the need for clear rules, the Court reasoned that Fourth Amendment protections “can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.”<sup>95</sup>

Enter the daily complexity. If police can conduct a search of a vehicle incident to arrest pursuant to a traffic stop, may the police conduct such a search based on an arrest of a recent occupant of a car who is now safely ensconced in a police cruiser? In *Thornton v. United States*, the Court decided that the spatial relation of a recent occupant does not determine whether police may search a car incident to an arrest.<sup>96</sup> In the interest of providing clear rules, the Court held that if an arrestee is a recent occupant of a car, police may search the car. “The need for a clear rule, readily understood by police officers and not depending on differing estimates of what items were or were not within reach of an arrestee at any particular moment, justifies” such a rule extending the circumstances in which police may conduct a warrantless search.<sup>97</sup>

In its October 2008 term, the Supreme Court reviewed a very similar factual situation in *Arizona v. Gant*.<sup>98</sup> Tucson police officers arrested Rodney Gant for driving with a suspended license, placed him handcuffed in the patrol car, and searched his car, finding cocaine in the pockets of a jacket strewn on the backseat.<sup>99</sup> The facts in *Thornton* were a bit different. Marcus Thornton had parked his car and walked away from it when a

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93. *Id.* at 455, 462–63.

94. In *Chimel v. California*, 395 U.S. 752, 763 (1969), the Court reasoned, “it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. . . . In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee’s person in order to prevent its concealment or destruction.”

95. *Belton*, 453 U.S. at 458 (quoting Wayne R. LaFare, “Case-By-Case Adjudication” Versus “Standardized Procedures”: *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 142 (1974)).

96. 541 U.S. 615, 622 (2004).

97. *Id.* at 622–23.

98. 129 S. Ct. 1710 (2009).

99. *Id.* at 1715.

police officer confronted him, frisked him, and subsequently discovered drugs in his front pocket.<sup>100</sup> The purpose behind searching Thornton's car was to discover more drug evidence pursuant to his arrest for narcotics possession, while in *Gant*, there was no purpose in trying to discover further evidence relating to an arrest for driving with a suspended license. The search of Gant's vehicle, by contrast, was a general investigatory search. Police had no reason to believe they would find contraband or weapons. They simply exercised what they believed was an entitlement to look. Out of concern for untethering the rationale from the rule, the Court held that only when a recent occupant is unsecured within reaching distance of the vehicle may the police search a vehicle incident to an arrest.<sup>101</sup> This circumstance does not exist when an arrestee is securely handcuffed in a patrol vehicle. Attempting to work within the *Belton-Thornton* doctrinal framework, Justice Stevens avoided overruling *Thornton*, concluding that "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest."<sup>102</sup> In the process of making a more refined determination of when vehicles may be searched incident to the arrest of recent occupants, Justice Stevens's majority opinion rejected the idea that the interest in providing police with a bright-line rule required a different result.<sup>103</sup> Here is where a major shift in the focus on regulating police occurred.

In the *Belton-Thornton* world, privacy scarcely makes an appearance. Indeed, Justice Rehnquist's majority opinion in *Thornton* fails to mention privacy at all, focused as it was on crafting a bright-line rule to guide police practice.<sup>104</sup> By contrast, Justice Stevens's opinion in *Gant* pivots on its rejection of the priority of police regulation. Privacy reappears as a central value because the Court recognizes that persons retain a privacy interest when they are in their vehicles that extends to their possessions, such as purses and briefcases.<sup>105</sup> Justice Stevens notes that "[a] rule that gives police the power to conduct such a search whenever an individual is

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100. *Thornton*, 541 U.S. at 617–18.

101. *See Gant*, 129 S. Ct. at 1719. In order to reconcile the opinion with *Thornton*, the Court further determined that "circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" *Id.* (citing *Thornton*, 541 U.S. at 632).

102. *Id.* at 1723.

103. *See id.* at 1720–21.

104. 541 U.S. at 617–24.

105. *See id.*

caught committing a traffic offense”<sup>106</sup> would constitute a serious threat to privacy. Responding to the argument that the state has an overriding interest in a bright-line rule, the majority opinion cautions that “the State seriously undervalues the privacy interests at stake.”<sup>107</sup> Expanding police authority to search cars during traffic stops “implicates the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person’s private effects.”<sup>108</sup> Although there are other occasions and justifications authorizing warrantless police searches of vehicles, the Court refused to construct a broad rule that would “provide a police entitlement” to intrude further on individual privacy.<sup>109</sup> In so doing, *Gant* makes apparent the significant tension that exists between the doctrine’s regulatory purposes and its privacy principles.

Often, the bright-line regulatory rule encourages more deference to police discretion in conducting warrantless searches and seizures.<sup>110</sup> By contrast, privacy considerations always place hurdles in the way of discretionary investigatory efforts. There is no intrinsic reason why bright-line rules need be less privacy protecting. When the Court focuses on regulating police practice, however, the tendency is to attend more closely to police needs rather than privacy protections. As in *Gant*, a rule flowing from a privacy-protecting rationale may require a more nuanced and fact-specific application than a bright-line rule allowing police to search a vehicle incident to the arrest of a recent occupant. From the perspective of police regulation, such fact-specific considerations are an anathema, because they make “it difficult for the policeman to discern the scope of his authority.”<sup>111</sup> Of course, some bright-line rules are also privacy-protecting, such as the bright line drawn around the privacy of the home.<sup>112</sup> But even there, the desire to provide for law enforcement needs

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106. *Id.*

107. *Id.*

108. *Id.* The Court also recognized that “*Belton* creates the risk ‘that police will make custodial arrests which they otherwise would not make as a cover for a search which the Fourth Amendment otherwise prohibits.’” *Id.* at 1720 n.5 (quoting WAYNE R. LAFAYE, 3 SEARCH AND SEIZURE § 7.1(c) (4th ed. 2004)).

109. *Id.* at 1721.

110. For example, concluding that there is no expectation of privacy in open fields, even if a land owner had fenced and posted her property, the Court argued that “[t]his Court repeatedly has acknowledged the difficulties created for courts, police, and citizens by an ad hoc, case-by-case definition of Fourth Amendment standards to be applied in differing factual circumstances” that make “it difficult for the policeman to discern the scope of his authority.” *Oliver v. United States*, 466 U.S. 170, 181 (1984) (citations omitted).

111. *Oliver*, 466 U.S. at 181.

112. See *Payton v. New York*, 445 U.S. 573, 589 (1980) (“The Fourth Amendment protects the

creates pressure for reasonable exceptions to the rule.<sup>113</sup> As a practical matter, therefore, whether a court has in view regulatory or privacy considerations will often determine substantive outcomes and shape everyday police-citizen encounters.

This difference is evident in Justice Alito's *Gant* dissent.<sup>114</sup> Claiming that the majority effectively overturned *Belton*, Justice Alito emphasized the fact that "the rule was adopted for the express purpose of providing a test that would be relatively easy for police officers and judges to apply."<sup>115</sup> The majority's approach is objectionable because it further complicates police procedure during roadside stops, requiring officers "to determine whether there is reason to believe that the vehicle contains evidence of the crime of arrest."<sup>116</sup> When the Court creates a standard such as "within an arrestee's reach" and "reasonable to believe" to justify vehicle searches, it invites more case-by-case determinations, which police may be ill suited to make.<sup>117</sup> From a regulatory standpoint, Justice Alito's concern is exemplified by the imprecision of similar standards. The Court has been unable to precisely define standards like "reasonable suspicion" and "probable cause,"<sup>118</sup> just as lower courts have struggled over a "reason to believe" standard in the context of entering a home pursuant to an arrest warrant.<sup>119</sup>

individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home . . .").

113. See *Illinois v. McArthur*, 531 U.S. 326, 331 (2001) (recognizing exigent circumstances exception); *Mincey v. Arizona*, 437 U.S. 385, 393–94 (1978) (same); see also *United States v. Leon*, 468 U.S. 897, 924 (1984) (recognizing good faith exception to probable cause requirement). Craig Bradley notes, "[t]he Court tries on the one hand to lay down clear rules for the police to follow in every situation while also trying to respond flexibly, or 'reasonably,' to each case because a hard-line approach would lead to exclusion of evidence." Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1470 (1985).

114. See *Arizona v. Gant*, 129 S. Ct. 1710, 1726–30 (2009) (Alito, J., dissenting).

115. *Id.* at 1729. Justice Alito further emphasized the *Belton* purpose as "'essential to guide police officers'" and lamented the fact that "[t]his 'bright-line rule' has now been interred." *Id.* at 1727 (quoting *New York v. Belton*, 453 U.S. 454, 458 (1981)).

116. *Id.* at 1729.

117. *Id.*

118. *Ornelas v. United States*, 517 U.S. 690, 695 (1996) ("Articulating precisely what 'reasonable suspicion' and 'probable cause' mean is not possible. They are commonsense, nontechnical conceptions that deal with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" (quoting *Illinois v. Gates*, 462 U.S. 213, 231 (1983) (quoting *Brinegar v. United States*, 338 U.S. 160, 175 (1949)))).

119. In *Payton v. New York*, 445 U.S. 573 (1980), the Court admonished that police in possession of an arrest warrant backed by probable cause had "limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." *Id.* at 603. Lower courts are split over whether "reason to believe" amounts to probable cause itself or a lower standard akin to "reasonable suspicion." Compare *United States v. Pruitt*, 458 F.3d 477, 483–84 (6th Cir. 2006) (concluding that "reason to believe" is less than probable cause), with *United States v. Gorman*, 314

Keeping the focus on police practice, Justice Alito notes that police have been trained to follow the *Belton* rule for more than twenty-five years.<sup>120</sup> He further observes that under the *Gant* rule, police would have a perverse incentive to keep an arrestee unsecured near the vehicle in order to justify conducting a search incident to arrest.<sup>121</sup> This incentive exists because police have been trained to conduct these searches pursuant to roadside arrests. Moreover, an unrestricted privilege to conduct searches incident to arrest provides a low-cost alternative to the investigative effort necessary to secure a warrant, providing further incentive to conduct these searches. Without particularized suspicion, police may rummage through the passenger compartment of a vehicle and a person's possessions, hoping to find something inculpatory. Because the Court's conduct rules under *Belton* did not prohibit the practice, and because police have strong incentives to take advantage of the low-cost investigatory technique, Justice Alito is no doubt correct in claiming that police have relied on the prior legal rule.<sup>122</sup> What Justice Alito fails to recognize is that factors such as reliance tell us nothing about the constitutional status of the underlying practice. For that, the Court ordinarily looks to the relevant privacy interests.

An individual's interest in privacy does not even merit mention in Justice Alito's dissent.<sup>123</sup> In response to Justice Alito's emphasis on police reliance interests, Justice Stevens observes that "[c]ountless individuals guilty of nothing more serious than a traffic violation have had their constitutional right to the security of their private effects violated as a result"<sup>124</sup> of law enforcement's widespread practice of conducting searches of recent vehicle occupants incident to arrest. Not only does Justice Stevens have in view the privacy implications of police practice in the case before the Court, but also the implications for privacy for others who will never bring a case before a judge. "Countless individuals" risk exposure to constitutional violations when the Court is focused primarily on easily administrable police regulations.

*Gant* illustrates how the choice to prioritize either regulating police conduct or protecting privacy interests determines substantive constitutional outcomes. By focusing on regulating police conduct, the

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F.3d 1105, 1111 (9th Cir. 2002) (concluding that "reason to believe" is equivalent to probable cause).

120. *Gant*, 129 S. Ct. at 1728 (Alito, J., dissenting).

121. *See id.* at 1730.

122. *Id.* at 1728–29.

123. *See id.* at 1726–32.

124. *Id.* at 1722–23 (majority opinion).

dissent would have legitimized an intrusive police practice. By focusing instead on protecting individual privacy interests, the majority invalidated a successful police search as unlawful, in the process making “clear that [if] a practice is unlawful, individuals’ interest in its discontinuance clearly outweighs any law enforcement ‘entitlement’ to its persistence.”<sup>125</sup> Because the *Chimel* reasons—officer safety and preservation of evidence—did not apply, the police reliance on a convenient practice was insufficient to justify the privacy intrusion.<sup>126</sup> Although successful in this case, privacy does not always prevail when the two Fourth Amendment purposes conflict.

These twin purposes are sometimes mediated by the textually determined standard of reasonableness, adding further occasions to consider regulatory interests.<sup>127</sup> Supreme Court majorities have sometimes examined the constitutionality of a particular search or seizure by balancing “on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.”<sup>128</sup> Under such a balancing approach, what is reasonable will depend, however, on how a court characterizes the interaction between the citizen and police. “Reasonableness” is not an independent inquiry. To conclude that a search is “reasonable,” courts must make prior judgments about the importance of a particular police practice or a particular privacy interest. When conducting a balancing inquiry, if the citizen is construed to have a diminished expectation of privacy, then the needs of effective law enforcement will almost always predominate.<sup>129</sup>

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125. *Id.* at 1723 (citation omitted).

126. *See id.* at 1719.

127. By adding reasonableness to the inquiry, the Court adds another layer of indeterminacy that is then used as a justification for imposing clear and simple rules for police to follow. As the Court admits, “there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails.” *Camara v. Municipal Court*, 387 U.S. 523, 536–37 (1967). Nonetheless the Court has frequently stated that “the ultimate touchstone of the Fourth Amendment is ‘reasonableness.’” *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (quoting *Flippo v. West Virginia*, 528 U.S. 11, 13 (1999) (per curiam)); *see also* *United States v. Knights*, 534 U.S. 112, 118 (2001) (“The touchstone of the Fourth Amendment is reasonableness . . .”).

128. *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999); *see also* *Illinois v. McArthur*, 531 U.S. 326, 331 (2001) (“Consequently, rather than employing a *per se* rule of unreasonableness, the Court must balance the privacy-related and law enforcement-related concerns to determine if the intrusion here was reasonable.”).

129. *See* Scott E. Sundby, “*Everyman’s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*,” 94 COLUM. L. REV. 1751, 1768 (1994) (“Once the reasonableness inquiry is undertaken, though, the government’s judgment that the particular intrusion is needed because of policy concerns becomes an integral part of the Fourth Amendment analysis.”).



For example, to decide whether police officers, who have probable cause to believe contraband is in an automobile during a traffic stop, may search a passenger's belongings, the Court in *Wyoming v. Houghton* exercised a balancing test.<sup>130</sup> First, because they are publicly visible and subject to extensive traffic regulation, vehicle occupants have a reduced expectation of privacy.<sup>131</sup> Second, the Court reasoned that searches of personal property do not implicate personal dignity in the manner that bodily searches do.<sup>132</sup> By contrast, "[e]ffective law enforcement would be appreciably impaired without the ability to search a passenger's personal belongings when there is reason to believe contraband or evidence of criminal wrongdoing is hidden in the car."<sup>133</sup> The need to provide "'clear and unequivocal' guidelines to the law enforcement profession" had already produced a rule allowing warrantless searches of vehicles and any containers found therein when officers have probable cause to believe contraband is present.<sup>134</sup> Citing the ready mobility of cars<sup>135</sup> and the likelihood of passengers sharing a common enterprise with the driver, the Court refused to recognize a "passenger's property" exception to warrantless vehicle searches.<sup>136</sup> Claiming that reasonableness requires consideration of practical realities, the Court sought to avoid creating incentives for drivers to hide contraband in passengers' personal containers and to avoid producing a feared "bog of litigation."<sup>137</sup> In this analysis, considerations of effective police enforcement, as well as the practical realities of judicial administration, predominate over any recognized privacy interests. A balancing inquiry into reasonableness allows the Court to consider an ever-widening set of practical and contextual issues, often framed in terms of law enforcement needs. From the perspective of claimed state necessity, privacy considerations must be

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130. See *Houghton*, 526 U.S. at 303–06.

131. See *id.* at 303.

132. See *id.*; *United States v. Di Re*, 332 U.S. 581, 587 (1948) ("We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled.").

133. *Houghton*, 526 U.S. at 304.

134. *California v. Acevedo*, 500 U.S. 565, 577 (1991) (quoting *Minnick v. Mississippi*, 498 U.S. 146, 151 (1990) (quoting *Arizona v. Roberson*, 486 U.S. 675, 682 (1988))). Prior cases, such as *United States v. Chadwick*, 433 U.S. 1 (1977), *Arkansas v. Sanders*, 442 U.S. 753 (1979), and *United States v. Ross*, 456 U.S. 798 (1982), had provided different rules applicable to warrantless searches of vehicles and containers, which the Court characterized as having "confused courts and police officers and impeded effective law enforcement." *Acevedo*, 500 U.S. at 576.

135. See *Carroll v. United States*, 267 U.S. 132 (1925) (creating an "automobile exception" to the warrant requirement based in part on the ready mobility of cars).

136. See *Houghton*, 526 U.S. at 304–05.

137. See *id.* at 305.

particularly weighty to prevail. Whether it is the need of law enforcement to search cars and containers,<sup>138</sup> to conduct temporary stops,<sup>139</sup> to operate sobriety checkpoints,<sup>140</sup> or to administer searches of student belongings,<sup>141</sup> a reasonableness inquiry often focuses on official necessity, not on personal privacy.

When privacy does make a robust appearance, as it does in Justice Stevens's dissent in *Houghton*,<sup>142</sup> the potential results are very different. Arguing that "the State's legitimate interest in effective law enforcement does not outweigh the privacy concerns at issue," Justice Stevens contested the majority's reasons for claiming ostensible simplicity in their chosen rule.<sup>143</sup> He would have required individualized suspicion of passengers before the police could search their possessions, thereby creating a rule every bit as easily administered as the majority's rule, but one that "simply protects more privacy."<sup>144</sup> Thus, practical conclusions about ease of administration or the simplicity of a bright-line rule may often depend on background assumptions about what matters most. Even for those who argue that the Fourth Amendment inquiry should be focused on reasonableness, such as Akhil Amar or Justice Scalia,<sup>145</sup> we still need an account of reasonableness in relation to particular values. Reasonableness is an incomplete evaluative standard. What is reasonable depends on a context that includes the values, purposes, and practices to which it applies. The two primary purposes—regulating police and protecting privacy—guide the reasonableness inquiry, but do not themselves instruct courts as to which purpose should take priority. For guidance, we need further inquiry into available constitutional values, purposes, and meanings.

Because the Court has two overriding purposes in directing its view of a particular case, the addition of a reasonableness balancing inquiry does nothing to resolve the tension. If a Court majority sees promotion of effective law enforcement as a primary purpose, a balancing inquiry will

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138. *See id.* at 303–06.

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

140. *See Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990).

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

142. *Houghton*, 526 U.S. at 309–13 (Stevens, J., dissenting).

143. *Id.* at 311.

144. *Id.* at 312.

145. *See California v. Acevedo*, 500 U.S. 565, 583 (1991) (Scalia, J., concurring) ("In my view, the path out of this confusion should be sought by returning to the first principle that the 'reasonableness' requirement of the Fourth Amendment affords the protection that the common law afforded."); AMAR, *supra* note 26, at 39 ("By focusing on constitutional reasonableness, we restore the Fourth to its rightful place.").

only reflect that view. The same exists for a view focused on protecting privacy.<sup>146</sup> If anything, a reasonableness inquiry risks pushing even further into the background the choice between Fourth Amendment purposes, obscuring prior determinations of relative value through the metaphor of balancing. What kinds of considerations might bring this tension into focus? Should one of these purposes take priority over the other?

## 2. *The New Exclusion in Herring*

Constitutional shift along the fault line between these dueling Fourth Amendment purposes is evident in the Court's opinion in *Herring v. United States*.<sup>147</sup> At stake was whether the exclusionary rule should apply to a search authorized by an outstanding arrest warrant that had been withdrawn but had negligently remained "active" in a computer database.<sup>148</sup> From the outset, Chief Justice Roberts, writing for the majority, framed the issue from the perspective of what the officer "reasonably believes."<sup>149</sup> Fourth Amendment violations do not always justify exclusion of evidence.<sup>150</sup> "Instead, the question turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct."<sup>151</sup> In deciding this question, the majority repeatedly asserted that the exclusionary rule was judicially created in order to deter constitutional violations by the police.<sup>152</sup> Moreover, "the benefits of deterrence must outweigh the costs," because the Court claims that small or marginal deterrence cannot justify the costs of letting lawbreakers go free.<sup>153</sup> Because "[t]he exclusionary rule was crafted to curb police"<sup>154</sup> misconduct, according to the majority, only "deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic

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146. *See Arizona v. Gant*, 129 S. Ct. 1710 (2009).

147. 129 S. Ct. 695 (2009).

148. *See id.* at 698.

149. *Id.*

150. *See, e.g., United States v. Leon*, 468 U.S. 897, 911–12 (1984) (applying "good-faith" exception to the exclusionary rule).

151. *Herring*, 129 S. Ct. at 698.

152. For example, the Court writes: "We have stated that this judicially created rule is 'designed to safeguard Fourth Amendment rights generally through its deterrent effect,'" *id.* at 699 (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)), and that "we have focused on the efficacy of the rule in deterring Fourth Amendment violations in the future." *Id.* at 700 (citing *Calandra*, 414 U.S. at 347–55); *see also Illinois v. Krull*, 480 U.S. 340, 352–53 (1987) ("[T]o the extent that application of the exclusionary rule could provide some incremental deterrent, that possible benefit must be weighed against [its] 'substantial social costs' . . ." (quoting *Leon*, 468 U.S. at 907)).

153. *Herring*, 129 S. Ct. at 700–01.

154. *Id.* at 701.

negligen[ce],” will justify its application.<sup>155</sup> To apply the exclusionary rule, “police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable” to justify the cost to the criminal justice system.<sup>156</sup> Otherwise, the majority concludes, there is no reason the criminal should “go free because the constable has blundered.”<sup>157</sup>

With this analysis, regulation of law enforcement practices rests on two layers of balancing. First, to determine whether a constitutional violation occurred, the needs of effective law enforcement are balanced against the privacy interests at stake. Second, when a constitutional violation has occurred, the deterrent effect of law enforcement is further weighed against the social cost of excluding reliable evidence of criminal wrongdoing. During the second-order balancing inquiry, the Court does not consider the social cost of losing trust in government, the social cost to innocent victims, or the social cost of having the judicial system confer its imprimatur on lawless conduct by police. What is more, in weighing whether to apply the exclusionary rule, a two-prong inquiry requires both deliberate and culpable police conduct. Such focus augurs further constitutional shift, as the Court considers on a case-by-case basis whether a substantial deterrent effect exists, justifying suppression of evidence to remedy future violations. By focusing on how well a present application of exclusion works to regulate future police conduct, the actual violation of Bennie Dean Herring’s Fourth Amendment privacy right scarcely comes into view.

Not only does the actual constitutional violation in *Herring* come into view for Justice Ginsburg writing in dissent, but also the “innocent persons ‘wrongfully arrested based on erroneous information [carelessly maintained] in a computer data base.’”<sup>158</sup> Where the majority focused on deterring future reckless police misconduct, the dissent focused on future constitutional violations that innocent persons will suffer.<sup>159</sup> The harm that results from erroneous record keeping is not insignificant, even if one

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155. *Id.* at 702.

156. *Id.*

157. *Id.* at 704 (quoting *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926) and applying Justice Cardozo’s quip). The Court also appealed to Judge Henry Friendly’s rationale for the exclusionary rule. *See id.* at 702; Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 951 (1965) (“The sole reason for exclusion is that experience has demonstrated this to be the only effective method for deterring the police from violating the Constitution.”).

158. *Herring*, 129 S. Ct. at 705 (Ginsburg, J., dissenting) (quoting *Arizona v. Evans*, 514 U.S. 1, 22 (1995) (Stevens, J., dissenting)).

159. *See id.* at 705–10.

focuses only on the deterrent effect of the exclusionary rule. As Justice Ginsburg observes, “[t]he offense to the dignity of the citizen who is arrested, handcuffed, and searched on a public street simply because some bureaucrat has failed to maintain an accurate computer data base’ is evocative of the use of general warrants that so outraged the authors of our Bill of Rights.”<sup>160</sup> This dignitary offense is not one easily remedied ex post by the innocent victim, whose likely incentive is to forego further hassle by choosing not to pursue an illusory civil remedy for which qualified immunity will likely apply.<sup>161</sup> Rather, it is precisely the kind of constitutional offense that will go unremedied, providing little incentive for police to maintain accurate records. Given how much information is increasingly accessible about individuals through national and local databases, the risk of harm is not insignificant and “raise[s] grave concerns for individual liberty.”<sup>162</sup> These criticisms confront the majority’s assessment of when the deterrent effects of exclusion are sufficiently substantial. If the disagreement went no further, the majority and dissent would simply differ in their judgments about the substantial effects of exclusion.

Justice Ginsburg’s dissent also addresses more fundamental issues by contesting the majority’s vision of the Fourth Amendment.<sup>163</sup> Much more than a technical regulatory scheme to govern police conduct, Justice Ginsburg suggests that the Fourth Amendment serves fundamental political purposes. “[T]he Amendment ‘is a constraint on the power of the sovereign, not merely on some of its agents.’”<sup>164</sup> Framed as a constraint on sovereign power, the Fourth Amendment has a broader political purpose that regulating police and protecting individual privacy help achieve. Even relatively minor constitutional violations, as Chief Justice Roberts might describe them, implicate important relations between state and citizen and occur within proper constraints on the power of governing officials.

Neither the majority nor the dissent focuses on privacy. Instead, the dissent’s conception of the Fourth Amendment is focused on protecting

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160. *Id.* at 709 (quoting *Evans*, 514 U.S. at 23 (Stevens, J., dissenting)).

161. *See* *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The difficulty overcoming qualified immunity is further exemplified in an opinion decided the same term as *Herring*. *See* *Pearson v. Callahan*, 129 S. Ct. 808 (2009).

162. *Herring*, 129 S. Ct. at 709 (Ginsburg, J., dissenting).

163. *See id.* at 705–10.

164. *Id.* at 707 (Ginsburg, J., dissenting) (quoting *Evans*, 514 U.S. 1, 18 (1995) (Stevens, J., dissenting)). Justice Ginsburg also cites Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development, and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365 (1983). *Herring*, 129 S. Ct. at 707 (Ginsburg, J., dissenting).

individual liberty and citizen dignity.<sup>165</sup> Dignitary harms result from unjustified physical contact by state agents. They are experienced by particular persons and shape how persons view their own security and how they fulfill their promise of liberty. Extending beyond individual acts of particular police officers, Fourth Amendment violations shape how individual persons experience their everyday relations to the institutions of government. Because individuals may rarely have direct interactions with state officials, they may suffer additional harms when subjected to an illegal search. These interactions can influence how particular individuals view the trustworthiness of state officials and can shape their overall view of governing institutions and authority. Unremedied Fourth Amendment violations can also impact an individual's sense of political belonging within a community. If constitutional protections fail to apply to them, then persons may legitimately question their standing within the political community. The limitation on searches and seizures, as a "right of the people," does more than regulate the conduct of particular officers. It establishes a political relation between "the People" and the institutions that exercise sovereign power in their name.<sup>166</sup>

What is significant about the dissent's analysis is that it evokes the larger Fourth Amendment purpose of protecting both liberty and dignity. In doing so, Justice Ginsburg recognizes the other objectives the exclusionary rule serves: avoiding loss of judicial integrity through the taint of lawlessness, ensuring that government does not profit from its own lawlessness, and promoting trust in government.<sup>167</sup> These are not thematically isolated considerations. Nor do they deny that deterring lawless conduct by individual police officers is an important consideration. Regulating police behavior, however, is not an objective isolated from a more fundamental need "to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it."<sup>168</sup> Constitutional respect is not merely a problem of individual state agents, but is a goal addressed to the exercise of sovereign power itself. Only sovereign power that respects "the People" and adheres to constitutional constraints has political legitimacy. If institutions exercising governing power retain unchecked incentives to

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165. *Herring*, 129 S. Ct. at 707 (Ginsburg, J., dissenting).

166. *See infra* notes 286–317 and accompanying text.

167. *See Herring*, 129 S. Ct. at 707 (Ginsburg, J., dissenting).

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

violate constitutional guarantees, then those institutions lose political legitimacy and produce political cynicism.<sup>169</sup>

### C. A Political Purpose?

By contrast to the dissent's broader view in *Herring*, the liberty-protecting Fourth Amendment does not appear in the majority's analysis.<sup>170</sup> Nor does the availability of any alternative remedy for the admitted constitutional violation in this case.<sup>171</sup> If letting a known lawbreaker go free is a cost to society, then so too is failing to remedy a constitutional violation, though that fact goes unacknowledged. Reconstructing precedent, Chief Justice Roberts based his analysis on the claim that past cases establish the fact that "the exclusionary rule is not an individual right and applies only where it "results in appreciable deterrence."'"<sup>172</sup> To explain why it only applies where appreciable deterrence results, Chief Justice Roberts claims that the rule "was crafted to curb police . . . misconduct."<sup>173</sup> Moreover, that conduct must be "sufficiently culpable" to justify the cost to the justice system.<sup>174</sup> Chief

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169. These thoughts are reflected in Justice Brandeis's powerful dissent in *Olmstead v. United States*: "In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting), *overruled by Katz v. United States*, 389 U.S. 347 (1967), and *Berger v. New York*, 388 U.S. 41 (1967).

170. See *Herring*, 129 S. Ct. at 698–704.

171. See *id.* When the Court has refused to apply the exclusionary rule in other contexts, such as violations of the Fourth Amendment prohibition against "no-knock" entries, it has referenced the possibility of other remedies. See *Hudson v. Michigan*, 547 U.S. 586 (2006) (refusing to apply exclusionary rule to no-knock entry); *Wilson v. Arkansas*, 514 U.S. 927 (1995) (holding that the Fourth Amendment requires police to knock and announce their presence before entering a premises to execute a warrant).

172. *Herring*, 129 S. Ct. at 700 (quoting *United States v. Leon*, 468 U.S. 897, 909 (1984) (quoting *United States v. Janis*, 428 U.S. 433, 454 (1976))). Contrast *Herring*'s emphasis on deterrence with the Court's emphasis that "[a] ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur." *Terry v. Ohio*, 392 U.S. 1, 13 (1968). Other scholars have noted the reconstruction of exclusionary doctrine at work in cases leading up to *Herring*, such as *Hudson v. Michigan*. See, e.g., Sharon L. Davies & Anna B. Scanlon, *Katz in the Age of Hudson v. Michigan: Some Thoughts on "Suppression as a Last Resort"*, 41 U.C. DAVIS L. REV. 1035, 1043 (2008); David Alan Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 OHIO ST. J. CRIM. L. 567, 568 (2008) ("The Court was right to suggest that policing has changed a lot since the 1960s. Those changes may in fact justify significant shifts in how we think about and regulate law enforcement. But they have not yet rendered the exclusionary rule superfluous, nor are they likely to do so anytime soon.").

173. *Herring*, 129 S. Ct. at 701.

174. *Id.* at 702.

Justice Roberts offers no principle to explain why the exclusionary rule must be limited only to providing “substantial deterrence” for police misconduct.<sup>175</sup> No doubt, deterring substantial police misconduct is an important purpose of much Fourth Amendment doctrine, but it does not follow that the remedies for constitutional violations must be limited to that purpose.<sup>176</sup> Since the exclusionary rule may be the only effective remedy to Fourth Amendment violations,<sup>177</sup> what is needed is not a statement that past cases have emphasized the deterrent effects of the rule, but a reason why the Court should limit application of the rule to this purpose alone. Moreover, Chief Justice Roberts does not explain why “the benefits of deterrence must outweigh the costs.”<sup>178</sup> If police violate the Constitution, why must a court engage in cost-benefit analysis at all?<sup>179</sup> What makes the Fourth Amendment so different in this respect from the First Amendment, under which the Court does not weigh the cost and benefits of content-based censorship? These are difficult questions the majority’s analysis fails to address.

One consequence of the new doctrinal emphasis is that because the police officer’s subjective state of mind was insufficiently culpable, the harm from a constitutional violation must go without a remedy, for society and for individuals like Mr. Herring. The officer did not consciously

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175. *See id.* at 704. Others have offered similar criticisms. *See, e.g.*, Wayne R. LaFare, *The Smell of Herring: A Critique of the Supreme Court’s Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757, 759 (2009) (“The holding in *Herring* finds little support in the Chief Justice’s opinion for the majority, which . . . is totally unconvincing and in many respects irrelevant and disingenuous.”).

176. Limited to “substantial deterrence,” the remedy becomes an increasingly imperfect implementation of accepted constitutional meaning. *See* Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1655 (2005) (arguing that “the rules courts apply in deciding constitutional cases do not necessarily reflect the underlying meaning of the Constitution.”).

177. Or, it may be more accurate to say, the worst remedy except for all the others. Its effectiveness has been questioned for some time, but no alternative has yet to emerge victorious. *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994) (arguing against reliance on exclusion in favor of civil liability); Morgan Cloud, *The Dirty Little Secret*, 43 EMORY L.J. 1311, 1315 (1994) (arguing that police perjury occurs because police seek to avoid the consequences of the exclusionary rule); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 366 (arguing for monetary remedies under the exclusionary rule to apply only in egregious cases).

178. *Herring*, 129 S. Ct. at 700.

179. One reason is that zero tolerance will raise the cost of policing. Since society derives a great benefit from good policing, overregulating police practice may generate less optimal amounts of policing. What is unclear is whether this rationale sufficiently addresses both the distributional costs of overpolicing that greater tolerance for constitutional violations produces, particularly among some populations, and the broader political costs to the system as a whole. *See generally* Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL’Y 111 (2003).



intend to violate Mr. Herring's constitutional right.<sup>180</sup> He merely sought to catch a criminal who would now go free absent a judicial weighing of costs and benefits. The Court's reasoning does not go far enough to recognize the greater complexities of what is at stake in narrowing the application of the exclusionary rule in this way. For one thing, the individual officer is an agent of state power, and "[t]he right of the people to be secure"<sup>181</sup> against state power is not obviously limited to the reasonableness or culpability of specific state agents. For another, any weighing of the costs and benefits of exclusion will only be as accurate as the inputs measured. If we are to have a true weighing of the costs and benefits of exclusion, courts must take a broader view than the majority did in *Herring*. Perhaps the disagreement between the majority and dissent over the proper incentives to avoid database error is an empirical one. The majority discounts the likelihood of purposeful neglect, and the dissent raises the specter of the indignities of innocents from poorly maintained electronic information. But more fundamentally, the majority has no response to the claims that negligent record keeping threatens individual liberty and that failure to exclude evidence risks undermining trust in government. These costs are broader in scope and speak to the Fourth Amendment's political purpose, often hidden from view. Focused narrowly on regulating police conduct, the majority can only see the benefits of deterrence in relation to the costs of nullifying law enforcement efforts.<sup>182</sup> Focused on a broader liberty-protecting conception of the Amendment, the dissent perceives other social costs and political harms.

A literary analogy may be useful here. Chief Justice Roberts has in view only the case before him. This police behavior was not intentional and outrageous, but negligent and well meaning. He does not appear to see, however, the large number of potential negligent, but well meaning, constitutional violations for which the exclusionary rule is not an option because the person searched had no contraband. In this, Chief Justice Roberts is like Josef K. (K.) in an important scene in Franz Kafka's novel *The Trial*.<sup>183</sup> Near the end of the novel, and just prior to meeting a chaplain before his inscrutable execution, K. is in a poorly lit cathedral. Shining a small light on a large religious painting, he focuses on a guard in one of

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180. *Herring*, 129 S. Ct. at 703–04.

181. U.S. CONST. amend. IV.

182. The opinion may also reflect wholesale hostility to the exclusionary rule. See Adam Liptak, *Supreme Court Edging Closer to Repeal of Evidence Ruling*, N.Y. TIMES, Jan. 31, 2009, at A1 (describing how Chief Justice Roberts "was hard at work on what he called in a memorandum 'the campaign to amend or abolish the exclusionary rule' when working for the Reagan Administration").

183. FRANZ KAFKA, *THE TRIAL* (Breton Mitchell trans., Schocken Books 1998) (1925).

the corners. He contemplates the soldier's bearing and expression, nearly missing entirely the painting's significance. Only after fixating on a peripheral element of the painting as a whole does he realize that it depicts a scene of Christ's entombment.<sup>184</sup> Similarly, Chief Justice Roberts's judicial minimalism focuses only on the actions of one officer in one county relying on one occasion of erroneous data.<sup>185</sup> The exclusionary rule should not apply here because its effect is so local and small that there is little police misconduct to deter, Chief Justice Roberts reasons.<sup>186</sup> But by focusing attention on such a narrow view, he misses the import of the overall picture. It is not simply this one occasion, but the larger theme of unconstrained police behavior in multifarious local circumstances, which, under Chief Justice Roberts's approach, may now never risk exclusion.<sup>187</sup> The Fourth Amendment canvas does more than deter particular police officers. It constrains the exercise of sovereign power—a theme of considerably greater consequence.

The Fourth Amendment as a constraint on sovereign power is rarely in view in Fourth Amendment jurisprudence.<sup>188</sup> Instead, as we have seen, the Court construes the Fourth Amendment to have twin purposes—protecting privacy and regulating police.<sup>189</sup> Privacy itself sometimes fails to come

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184. *Id.* at 206–07.

185. In doing so, Chief Justice Roberts exemplifies a “minimalist” approach to judicial decision making. See CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3 (1999) (defining minimalism as “the phenomenon of saying no more than necessary to justify an outcome, and leaving as much as possible undecided”). Chief Justice Roberts seems to have endorsed such an approach, stating during his confirmation hearings that “[j]udges are like umpires. Umpires don’t make the rules, they apply them.” *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr., Nominee to Be Chief Justice of the United States). His public statements support such a view as well. See *Chief Justice Says His Goal Is More Consensus on Court*, N.Y. TIMES, May 22, 2006, at A16 (“If it is not necessary to decide more to a case, then in my view it is necessary not to decide more . . .”).

186. *Herring v. United States*, 129 S. Ct. 695, 703–04 (2009).

187. Judicial minimalism is vulnerable to criticism because Supreme Court decisions have systemic and broader implications for constitutional culture. See Tara Leigh Grove, *The Structural Case for Vertical Maximalism*, 95 CORNELL L. REV. 1, 4 (2009) (“The Court must . . . make the most of the cases it does hear by issuing broad (maximal) decisions that guide the lower courts in the many cases that it lacks the capacity to review.”); Neil S. Siegel, *A Theory in Search of a Court, and Itself: Judicial Minimalism at the Supreme Court Bar*, 103 MICH. L. REV. 1951, 2014 (2005) (“[A]n attractive constitutional theory must transcend a narrow and shallow approach to constitutional decisionmaking. Judicial minimalism can provide no guidance concerning the foundational questions of constitutional theory . . .”).

188. *But see Arizona v. Evans*, 514 U.S. 1, 18 (1995) (Stevens, J., dissenting) (“The Amendment is a constraint on the power of the sovereign, not merely on some of its agents.”).

189. The Court does not always recognize the potential for conflict, stating the two objectives in relation to probable cause as two parts to a single inquiry: “These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges

into view, however, and law enforcement regulations are often as much about facilitating law enforcement practices as they are about limiting them. This latter orientation is discordant with a declaration of fundamental rights against state practice. Imagine orienting First Amendment jurisprudence toward providing clear rules and bright lines to facilitate the state censor. No doubt there are legitimate occasions when the state may suppress speech<sup>190</sup> and others when there is pressure for the state to regulate,<sup>191</sup> but the First Amendment's purpose is never articulated as providing rules to guide state regulation of speech.<sup>192</sup> To do so would turn free speech values on their head.

To think that the Fourth Amendment's purpose is to create a doctrinal opportunity to manage modern police practices is to think that the First Amendment creates the doctrinal framework for facilitating the state censor. No First Amendment doctrine is written as if the Court has a special obligation to create bright-line rules for the censorship of speech. Congress attempted to regulate internet communications it deemed "patently offensive" through the Communications Decency Act of 1996,<sup>193</sup> the Child Pornography Prevention Act,<sup>194</sup> and the Child Online Protection Act,<sup>195</sup> but in holding that each violated the First Amendment, the Court did not focus on the need to provide clear rules to facilitate Congress's censorship of the internet.<sup>196</sup> Other than making clear that child pornography falls outside the protections of the First Amendment,<sup>197</sup> the Court has not claimed a special obligation to clarify how Congress might successfully regulate online speech.<sup>198</sup> By contrast, why does the Supreme Court assume an obligation to facilitate regulation of police practice?

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of crime. They also seek to give fair leeway for enforcing the law in the community's protection." *Brinegar v. United States*, 338 U.S. 160, 176 (1949).

190. *See, e.g.*, *Miller v. California*, 413 U.S. 15 (1973); *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

191. *See, e.g.*, Communications Decency Act of 1996, 47 U.S.C. § 223 (Supp. 1997), *invalidated in part by* *ACLU v. Reno*, 521 U.S. 844 (1997).

192. *See, e.g.*, ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781 (1987).

193. Communications Decency Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended at 47 U.S.C. § 223 (2006)), *invalidated in part by* *ACLU v. Reno*, 521 U.S. 844 (1997).

194. Child Pornography Prevention Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (codified as amended at 18 U.S.C. §§ 2251-2260 (2000)), *invalidated in part by* *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002)).

195. Child Online Protection Act, Pub. L. No. 105-277, 112 Stat. 2681 (1998) (codified at 47 U.S.C. § 231 (1998)), *invalidated by* *Ashcroft v. ACLU*, 542 U.S. 656 (2004).

196. *See supra* notes 191, 194, 195.

197. *See New York v. Ferber*, 458 U.S. 747, 756-64 (1982).

198. In holding that Congress had failed to employ the least restrictive means to achieve its legislative purpose of protecting children, the Court did recognize the existence of other less restrictive

Society benefits from successful police practice. Exclusion of evidence is only possible when police discover evidence of criminal wrongdoing that society wishes to punish. Thus, the constitutional violation only becomes an issue because the search was “successful.” The real cost of exclusion is borne by society, not the police. Police searches are desirable because of the high social value placed on solving crime, punishing criminals, and vindicating the truth-seeking function of the courts. As the Court explained in *Hudson v. Michigan*, the exclusionary rule does not apply to all Fourth Amendment violations: “What the knock-and-announce rule has never protected, however, is one’s interest in preventing the government from seeing or taking evidence described in a warrant.”<sup>199</sup> The Court assumes that government officials are entitled to find what they properly seek, despite any “attenuated” violations in the manner of their search. Under the proper circumstances—with possession of a warrant backed by probable cause, in exigent circumstances, or on occasions of “special needs”—police may search for or seize evidence of criminal activity. To do so promotes a social good.

Prohibitions on searches, according to this view, are more like First Amendment content-neutral time, place, and manner restrictions.<sup>200</sup> The state may reasonably regulate the time, place, and manner of speech in order to foster public order in a content-neutral manner. Such regulations promote democratic deliberation, rather than hinder it, by enabling a more orderly exchange of ideas in the public sphere. We may seek to avoid loud noise, intrusion upon personal space and solitude, public disorder, or certain secondary effects of otherwise protected speech. Similarly, on this social-good theory of the Fourth Amendment, we enable police practice while seeking to avoid warrantless or unreasonable intrusion into homes and other private places.<sup>201</sup> Such regulations provide clear rules to guide police practice and, on balance, protect some personal expectations of privacy. This analogy—“the People” will speak, the police will search—

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regulatory alternatives. *See Ashcroft*, 542 U.S. at 673. But recognizing less restrictive alternative means of regulating speech is very different from proposing to provide bright-line rules to assist state censorship.

199. 547 U.S. 586, 594 (2006). Furthermore, “[t]he interests protected by the knock-and-announce requirement are quite different—and do not include the shielding of potential evidence from the government’s eyes.” *Id.* at 593.

200. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

201. *See, e.g., Kyllo v. United States*, 533 U.S. 27, 40 (2001); *Payton v. New York*, 445 U.S. 573, 589 (1980) (“The Fourth Amendment protects the individual’s privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual’s home . . .”).

means that the deterrence of excluding evidence works only to avoid undesirable instances of otherwise desired conduct.

For the Fourth Amendment to work in full like the First Amendment, however, we would have to assume a baseline of government noninterference, interrupted only by reasonable content-neutral time, place, and manner justifications. That is, we would have to assume that police are not entitled to search except for in relatively rare and very particular circumstances. But the actual state of current jurisprudence often turns the analogy on its head, assuming that a core Fourth Amendment value is the facilitation of government searches, as if the core First Amendment value were the facilitation of state censorship.<sup>202</sup> In order to reconcile First Amendment jurisprudence with the Fourth Amendment's focus, we would have to assume the state censor will often interfere with private speech. By contrast, to reconcile the Fourth Amendment with the First Amendment, we would assume foremost that searches should not occur unless specifically authorized and that "the People" should otherwise be secure from government intrusion in their persons and homes. These assumptions are not outside the Fourth Amendment's purview. A requirement of a judicially authorized warrant backed by probable cause, or a requirement of reasonable suspicion, denote an intention to limit the availability of police searches.<sup>203</sup> Here is where the different Fourth Amendment narratives produce real differences in practice.

Focusing on the perceived needs of everyday law enforcement, the Court has reflected: "[W]e cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for arrest."<sup>204</sup> When an officer has "reasonable suspicion" that a person is armed and dangerous, it would "be clearly unreasonable to deny the officer the power

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202. See, e.g., *Thornton v. United States*, 541 U.S. 615, 622–23 (2004) (emphasizing "[t]he need for a clear rule, readily understood by police" officers to facilitate effective law enforcement).

203. Even these limits do not mean that we do not invite widespread violations. See, e.g., Ian Ayres, *Racial Profiling in L.A.: The Numbers Don't Lie*, L.A. TIMES, Oct. 23, 2008, at A27 (finding "persistent and statistically significant racial disparities in policing that raise grave concerns that African Americans and Latinos in Los Angeles are . . . 'over-stopped, over-frisked, over-searched and over-arrested.'"); see also Bernard E. Harcourt, *Rethinking Racial Profiling: A Critique of Economics, Civil Liberties, and Constitutional Literature, and of Criminal Profiling More Generally*, 71 U. CHI. L. REV. 1275, 1282 (2004) (concluding that race-based police profiling is probably not narrowly tailored to minimize costs); Harcourt, *supra* note 88, at 363–64 (examining data of widespread illegal police searches and seizures).

204. *Terry v. Ohio*, 392 U.S. 1, 24 (1968).

to take necessary measures.”<sup>205</sup> So construed, the Fourth Amendment’s “reasonableness” language becomes a permissive, rather than a limiting, principle of police practice. When the Fourth Amendment’s purpose is construed as facilitating police practice, subtle distinctions motivated by suspicion of the state’s power to search must give way to police interests: “When a legitimate search is under way, . . . nice distinctions between . . . glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand.”<sup>206</sup> Imagine a similar statement regarding regulation of speech: “When a legitimate censor contemplates suppression of speech, nice distinctions between political pamphlets, handbills, and soapbox harangues must give way to the interest in the prompt and efficient maintenance of public order.” No such statement would be recognized within modern First Amendment jurisprudence. When the Fourth Amendment’s purpose is construed as protecting privacy, by contrast, skepticism about the use of police searches mirrors skepticism about state censorship.<sup>207</sup>

Fourth Amendment protections of personal and interpersonal privacy are congruent with First Amendment purposes, whereas rules facilitating law enforcement practice are often not.<sup>208</sup> As the narratives of *Gant* and

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205. *Id.* What is “clearly unreasonable” has in practice led to widespread racial disparity in the distribution of stops and frisks. *See, e.g.*, I. Bennett Capers, *Policing, Race, and Place*, 44 HARV. C.R.–C.L. L. REV. 43, 63 (2009) (“But Terry means something else in practice and has another face that, for many, is less well known. The vast majority of individuals stopped and questioned by the police are not engaged in criminal activity and are not carrying weapons or contraband.”); Tracey Maclin, *Terry v. Ohio’s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN’S L. REV. 1271, 1278 (1998) (noting that *Terry* functioned as “a springboard for modern police methods that target black men and others for arbitrary and discretionary intrusions” (footnote omitted)). *See generally* ANDREW E. TASLITZ, *RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789–1868* (2006) (charting the Fourteenth-Amendment relations of African Americans to Fourth Amendment law).

206. *United States v. Ross*, 456 U.S. 798, 821 (1982). Other examples in which the Court assumes that the search should occur abound. *See, e.g.*, *Illinois v. Lafayette*, 462 U.S. 640, 647 (1983) (“[E]very consideration of orderly police administration benefiting both police and the public points toward the appropriateness” of suspicionless searches.)

207. “Power is a heady thing; and history shows that the police acting on their own cannot be trusted.” *McDonald v. United States*, 335 U.S. 451, 456 (1948); *see also* Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 249 (1993) (“This distrust of police power is the central meaning of the Fourth Amendment.”). Skepticism can produce fruitful dialogue based “upon the idea that integral to the Constitution and our societal view of government is a reciprocal trust between the government and its citizens.” Sundby, *supra* note 129, at 1777.

208. The Free Speech Clause probably protects more speech than would be desirable from an ideal standpoint, but we protect more to ensure that we do not receive less than is necessary for a dynamic deliberative polity. If we read the Fourth Amendment alongside the First Amendment, we should likewise expect to restrict police practice more than is ideal in order to ensure the polity’s political security.

*Herring* suggest, these differing Fourth Amendment purposes sometimes conflict; and when they do, there is no metanarrative to explain when or why one purpose should be prioritized over the other. Sometimes the Court emphasizes the interest of effective law enforcement practice, and sometimes the Court emphasizes individual privacy. Bright-line rules regulating police can be privacy enhancing, but the mere existence of a rule easily followed by the beat officer does not necessarily lead to a rule protecting privacy. Depending on the interest in view, the Court may develop doctrinal rules regulating police that protect privacy, as it does within the home<sup>209</sup> and for warrantless electronic surveillance,<sup>210</sup> or that fail to protect privacy, as it does with the third-party doctrine<sup>211</sup> and with some automobile searches.<sup>212</sup> As a consequence, Fourth Amendment doctrine lurches from one consideration to the other, with no overarching guidance.

Because these competing narratives each rest on a different “vision of the Amendment,”<sup>213</sup> it is useful to widen the frame of reference to ask how each narrative fits within broader readings of the Constitution. A wider frame allows us to see the connections between First and Fourth Amendment protections, and thus to see more than a contrast between protecting privacy and regulating police. Justice Ginsburg’s dissent in *Herring* provides a basis for reorienting the Fourth Amendment narrative around a broader political purpose aimed at protecting liberty. Following Justice Stevens’s dissent in *Arizona v. Evans*,<sup>214</sup> Justice Ginsburg recognizes the liberty and dignity interests of persons made vulnerable when barriers are removed from government use of illegally obtained evidence.<sup>215</sup> By contrast, Chief Justice Roberts focused on the fact that “[t]he exclusionary rule was crafted to curb police rather than judicial misconduct.”<sup>216</sup> Regulating police misconduct is the special province of the Constitution’s “criminal procedure” clauses. Judicial vision focused on the exclusionary rule’s regulatory purpose places the Fourth Amendment alongside the criminal procedure provisions of the Fifth and Sixth Amendments. Alternatively, judicial vision focused on liberty and dignity places the Fourth Amendment alongside provisions like the First

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209. *See, e.g.*, *Kyllo v. United States*, 533 U.S. 27 (2001).

210. *See, e.g.*, *United States v. U.S. District Court (Keith)*, 407 U.S. 297 (1972).

211. *See, e.g.*, *United States v. Jacobsen*, 466 U.S. 109, 117 (1984).

212. *See, e.g.*, *Wyoming v. Houghton*, 526 U.S. 295 (1999).

213. *Herring v. United States*, 129 S. Ct. 695, 707 (2009) (Ginsburg, J., dissenting).

214. 514 U.S. 1, 18–23 (1995) (Stevens, J., dissenting).

215. *Herring*, 129 S. Ct. at 709 (Ginsburg, J., dissenting).

216. *Id.* at 701 (majority opinion).

Amendment that secure “the People’s” rights to political liberty. Different constitutional cultures become possible under these differing visions and narratives. What reasons counsel in favor of Justice Ginsburg’s constitutional vision?

First, government officials have at their fingertips ever more powerful sources of information that can be used to intrude into our lives. The anonymity of the public speaker may increasingly be a creature of the past, as recognition and tracking technologies make it easier for government officials to monitor our public movements and activities.<sup>217</sup> Moreover, through contemporary forms of commercial and social life, we promiscuously share personal information with others, which law unevenly regulates.<sup>218</sup> Because our daily lives are often lived in the company of others, not in spaces of private seclusion, under the *Katz* framework, the Court has found fewer expectations of privacy to protect.<sup>219</sup> What we reveal to others when moving on public streets and sidewalks, and what we disclose to others when engaging in conversations and transactions, form no part of current Fourth Amendment protections.<sup>220</sup> Objecting to this reasoning, one of Justice Douglas’s dissents on Fourth Amendment matters of interpersonal privacy remains applicable: “[E]very individual needs both to communicate with others and to keep his affairs to himself. That dual aspect of privacy means that the individual should have the freedom to select for himself the time and circumstances when he will share his secrets . . . .”<sup>221</sup> This “dual aspect of privacy” is relevant to citizen participation through social networking sites with government officials. Does the access we grant to our information remain “private,” or are government officials free to use this information for other purposes such as law enforcement?<sup>222</sup> These and other questions remain outside the current Fourth Amendment’s purview.

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217. See generally SLOBOGIN, *supra* note 70; Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083 (2002).

218. Uneven availability of personal information creates a number of legal challenges outside of the criminal law enforcement. See Lior Jacob Strahilevitz, *Reputation Nation: Law in an Era of Ubiquitous Personal Information*, 102 NW. U. L. REV. 1667 (2008).

219. As Morgan Cloud concludes: “After a third of a century, it is fair to conclude that *Katz* is a failure, at least if its original purpose was to ensure that Fourth Amendment standards regulate the use of modern surveillance technologies.” Morgan Cloud, *Rube Goldberg Meets the Constitution: The Supreme Court, Technology, and the Fourth Amendment*, 72 MISS. L.J. 5, 28–29 (2002).

220. See, e.g., *United States v. Karo*, 468 U.S. 705, 713–14 (1984); *United States v. Miller*, 425 U.S. 435, 443 (1976) (“[T]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities . . . .”); *United States v. White*, 401 U.S. 745, 787 (1971).

221. *Warden v. Hayden*, 387 U.S. 294, 323 (1967) (Douglas, J., dissenting).

222. See Danielle Keats Citron, *Fulfilling Government 2.0’s Promise with Robust Privacy*



If accumulated information empowers government officials to conduct searches and seizures as in *Herring*, then it seems inescapable that “[n]egligent recordkeeping errors by law enforcement threaten individual liberty,”<sup>223</sup> as Justice Ginsburg argued.<sup>224</sup> Government records maintained on the basis of data mining—the process of obtaining and analyzing recorded information about persons from private and public sources—can lead to individuals’ placement on “watch lists” or no-fly lists, or otherwise being targeted by law enforcement officials.<sup>225</sup> The most iconic version of this process was the Total Information Awareness program, whose slogan, “knowledge is power,” was well-suited to a new public panopticon.<sup>226</sup> Although this particular program was abandoned, others proliferate, most recently through a federally funded program of information “fusion centers.”<sup>227</sup> At least one of these data-mining initiatives, TALON (Threat and Local Observation Notice), focused on ordinary political protest activities of citizens—activities at the core of political liberty.<sup>228</sup> The problem with these and other federal data-mining initiatives, as Christopher Slobogin argues, is that “[c]urrent Fourth Amendment jurisprudence appears to leave data mining completely unregulated.”<sup>229</sup>

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*Protections*, 78 GEO. WASH. L. REV. 822, 827 (2010) (arguing that “government should view Government 2.0 sites as one-way mirrors, where individuals can see government’s activities and engage in policy discussions but where government cannot use, collect, or distribute individuals’ social-media information”); see also Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 21, 2009); Chris Snyder, *Government Agencies Make Friends with New Media*, WIRED, Mar. 25, 2009, <http://www.wired.com/epicenter/2009/03/government-agen/>.

223. *Herring v. United States*, 129 S. Ct. 695, 710 (2009) (Ginsburg, J., dissenting).

224. This individual liberty implicates First Amendment concerns as well. See Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387 (2008).

225. See, e.g., Daniel Solove, *Data Mining and the Security-Liberty Debate*, 75 U. CHI. L. REV. 343, 357 (2008) (“Some of the most significant problems of data mining involve information processing—the way that previously gathered information is stored, analyzed, and used. The analysis of data to identify people who match certain profiles resembles a dragnet search . . . .”); Eric Lichtblau, *F.B.I. Data Mining Reached Beyond Initial Targets*, N.Y. TIMES, Sept. 9, 2007, at A1.

226. See Jeffrey Rosen, *Total Information Awareness*, N.Y. TIMES MAG., Dec. 15, 2002, at E128, E130; see also JEREMY BENTHAM, *THE PANOPTICON; OR, THE INSPECTION-HOUSE* (1791); MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 204, 195–228 (Alan Sheridan trans., Vintage Books 1977) (“The Panopticon functions as a kind of laboratory of power.”).

227. See JOHN ROLLINS, CONG. RESEARCH SERV., RL 34070, *FUSION CENTERS: ISSUES AND OPTIONS FOR CONGRESS* (2008); Hilary Hylton, *Fusion Centers: Giving Cops Too Much Information?*, TIME, Mar. 9, 2009, available at <http://www.time.com/time/nation/article/0,8599,1883101,00.html>; see also Danielle Keats Citron & Frank A. Pasquale III, *Network Accountability for the Domestic Intelligence Apparatus*, 62 HASTINGS L.J. (forthcoming 2011).

228. See James Bamford, *Private Lives: The Agency That Could Be Big Brother*, N.Y. TIMES, Dec. 25, 2005, at C1; Walter Pincus, *Protesters Found in Database: ACLU is Questioning Entries in Defense Dept. System*, WASH. POST, Jan. 17, 2007, at A8.

229. Christopher Slobogin, *Government Data Mining and the Fourth Amendment*, 75 U. CHI. L. REV. 317, 321 (2008).

Second, searches and seizures directly impact personal participation in community and political life. When a person's race, religion, or political preferences contribute to whether she is subject to search, more than her privacy or equal status is implicated. Her full political participation in the polity is at stake. To see how, contrast the Fourth Amendment with the Takings Clause.<sup>230</sup> The Fifth Amendment permits government officials to take private property for public purposes with just compensation.<sup>231</sup> Like the Fourth Amendment, there is no absolute bar to the government action—the Constitution permits both searches and takings. Rather, officials may engage in the regulated action subject to fulfillment of the appropriate conditions (e.g., a reasonable search or a public purpose with just compensation). Read alongside the Takings Clause, we might conclude that the Fourth Amendment's regulation of searches and seizures merely puts a proper price on an activity that produces a social good by enabling police to ferret out criminal wrongdoing, just as the Fifth Amendment provides a price for an activity that produces a social good by enabling completion of public projects like road construction. We do not want to make effective police practice too expensive by overregulating it and thereby risk social harm from increased levels of crime.

Both searching and taking produce individual costs in addition to public benefits, as the public outcry following the Supreme Court's takings decision in *Kelo v. City of New London*<sup>232</sup> attests. But each activity is compensated differently. Most importantly, the Takings Clause mandates compensation.<sup>233</sup> On the assumption that property is fungible with money, when the state compensates a property owner for an eminent domain taking, the owner should be in roughly the same position after the transaction as before. By contrast, the Fourth Amendment does not mandate any form of compensation. A person subject to a proper search receives no compensation, while a person subject to an unconstitutional search may seek to exclude from trial any evidence found, but otherwise faces little prospect for compensation. The innocent person wrongfully searched is unlikely to seek or receive monetary damages from the offending officer through a civil suit. Thus, we could describe Fourth Amendment violations as exacting uncompensated takings from innocent

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230. This comparison was helpfully suggested to me by Orin Kerr.

231. U.S. CONST. amend. V. *See* *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984); *Penn Cent. Trans. Co. v. New York City*, 438 U.S. 104 (1978).

232. 545 U.S. 469 (2005) (holding that a municipality acts within the Fifth Amendment's public use requirement when it takes individual property as part of a planned comprehensive city redevelopment project).

233. *See* *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

victims to achieve the public purposes of regulating crime. The uncompensated costs of searches go beyond any monetary value because these costs affect a person's sense of standing and security within the community. Searches can impose "chilling effects" on individuals' ability and willingness to engage in public social and political activities when they fear unpleasant interactions with police. Like infringements on First Amendment rights to speak, assemble, and petition, the costs of unconstitutional searches affect the deliberative prospects of the wider polity. From a political liberty perspective, we have more to fear from government search and surveillance than from the exercise of eminent domain.

Finally, flourishing political life requires the freedom to think, listen, and speak with others openly in public space, without the fear of repercussions, whether in the form of sanctions or in the form of unwanted government surveillance.<sup>234</sup> Uninhibited and robust political life therefore requires the protections afforded by both the First and Fourth Amendments. If the First Amendment protects no more than the ability to speak in private, then it would protect little that is of political value.<sup>235</sup> To speak alone to oneself does little to fulfill the promise of free speech. Similarly, a Fourth Amendment that protects no more than the secrets we seek to keep provides scant protection for our actual social lives. Being left alone only when in solitude fails to fulfill "the Blessings of Liberty" promised to "the People" by the Constitution. Justice Ginsburg's constitutional vision would reconnect the Fourth Amendment to broader concerns for political liberty. These connections have not gone unrecognized in the Supreme Court's decisions: "The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression."<sup>236</sup> This alternative vision seeks to recover the forgotten

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234. See, e.g., *Thornhill v. Alabama*, 310 U.S. 88, 101–02 (1940) ("The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." (footnote omitted)); see also Thomas P. Crocker, *Displacing Dissent: The Role of "Place" in First Amendment Jurisprudence*, 75 *FORDHAM L. REV.* 2587 (2007).

235. I do not mean to suggest that private formation of ideas is not important, nor that a sphere of privacy is not important for self-development. Rather, these by themselves, while necessary, are insufficient for political life. Moreover, both are vulnerable to pervasive surveillance. See Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 *STAN. L. REV.* 1373, 1426–27 (2000) ("A robust and varied debate on matters of public concern requires the opportunity to experiment with self-definition in private, and (if one desires) to keep distinct social, commercial, and political associations separate from one another.").

236. *Marcus v. Search Warrant*, 367 U.S. 717, 729 (1961).

political bearings of the Fourth Amendment. It is precisely this focus on the nature of official conduct as “totally subversive of . . . liberty” that motivated the construction of the Fourth Amendment through political liberty cases, such as *Wilkes v. Wood*,<sup>237</sup> which share an underlying First Amendment interest in the publication of political pamphlets. This third narrative focuses on political liberty, for which privacy may play a significant role but does not constitute the whole story. Beyond the practical considerations of public surveillance and public political life, the Fourth Amendment’s historical origin, as well as its textual focus on a “right of the people,” provides a solid basis for reviving a third narrative. As the next part argues, the historical origins of the Fourth Amendment are based on cases attending to the common interests shared by both the First and the Fourth Amendments in limiting state interference with political liberties.<sup>238</sup>

## II. FOURTH AMENDMENT BEGINNINGS AND SEDITIOUS LIBEL

To begin at the beginning is to cover familiar scholarly terrain.<sup>239</sup> English and American courts established important precedents vindicating revolutionary colonists’ claims of freedom from arbitrary and intrusive practices of searches and seizures by governing officials.<sup>240</sup> In the beginning, political liberty was a central issue because abusive searches and seizures undermined “the People’s” political and private security. As it has evolved, the Fourth Amendment evinces little concern for broader questions of political liberty. Instead, the modern Fourth Amendment has developed an intricate set of procedures designed to regulate police in their conduct of ordinary criminal investigation, leaving to other Amendments

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237. (1763) 98 Eng. Rep. 489 (C.B.).

238. See Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112 (2007). Solove argues that “the First Amendment should serve as an independent source of procedure to protect expressive and associational activity from government information gathering.” *Id.* at 151. Solove’s contribution is important because he reads the First Amendment as a special “source of criminal procedure.” *Id.* at 114. This Article moves in the opposite direction, reading the Fourth Amendment as a source of protections for political liberty. Whether reading the First Amendment as criminal procedure or reading the Fourth Amendment as protecting political liberty, the most important development is to bring the law of search and seizure closer to the liberty-enhancing values protected by other constitutional provisions—most significantly, the First Amendment.

239. See generally THOMAS K. CLANCY, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION* (2008); WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* 602–1791 (2009).

240. See *Entick v. Carrington*, (1765) 19 Howell’s State Trials 1029 (C.P.); *Wilkes v. Wood*, (1763) 19 Howell’s State Trials 1153 (C.P.) 1167; *Paxton’s Case*, Quincy 51 (Mass. 1761), in 2 *LEGAL PAPERS OF JOHN ADAMS* 123–34 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

the essential task of securing the liberty of “the People.” To begin to see how this division of constitutional labor is a modern and contingent construct, we must first reconstruct the narrative in which political liberty was, and continues to be, a Fourth Amendment value. Reading the First Amendment in relation to the Fourth, as this Article does, has deep roots in our constitutional history.

### A. *The Child Independence*

The Fourth Amendment is rooted in cases that have as much to do with political speech as they do with searches and seizures. Publishing pamphlets critical of the Crown could be a risky endeavor, as John Entick and John Wilkes each discovered in eighteenth-century England.<sup>241</sup> Risk arose because they were subject to prosecution under seditious libel for speaking publicly in criticism of Crown officials. Criticizing political authorities was thought to be dangerous because it denigrated the dignity of Crown officials and could lead to public discontent.<sup>242</sup> To criticize the sovereign was to criticize the body of the state.<sup>243</sup> No state body could remain healthy if subject to the disease of discontent. It was therefore incumbent on state officials to root out seditious libel for the health and security of the state.

In 1762, John Entick published pamphlets critical of Crown officials.<sup>244</sup> Pursuing a claim for seditious libel, the British Secretary of State, Lord Halifax, issued warrants to search Entick’s home and seize his papers.<sup>245</sup> The warrant was executed and the papers seized.<sup>246</sup> Entick subsequently sued in trespass.<sup>247</sup> A jury awarded him damages,<sup>248</sup> and in an opinion

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241. This history is recounted in a number of sources. *See, e.g.*, AMAR, *supra* note 26, at 13; NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 43–50 (1937); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 562–70 (1999); William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 396–404 (1995).

242. “An attack on the dignity or respectability of authority was deemed to undermine its credibility and to subvert the affection of its subjects in the same manner that libel or slander injured an individual’s reputation. Similarly, seditious libel was thought to disturb the inner tranquility of the state and throw its members into a distemper just as defamation was thought to disturb the inner tranquility of a person.” Judith Schenck Koffler & Bennett L. Gershman, *The New Seditious Libel*, 69 CORNELL L. REV. 816, 821 (1984).

243. *See generally* ERNST H. KANTOROWICZ, THE KING’S TWO BODIES: A STUDY IN MEDIAEVAL POLITICAL THOUGHT (1957).

244. *Entick v. Carrington*, (1765) 19 Howell’s State Trials 1029 (C.P.) 1031. *See* LASSON, *supra* note 241, at 47.

245. *Entick*, 19 Howell’s State Trials at 1031.

246. *Id.*

247. *Id.* at 1030.

famous at the time of the American Founding, Lord Camden upheld the verdict, reasoning that officials had no power to seize personal papers:

[I]t is urged as an argument of utility, that such a search is a means of detecting offenders by discovering evidence. . . .

In the criminal law such a proceeding was never heard of; and yet there are some crimes, such for instance as murder, rape, robbery, and house-breaking, to say nothing of forgery and perjury, that are more atrocious than libelling. But our law has provided no paper-search in these cases to help forward the conviction.<sup>249</sup>

This broad ruling protected the privacy of papers against searches pursuant to general warrants, which lacked specificity or probable cause and which sought to discover evidence for use in seditious libel prosecutions. Lord Camden's opinion was not only important in the minds of constitutional drafters, but has also been important in Supreme Court precedent.<sup>250</sup> Justice Bradley wrote in *Boyd v. United States*, a case finding both Fourth and Fifth Amendment values at stake in the seizure of property for use as evidence, that "[t]he principles laid down in this opinion affect the very essence of constitutional liberty and security."<sup>251</sup> Justice Bradley also noted that Lord Camden's opinion has been "considered as one of the landmarks of English liberty. It was welcomed and applauded by the lovers of liberty in the colonies as well."<sup>252</sup>

John Wilkes was a Member of Parliament who also published a series of pamphlets critical of Crown officials, though he did so anonymously.<sup>253</sup> Lord Halifax again issued warrants, which were this time served against not only Mr. Wilkes, but a large number of his associates.<sup>254</sup> Officials arrested forty-nine persons, in the process searching Wilkes' home and

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248. *Id.* at 1036 (awarding damages of £300).

249. *Id.* at 1073.

250. See LASSON, *supra* note 241, at 47; TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION: SEARCH, SEIZURE, AND SURVEILLANCE AND FAIR TRIAL AND FREE PRESS 38–44 (1969).

251. 116 U.S. 616, 630 (1886).

252. *Id.* at 626.

253. *Wilkes v. Wood*, (1763) 19 Howell's State Trials 1153 (C.P.) 1167; CUDDIHY, *supra* note 239, at 440–43; LASSON, *supra* note 241, at 43; see also WALTER F. PRATT, PRIVACY IN BRITAIN 55–56 (1979).

254. The warrant had no restriction on who or where officials could search, authorizing Crown officials "to make strict and diligent search for the authors, printers and publishers of a seditious and treasonable paper, entitled, The North Briton, No. 45 . . ." The Case of John Wilkes, 19 Howell's State Trials 981 (1763); see also LASSON, *supra* note 241, at 43.

seizing his books, manuscripts, and papers.<sup>255</sup> Wilkes and his associates sued in trespass, and a jury awarded him a substantial verdict of one thousand pounds.<sup>256</sup> As in *Entick*, Lord Camden upheld the verdict, reasoning:

The defendants claimed a right, under precedents, to force persons houses, break open escutores, seize their papers, &c. upon a general warrant, where no inventory is made of the things thus taken away, and where no offenders names are specified in the warrant, and therefore a discretionary power given to messengers to search wherever their suspicions may chance to fall. If such a power is truly invested in a Secretary of State, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject.<sup>257</sup>

It is noteworthy that the defendants to the trespass action were not police officers, since the London police were not first organized until 1829.<sup>258</sup> They were persons acting on behalf of the Secretary of State against a Member of Parliament. The crime about which they sought evidence was not “murder, rape, robbery and house-breaking,” as Lord Camden contrasted in *Entick*,<sup>259</sup> but a political crime—criticizing state officials.<sup>260</sup> For ordinary crime, the self-informing jury of peers, persons of the vicinage who had knowledge of the crime, did the investigating.<sup>261</sup> Crown officials ordinarily arrived only when others had gathered enough evidence to arrest individuals and would conduct searches incident to the arrest.<sup>262</sup> In *Wilkes*’s case, the search was not incident to an arrest, but was itself an attempt to find the papers, manuscripts, and books needed to convict Wilkes of seditious libel.<sup>263</sup>

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255. See CUDDIHY, *supra* note 239, at 442–43.

256. *Wilkes v. Wood*, (1763) 19 Howell’s State Trials 1153 (C.P.) 1168.

257. *Wilkes*, 19 Howell’s State Trials at 1167.

258. See John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 55 (1983) (discussing consequences of the fact that London lacked an organized police force until “Sir Robert Peel’s Metropolitan Police Act of 1829 founded the ‘bobbies’” (footnote omitted)).

259. *Entick v. Carrington*, (1765) 19 Howell’s State Trials 1029 (C.B.) 1073.

260. *Wilkes*, 19 Howell’s State Trials at 1166.

261. See, e.g., John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 AM. J. LEGAL HIST. 313, 314–15 (1973).

262. See Langbein, *supra* note 258, at 55–60; see also Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 830–32 (1994); Stuntz, *supra* note 241, at 401.

263. Parliament also sought to deprive Wilkes of his seat, a further aspect of the case that resounded in America. See *Powell v. McCormack*, 395 U.S. 486, 527–31 (1969).

The general warrant did not limit the power of state agents to specific persons or things and was not supported by probable cause—key components of the Fourth Amendment. The problem, as Lord Camden identified, was the political ramification of the Secretary having such power to “affect the person and property of every man in the kingdom,” in a way that is “totally subversive of the liberty of the subject.”<sup>264</sup> Although the British did not have the equivalent of our First Amendment as a basis for challenging the legality of the substantive offense of seditious libel, the limitations on official power served similar ends. If in order to prosecute a political crime, the state were entitled to search whomever and wherever, liberty would be totally subverted. The liberty interest—not an interest in the privacy and sanctity of the home for an individual’s own sake—is the central concern of the *Wilkes* case. Liberty was to be protected through procedural limitations on the ability of government agents to search for evidence, not through a facial challenge to the substantive law they sought to vindicate. Procedural limitations found a home in Fourth Amendment text, which explicitly protects against the unconstrained discretion attending general warrants.

A final eighteenth-century precedent, this time involving events that occurred in Boston, emphasized the dangers that accompany the power to execute general warrants. In *Paxton’s Case* (also known as the *Writs of Assistance* or *Petition of Lechmere* case), James Otis argued on behalf of merchants who had been subject to searches by customs officials authorized by general warrants.<sup>265</sup> Issuance of general warrants was authorized in the colonies by the Act of Frauds of 1696, empowering customs officials—based solely on their own suspicion—to search anywhere they might find contraband.<sup>266</sup> In particular, Otis’s argument was directed toward the liberty to be free from government intrusion in the home, claiming that “one of the most essential branches of English liberty, is the freedom of one’s house.”<sup>267</sup> Here again, the underlying conduct was

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264. *Wilkes*, 19 Howell’s State Trials at 1167.

265. *Paxton’s Case*, Quincy 51 (Mass. 1761), in 2 LEGAL PAPERS OF JOHN ADAMS 123–34 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965). The title of the case varies, as noted by CUDDIHY, *supra* note 239, at 382 n.26. On the significance of the case, see *Boyd v. United States*, 116 U.S. 616, 625 (1886) (“‘Then and there,’ said John Adams, ‘then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.’”); M.H. SMITH, THE WRITS OF ASSISTANCE CASE 316–17 (1978).

266. See SMITH, *supra* note 265, at 25, 51–66.

267. *Id.* at 344. James Otis further argued: “A man’s house is his castle; and while he is quiet, he is as well guarded as a prince in his castle.—This writ, if it should be declared legal, would totally annihilate this privilege.” *Id.*



no ordinary criminal offense, but was a politically charged question of trade limitations.

Privacy in the home was an important feature of the colonialists' complaint, but this value was understood in terms of political liberty—freedom from state interference in spheres of the colonialists' lives—not merely in terms of personal privacy.<sup>268</sup> As Otis argued, the use of Writs of Assistance constituted “the worst instance of arbitrary power, the most destructive of English liberty, that ever was found in an English law book.”<sup>269</sup> Resistance to arbitrary power and its destructive effects on political liberty gave rise to revolutionary political claims. John Adams claimed of Otis's arguments that

American independence was then and there born; the seeds of patriots and heroes were then and there sown . . . . Every man of a crowded audience appeared to me to go away, as I did, ready to take arms against writs of assistance. Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.<sup>270</sup>

If American political independence was born, at least in some part, from contestation over general warrants,<sup>271</sup> then the Fourth Amendment can have an important role to play in preserving a political liberty that extends beyond regulating police or protecting privacy. As important as these purposes may be, *Entick*, *Wilkes*, and *Paxton's Case* all speak to broader concerns over the power of government officials to constrain the liberty of persons in their political and public dealings with each other.

### *B. A Division of Constitutional Labor*

As it has developed in the twentieth century, Fourth Amendment jurisprudence has focused almost exclusively on protecting privacy by regulating police investigation of crimes such as drug possession, murder, rape, and robbery. Even though the Court has placed increased emphasis

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268. See, e.g., William Cuddihy & B. Carmon Hardy, *A Man's House Was Not His Castle: Origins of the Fourth Amendment to the United States Constitution*, 37 WM. & MARY Q. 371, 386–87, 394–97 (1980).

269. LASSON, *supra* note 241, at 59 (quotation omitted).

270. Letter from John Adams to William Tudor (Mar. 29, 1817), in 10 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 247–48 (Charles Francis Adams ed., Little, Brown & Co. 1856).

271. Unlike *Wilkes* and *Entick*, the importance of *Paxton's Case* to the writing of the Fourth Amendment is contested. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 66 (1998).

on protecting the privacy of places such as the home,<sup>272</sup> as Fourth Amendment jurisprudence first emerged, the connection between liberty and privacy remained. In *Boyd v. United States*, Justice Bradley emphasized the fact that *Entick* and *Wilkes*

apply to all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence.<sup>273</sup>

Security, liberty, and property were all to be protected through limitations on the power of government officials to engage in investigatory searches. Privacy was to become the linchpin of Fourth Amendment jurisprudence only when the focus turned to protecting persons in places where they sought to shield themselves from the eyes and ears of others.<sup>274</sup> Liberty and security remain equally important, even if they are often latent Fourth Amendment values.

As a means of regulating official intervention in the political lives of citizens, relying only upon procedural limitations to searches would not be enough. After all, John Wilkes was still convicted of seditious libel.<sup>275</sup> Nothing in his successful trespass suit affected the legality of the underlying prosecution. Lacking anything like a modern exclusionary rule, there was no further political check, at least where the conviction could not be nullified by a jury of his peers. Early American constitutional history faced a similar problem.

Under a Federalist administration and Congress, seditious libel was prohibited by statute in 1798 out of the same fears of the disease of

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272. See, e.g., *Wilson v. Layne*, 526 U.S. 603, 610 (1999) (referring to the “centuries-old principle of respect for the privacy of the home”); *Payton v. New York*, 445 U.S. 573, 589 (1980) (“The Fourth Amendment protects the individual’s privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual’s home . . .”).

273. 116 U.S. 616, 630 (1886).

274. As the Court explained in the seminal modern Fourth Amendment case: “What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.” *Katz v. United States*, 389 U.S. 347, 351–52 (1967) (citation omitted).

275. See *Powell v. McCormack*, 395 U.S. 486, 527 (1969).

discontent that animated British prosecutions.<sup>276</sup> Newspaper editors, such as Thomas Cooper, and politicians, such as Vermont Congressman Matthew Lyon, were prosecuted and convicted for speech criticizing John Adams's Federalist administration.<sup>277</sup> Although the Act expired in 1801, Congress passed other acts during times of national crisis intending to suppress dissent, such as the Espionage Act of 1917 and the Sedition Act of 1918.<sup>278</sup> These new attempts were tested substantively rather than procedurally, slowly awakening the modern First Amendment tradition. Prosecutions for disseminating "dangerous ideas" were upheld against First Amendment challenges during the First World War,<sup>279</sup> the first red scare,<sup>280</sup> and the second red scare during the Cold War.<sup>281</sup> A tradition developed through Justice Holmes's dissent in *Abrams v. United States*<sup>282</sup> and Justice Brandeis's concurrence in *Whitney v. California*,<sup>283</sup> however, that began to protect speech through substantive limitations on the application of the underlying criminal statutes.<sup>284</sup>

During this history, the Fourth Amendment played little role in limiting the power of officials to prosecute individuals for their speech. The Fourth Amendment was increasingly occupied with regulating criminal investigations.<sup>285</sup> It was through the First Amendment that the Supreme Court finally made clear that officials cannot prosecute individuals for merely criticizing the government.<sup>286</sup> Thus, we have a division of labor:

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276. Act of July 14, 1798, ch. 74, 1 Stat. 596 (providing for the punishment of certain crimes against the United States).

277. See GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 33–73 (2004). For more on the acrimonious election of 1800, which the Sedition Act had sought to influence, see BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* (2005).

278. Espionage Act of 1917, ch. 30, 40 Stat. 217 (codified at 18 U.S.C. §§ 792–794); Sedition Act of 1918, ch. 75, 40 Stat. 553, *repealed by* Act of Mar. 3, 1921, h. 136, 41 Stat. 1359–60.

279. *Schenck v. United States*, 249 U.S. 47 (1919) (upholding prosecution for circulating pamphlets said to violate the Espionage Act).

280. *Gitlow v. New York*, 268 U.S. 652 (1925).

281. *Dennis v. United States*, 341 U.S. 494 (1951).

282. 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting); *see also Gitlow*, 268 U.S. at 672–73 (Holmes, J., dissenting).

283. 274 U.S. 357, 372–79 (1927) (Brandeis, J., concurring), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

284. Following *Whitney*, the Court struck down convictions for subversive advocacy in a number of cases. *See De Jonge v. Oregon*, 299 U.S. 353 (1937); *Fiske v. Kansas*, 274 U.S. 380 (1927). Harry Kalven, Jr., provides a masterful overview of the development of the free speech tradition from its anemic start in the Holmes dissents and the Brandeis concurrence to its robust flowering under the Warren Court. *See HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* 167–236 (1988).

285. *See, e.g., Mapp v. Ohio*, 367 U.S. 643 (1961); *Silverman v. United States*, 365 U.S. 505 (1961); *Brinegar v. United States*, 338 U.S. 160 (1949).

286. *See Brandenburg*, 395 U.S. 444; *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

the First Amendment protects substantive political rights to speak, assemble, and petition the government, while the Fourth Amendment protects against arbitrary criminal process. Does this division adequately reflect constitutional meaning, structure, and history regarding the protection of political liberty?<sup>287</sup> Because Fourth Amendment doctrine has developed an almost exclusive focus on protecting privacy by regulating police investigation of ordinary crime, there is good reason to doubt the necessity of this exclusive division. The Court's jurisprudence regulating police provides a narrow construction of privacy as secret or undisclosed to others.<sup>288</sup> Privacy is defeated, and thus no constitutional search occurs, when police examine places and persons that have been publicly exposed.<sup>289</sup> But political liberty is realized in the company of others, most notably in the freedom to associate with others and to peaceably assemble. These are public activities, not activities that remain private and undisclosed to others. Of course, regulating police practice has little to do directly with political liberty. If we attend to the Fourth Amendment's historical setting of seditious libel cases, which present the arbitrary use of power for political purposes, we are better able to see that "[t]his history was, of course, part of the intellectual matrix within which our own constitutional fabric was shaped,"<sup>290</sup> a fabric that includes many threads comprising a powerful weave. As the Supreme Court has recognized, speaking of cases such as *Wilkes* and *Entick*, "[i]t was in the context of the latter kinds of general warrants that the battle for individual liberty and privacy was finally won."<sup>291</sup> Privacy is not a Fourth Amendment value isolated from liberty.

Following these historical precedents, it is a mistake to focus Fourth Amendment protections exclusively on privacy. Such an exclusive

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287. These are only three modalities of constitutional interpretation, though others may be relevant. See generally PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982).

288. See *Smith v. Maryland*, 442 U.S. 735, 743 (1979) (noting that we relinquish an expectation that information we reveal to others "will remain secret"); *Katz v. United States*, 389 U.S. 347, 351–52 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.");

289. See *United States v. Jacobsen*, 466 U.S. 109, 117 (1984) ("It is well settled that when an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities, and if that occurs the Fourth Amendment does not prohibit governmental use of that information."); *United States v. Knotts*, 460 U.S. 276, 281–82 (1983) (concluding that when the defendant "traveled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction").

290. *Marcus v. Search Warrant*, 367 U.S. 717, 729 (1961).

291. *Stanford v. Texas*, 379 U.S. 476, 483 (1965).

conception of privacy has little place in the historical precedents, as we have seen, which focused on limiting the political power of government officials to investigate and prosecute political crimes. In relation to seditious libel or the arbitrary power of customs officials, liberty was the central value. Moreover, a value in protecting only what is publicly undisclosed does not fit well with an eighteenth-century conception of ordinary life.<sup>292</sup> Communities and homes were not constructed or occupied in ways that led to expectations of privacy as undisclosed to others.<sup>293</sup> Community life was life lived in public, not private. There was no fully modern equivalent of “private life” lived apart from the community. Modern privacy is a social construct, conceptually cultivated and practically produced in forms of everyday life.<sup>294</sup> The modern Fourth Amendment’s focus on personal privacy in relation to police practice has generated a number of jurisprudential anomalies and has obscured the Amendment’s political protections. As this Article argues, the Fourth Amendment continues to have an important and underemphasized role to play in protecting against the subversion of liberty. To recognize the important protections the Fourth Amendment affords to political liberty requires us to focus on protecting the “rights of the people” as a collective and sovereign political body. Reading the Fourth Amendment’s protection for a “right of the people” in light of the other constitutional provisions referring to “rights of the people” accentuates the importance of political liberty.

### III. THE RIGHT OF THE PEOPLE

Privacy, as the central value of this modern doctrine, is not textually referenced in the Fourth Amendment. No doubt, privacy can be inferred from what the Amendment specifically protects—persons, papers, and places. But, as this brief overview of Fourth Amendment doctrine and

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292. See A HISTORY OF PRIVATE LIFE III: PASSIONS OF THE RENAISSANCE 493–529 (Roger Chartier ed., Arthur Goldhammer trans., 1989); MICHAEL MCKEON, THE SECRET HISTORY OF DOMESTICITY 212–68 (2005).

293. See sources cited *supra* note 293; see also Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1132–40 (2002).

294. The “right to be let alone” as a form of privacy was first conceptualized in the late nineteenth century, enabling it to take on its more modern guise in Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). If it were already a recognized and embedded value, then there would have been nothing at all noteworthy about the authors’ famous article. “Thus, when Warren and Brandeis sound the alarm in 1890 they do so not to protect or mourn privacy, but to produce it—in a particular guise, and toward a particular purpose.” KATHERINE ADAMS, OWNING UP: PRIVACY, PROPERTY, AND BELONGING IN U.S. WOMEN’S LIFE WRITING 6 (2009).

history attests, this central analytic feature has been read into the Amendment.<sup>295</sup> In protecting “reasonable expectations of privacy”<sup>296</sup> and recognizing a “right to privacy, no less important than any other right carefully and particularly reserved to the people,”<sup>297</sup> the Warren Court also protected “a right of privacy older than the Bill of Rights.”<sup>298</sup> This latter development, ambiguously perched among the “penumbras” and “emanations” from “specific guarantees in the Bill of Rights,”<sup>299</sup> eventually found a more precise textual home in the liberty component of the Due Process Clause.<sup>300</sup> In so doing, due process privacy remained tethered to its broader political right of liberty. By contrast, Fourth Amendment privacy protections have developed in relative independence from broader constitutional commitments and textual themes. Curiously, in all of the detailed rules of Fourth Amendment jurisprudence aimed at regulating police to protect privacy, five important words have dropped from view. The first five words of the Amendment are “[t]he right of the people.”<sup>301</sup>

As the Court has recognized, “the People” is an important term of art in constitutional construction.<sup>302</sup> From its opening words, “We the People,” the Constitution brings into existence a national polity, performing the creation of “[a] People” even as it presupposes their political sovereignty. “[T]he People” are foremost a political body, the grounds for all political legitimacy of government action. Political power resides with “the People,” and it is only upon their consent that the institutions of government operate. As “Publius” explained: “The genius of republican liberty, seems to demand on one side, not only that all power should be derived from the people; but that those entrusted with it should be kept in dependence on the people . . . .”<sup>303</sup> Bypassing the authority of the states as

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295. In other contexts, the Court has been exposed to withering criticism for protecting a textually unspecified right to privacy. See, e.g., John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 936–37 (1973) (“At times the inferences the Court has drawn from the values the Constitution marks for special protection have been controversial, even shaky, but never before has its sense of an obligation to draw one been so obviously lacking.”). By contrast, there has been little criticism of the Court’s claim that the purpose of the Fourth Amendment is to protect privacy.

296. *Katz v. United States*, 389 U.S. 347, 362 (1967) (Harlan, J., concurring).

297. *Mapp v. Ohio*, 367 U.S. 643, 656 (1961).

298. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

299. *Id.* at 484.

300. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 847 (1992) (upholding “a promise of the Constitution that there is a realm of personal liberty which the government may not enter”).

301. U.S. CONST. amend. IV.

302. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2790–91 (2008).

303. THE FEDERALIST NO. 37 (James Madison).

sovereigns, the new Constitution reposed power in “the People” themselves.<sup>304</sup> As the debates over constitutional ratification developed, the question of specific right guarantees led Alexander Hamilton to argue that “[h]ere, in strictness, the people . . . retain everything [and] have no need of particular reservations.”<sup>305</sup> “[T]he People” were empowered to choose the members of the House of Representatives, suggesting the close political connection between “the People” and their governing representatives.<sup>306</sup> Despite arguments against the need for a specific Bill of Rights, ten amendments were added in 1791, several of which confirmed the centrality of “the People.” In addition to the Fourth Amendment’s protection of the “right of the people,”<sup>307</sup> the First Amendment protects “the right of the people peaceably to assemble, and to petition the Government for a redress of grievances,”<sup>308</sup> while the Second Amendment refers to a “right of the people to keep and bear Arms.”<sup>309</sup> Indeed, the Ninth Amendment assures against denial or disparagement rights “retained by the people,”<sup>310</sup> and the Tenth Amendment confirms powers “reserved . . . to the people.”<sup>311</sup>

Rights protections among the amendments are not always granted to “the People.” The Fifth Amendment protects *persons* under due process and other provisions, while the Sixth Amendment guarantees rights to the *accused* in criminal prosecutions. Both the Sixth and Seventh Amendments protect the role of juries, a political body closely associated with “the People” themselves.<sup>312</sup> “We the People,” however, are not synonymous with the individual persons who comprise the sovereign body. Indeed, the founding Constitution’s protections for “persons” included those such as women or noncitizens who could not vote and were not full participants in the republican polity. The need to protect the rights of persons, and their prospects for a more inclusive equal citizenship,

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304. James Madison described the important ability to circumvent the states because “the people were in fact, the fountain of all power, and by resorting to them, all difficulties were got over. They could alter constitutions as they pleased.” GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–87*, 533 (1969) (footnote omitted).

305. THE FEDERALIST NO. 84 (Alexander Hamilton).

306. U.S. CONST. art. I, § 2, cl. 1.

307. U.S. CONST. amend. IV.

308. U.S. CONST. amend. I.

309. U.S. CONST. amend. II.

310. U.S. CONST. amend. IX.

311. U.S. CONST. amend. X.

312. According to Akhil Amar, the role of juries is also closely connected to the “right of the people”: “No idea was more central to our Bill of Rights—indeed, to America’s distinctive regime of government of the people, by the people, and for the people—than the idea of the jury.” AMAR, *supra* note 26, at 161.

formed a basis for reconstituting the fundamental constitutional structure through the Fourteenth Amendment. The process of creating an expanded national community required overturning *Dred Scott v. Sandford*<sup>313</sup> and recognizing the equal citizenship of “all persons.” This national struggle for recognition reaffirmed the vitality and importance of preserving the “rights of the people” as equal citizens and their republican participation in the polity. Given this contrast between persons and “the People,” what effect does reference to rights and powers of “the People” have for constitutional interpretation?

One answer emphasizes the role that popular constitutionalism has to play, not only for politics, but also as a source of constitutional meaning. The usual narrative of judicial review reposes ultimate power to say what the law is in the judiciary.<sup>314</sup> The 1789 Constitution, however, provided mechanisms for constitutional change that reside with “the People.” Thus, under this narrative, the judiciary interprets the Constitution in light of any changes wrought by popular amendment. When the Constitution is stable, the judiciary’s duty is to uphold the will of “the People” against any contrary ordinary legislation.<sup>315</sup> Absent popular involvement in the formal amendment process, “the People” have little role to play. When “the People” are otherwise engaged in the pursuits of private life, the Court’s task is to act as guardians over constitutional text and meaning, having the last word on all interpretive matters.<sup>316</sup>

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313. 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

314. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”); *see also* *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (“[T]he federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.”).

315. *See* THE FEDERALIST NO. 78 (Alexander Hamilton) (“[T]he Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.”).

316. Even when the Court plays the role of constitutional guardian, the scope of judicial review and the method of constitutional interpretation remain very much contested. For a small sampling, *see*, for example, BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998) [hereinafter ACKERMAN, *WE THE PEOPLE*]; ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982); RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE CONSTITUTION* 1–38 (1996); H. JEFFERSON POWELL, *CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION* (2008); ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (Amy Gutmann ed., 1997); Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737 (2007) [hereinafter Ackerman, *The Living Constitution*]; David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). Constitutional interpretation requires an ongoing conversation in which we manifest “at least a limited constitutional faith,” committing us “not to closure but only to a process of becoming and to



Contesting this notion, a second general response recognizes the role of popular sovereignty, emphasizing the everyday actions “the People” can take in contesting and constructing constitutional meaning. Larry Kramer, for example, argues that the supremacy of judicial review should be supplanted by popular authority over constitutional meaning.<sup>317</sup> Because the Constitution was an act of popular will, “the People” retain final interpretive authority over the Constitution’s meaning, creating a constitutional practice of regular popular participation.<sup>318</sup> Bruce Ackerman argues that “We the People” have an ongoing role to play in enabling major constitutional transformations outside the formal amendment process through our efforts to enshrine new constitutional meanings as fundamental law.<sup>319</sup> “[T]he People” are not some historic body who gave life to the Constitution and then disappeared, but are a living body participating in ongoing debates over constitutional culture and retaining the power to transform constitutional meaning through extended popular involvement in political processes.<sup>320</sup> To place “the People, not the Court, at the center of constitutional development,” is to insist

that ordinary Americans, led by such figures as Franklin Roosevelt and Martin Luther King, Jr., have made as large a constitutional contribution as the generations led by George Washington and Abraham Lincoln—and that the job of the Supreme Court is to recognize this point when making sense of the living Constitution.<sup>321</sup>

When it comes to understanding our intergenerational constitutional commitments, “the People” both ordained and established the Constitution and continue to play a central role in sustaining constitutional culture.

Neither of these two views tells us how to understand the “right of the people” in the Fourth Amendment. The first tells us only that the judiciary

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taking responsibility for constructing the political vision towards which [we] strive . . . .” SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 193 (1988).

317. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 247 (2004) (“[T]o control the Supreme Court, we must first lay claim to the Constitution ourselves. That means publicly repudiating Justices who say that they, not we, possess ultimate authority to say what the Constitution means.”).

318. *See id.* at 8 (“Final interpretive authority rested with ‘the people themselves,’ and courts no less than elected representatives were subordinate to their judgments.”).

319. ACKERMAN, *WE THE PEOPLE*, *supra* note 316, at 384.

320. Ackerman writes: “For me, ‘the People’ is not the name of a superhuman being, but the name of an extended process of interaction between political elites and ordinary citizens” who have a particular role to play during “constitutional moments.” *Id.* at 187.

321. Ackerman, *The Living Constitution*, *supra* note 316, at 1804–05.

is supreme in interpreting the scope of this right. The second view, however, is more fruitful because it provides a useful answer to our question about the relation of “the People” to constitutional meaning. It acknowledges the ongoing importance of “the People” as a political body—whether involved in constitutional interpretation, constitutional politics, or constitutional transformation. Given the repeated invocation of “the People” as possessing rights and powers, and given the constitutional purpose to establish “a government which derives all its powers directly or indirectly from the great body of the people,”<sup>322</sup> constitutional interpretation must acknowledge the important status of “the People.” Beyond their role as sovereigns, and beyond their role in creating and sustaining a national community, “the People” are the objects of textually specific rights and powers.

Little judicial attention has been paid to the interpretive significance of “the People” when considering the constitutional meaning of their protected rights and powers. Seeking to counter the claim that the Second Amendment right to bear arms is a collective right, the majority in *District of Columbia v. Heller* claimed that other provisions protecting “the People” “unambiguously refer to individual rights, not ‘collective’ rights, or rights that may be exercised only through participation in some corporate body.”<sup>323</sup> Although the argumentative aim is directed elsewhere, the *Heller* majority commented that “the term unambiguously refers to all members of the political community, not an unspecified subset.”<sup>324</sup> The logic of these claims is anything but “unambiguous” since the reduction of a “right of the people” to an individual, private right requires careful attention to constitutional structure, text, and history, all of which point to the important role of “the People,” not the individual person. Significantly, the majority admits that “the People” refers to a political community, and whatever else the Court says about whether the right is held as an “individual” or “collective” right, the intrinsic political import of the term is affirmed. In another context, the Court explained that the constitutional text “suggests that ‘the people’ protected by the Fourth Amendment . . . refers to a class of persons who are part of a national community.”<sup>325</sup> Here, however, reference to a class of aggregated persons does not exhaust the term’s meaning.

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322. THE FEDERALIST NO. 39 (James Madison).

323. 128 S. Ct. 2783, 2790 (2008).

324. *Id.* at 2790–91.

325. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

“The People,” as the repository of republican civic virtue, sought to secure their rights through constitutional text and structure. As “Publius” explains in *The Federalist No. 51*, dividing government into “distinct and separate departments” provides “a double security . . . to the rights of the people.”<sup>326</sup> A republican form of government, however, requires more than structure. It also requires participation. Security from improper interference by governing institutions and officials also affects “the People’s” full participation in and enjoyment of all the “Blessings of Liberty.” For example, the First Amendment right to assemble and petition the government protects a public, collective ability to act in concert to effect political ends.<sup>327</sup> In order to live lives in which public collective action is possible, people must also be secure in the liberty of shared social life in their homes and in their persons. The political right of “the People” may be manifest as an individual right to be secure in “their persons,” but the collective political right transcends the interests of private individuals. Focusing on privacy alone misses the broader political implications of the “right of the people to be secure” through the protections afforded by the Fourth Amendment.

#### A. *The People as Jurors*

There is a strong tendency to view the Fourth Amendment as focused on individual persons, despite the fact that the textual grammar is rendered in the plural. For example, Akhil Amar writes: “The Fourth Amendment, after all, focused on individual persons as core rights’ bearers, yet nevertheless involved the people (via civil juries) as implementers and interpreters of the rights at stake.”<sup>328</sup> If the Fourth Amendment focused on “individual persons,” it did not textually say so. If the Fourth Amendment depended on juries as the primary source of its protection, it did not textually say so. The Amendment is written in the plural, purposing to secure a “right of the people . . . in their persons, houses, papers, and effects.”

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326. THE FEDERALIST NO. 51 (James Madison).

327. See, e.g., *Gregory v. Chicago*, 394 U.S. 111 (1969); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *NAACP v. Button*, 371 U.S. 415 (1963); *United States v. Cruikshank*, 92 U.S. 542, 552 (1875) (“The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for redress of grievances.”); see also Ronald J. Krotoszynski, Jr. & Clint A. Carpenter, *The Return of Seditious Libel*, 55 UCLA L. REV. 1239 (2008).

328. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 329 (2005).

Amar is not alone in failing to attend to the Fourth Amendment's grammar, though he has been vocal in criticizing others for failing "to read the amendment's words and take them seriously."<sup>329</sup> No doubt, Amar's primary critical focus is on the pervasive claim that the Fourth Amendment requires warrants backed by probable cause. Amar argues that if we attend to the explicit terms of the text, we will see "the basic Fourth Amendment mandate was not the warrant, not probable cause, but reasonableness."<sup>330</sup> Even if this reading of the text is correct, to focus only on the mandate to government officials to be "reasonable" does not yet tell us much about the plural and shared purpose of securing a "right of the people." Focused on providing arguments for the republican virtue of civil juries as the remedial source for constitutional violations rather than on the modern warrant requirement, Amar places the Fourth Amendment in the context of the Seventh Amendment,<sup>331</sup> ignoring any further textual significance of the "right of the people."<sup>332</sup> The Fourth Amendment, however, looks very different when read in the company of the other criminal process provisions, in addition to the Seventh Amendment, than when grouped among the political liberty provisions protecting "rights of the people." Seen from the perspective of a special domain of constitutional criminal procedure, "the People" provide an important political check to unreasonable searches and seizures through their service on civil juries. Because constitutional text does not explicitly provide for the exclusion of evidence, according to Amar the civil jury becomes the mechanism of political control over unwarranted police intrusions. The question of Fourth Amendment remedy thus compels a reading of Fourth Amendment rights. "What better body than a jury of 'the people'—a jury that truly looks like America—to cherish and protect this precious right?"<sup>333</sup> Under Amar's reading, this precious right fits comfortably within a narrative of regulating reasonable police practice.

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329. AMAR, *supra* note 26, at 2. Amar claims that "[t]he Fourth Amendment today is an embarrassment," because, among other confusions, it ignores the explicit text. *Id.* at 1. He writes: "The words of the Fourth Amendment really do mean what they say." *Id.* at 3. Moreover, "[t]extual argument is, as I have said, a proper starting point for proper constitutional analysis." *Id.* at 153.

330. Akhil Reed Amar, *Terry and Fourth Amendment First Principles*, 72 ST. JOHN'S L. REV. 1097, 1101 (1998).

331. *See* AMAR, *supra* note 26, at 13 ("History also reveals strong linkages between the Fourth and Seventh Amendments that previous clause-bound scholarship about each amendment in isolation has overlooked.")

332. *See id.* at 67–77.

333. AMAR, *supra* note 26, at 45. Perhaps the jury will "look like America," but the subject of a search will more often look like a minority of America. *See, e.g.,* Maclin, *supra* note 205, at 1278.

If we accept, at least in part, Amar's central point—that the civil jury is a body comprised of representatives of “the People” who can check arbitrary abuses of search and seizure—we still need an account of the nature of the right and the right's holder to be protected. If “the People” serving on juries provide the remedy for unreasonable searches and seizures, we still want to know, what is the nature of this “right of the people”? It is not enough to say that we have a right to “reasonable” police practices, because questions of reasonableness presuppose answers to questions concerning the analytic priority of privacy and police practice. These prior questions require articulation of comparative constitutional values involving privacy, liberty, and social good. Because “the People” in the Fourth Amendment are “the [same] People” in the First, Second, and Ninth Amendments, we also need to understand the role that a “right of the people” plays in a broader scheme of ordered liberty.<sup>334</sup> Elsewhere, Amar recognizes the distinctive phrasing of “the right of the people,” but warns that “[i]n the Fourth Amendment, as elsewhere, we need not view the phrase *the people* as sounding solely in collective, political terms . . . . [I]t is far from clear that populism is the core here.”<sup>335</sup> Mere populism is not the core here, but popular sovereignty is. We can see this fact only if we pay attention to the textual assignment of a right to “the People,” who, with the power of words, construct a new Republic while preserving political liberties against arbitrary exercises of authority that would subvert their sovereign power. This power is political and personal, but in recognizing the dual function that persons play—living private lives and participating in public deliberation—we should not forget the importance of the political, as courts and commentators often do. Instead, Amar falls into the tradition of viewing the Amendment as protecting a right of individual persons to be free from unreasonable searches and seizures.<sup>336</sup> Rather than take seriously the Amendment's focus on a “right of the people,” Amar suggests that “this reading seems a bit too cute.”<sup>337</sup> After

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334. See *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (recognizing the Constitution's protection for “the very essence of a scheme of ordered liberty”).

335. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 67 (1998). He further observes that “[t]he amendment's text seems to move quickly from the public to the private, from the political to the personal, from ‘the people’ out-of-doors in conventions and suchlike to ‘persons’ very much indoors in their private homes.” *Id.*

336. See, e.g., *Gouled v. United States*, 255 U.S. 298 (1921) (holding that Fourth Amendment rights were personal).

337. AMAR, *supra* note 335, at 65. He follows this claim with an assertion that begins with “surely.” *Id.* More than an assertion that “surely” the Amendment intends to protect private places and not public assemblies is needed. A right to speak only in private accomplishes none of the deliberative democratic goals the First Amendment protects, and the people's right of free speech and public

all, the Fourth Amendment does mention “persons” twice and “the right of the people” only once.<sup>338</sup> Overlooked is the idea that a plurality free from widespread misuse of search or seizure is important to the constitution of a vibrant deliberative polity.

### *B. The Fourth Amendment Revised*

The problem of grammatical number emerged as a central issue to the Supreme Court’s Fourth Amendment standing doctrine. When does a person have a protected Fourth Amendment right to privacy as an occupant of another person’s dwelling? In *Minnesota v. Carter*, two men, who were temporary occupants of Kimberly Thompson’s apartment, sought to assert a Fourth Amendment right to privacy in that apartment.<sup>339</sup> The Court began by claiming that “the extent to which the Fourth Amendment protects people may depend upon where those people are.”<sup>340</sup> Even though *Katz v. United States* had categorically stated that “the Fourth Amendment protects people, not places,”<sup>341</sup> Supreme Court doctrine has evolved to protect persons only in particular places. Citing this phrase in *Katz*, the Court stated, but failed to recognize, the grammatical problem of the Fourth Amendment: “The Amendment protects persons against unreasonable searches of ‘their persons [and] houses’ and thus indicates that the Fourth Amendment is a personal right that must be invoked by an individual.”<sup>342</sup> If it is indeed a “personal right” that can be invoked only by an individual, some explanation of the plural subject and plural possessive employed by the Amendment’s text needs explaining.

Perceiving the grammatical problem of the plural possessive, Justice Scalia rewrote the Amendment in his separate concurrence in order to resolve the difficulty.<sup>343</sup> He acknowledged that “their . . . houses” could be read to grant a person protection even when visiting a friend’s house.<sup>344</sup> Rejecting this reading, he concluded that the text should be read to say

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assembly accomplishes little without Fourth Amendment protections against pervasive, even if limited in scope, government surveillance, search, and seizure of their public activities. Given this fact, “surely” the Amendment intends to protect a “right of the people” both in and out of doors.

338. Amar takes this linguistic count to be significant, though he does not explain why. See AMAR, *supra* note 335, at 67 (“[T]he collective-sounding phrase *the people* is immediately qualified by the use—twice—of the more individualistic language of *persons*.”).

339. 525 U.S. 83, 86 (1998).

340. *Id.* at 88.

341. 389 U.S. 347, 351 (1967).

342. *Carter*, 525 U.S. at 88.

343. *See id.* at 91–99 (Scalia, J., concurring).

344. *See id.* at 92.

“‘their respective houses,’ so that the protection extends to each person only in his *own* house.”<sup>345</sup> He reasoned:

[I]t is not linguistically possible to give the provision the . . . [more] expansive interpretation with respect to “houses” without giving it the same interpretation with respect to the nouns that are parallel to “houses”—“persons, . . . papers, and effects”—which would give me a constitutional right not to have your person unreasonably searched. This is so absurd that it has to my knowledge never been contemplated.<sup>346</sup>

Justice Scalia contrasted this “absurd” interpretation with “[t]he obvious meaning of the provision[, which] is that *each* person has the right to be secure against unreasonable searches and seizures in *his own* person, house, papers, and effects.”<sup>347</sup> This “obvious meaning” requires another rewriting to replace the plural possessive pronoun “their” with the masculine singular phrase “his own” and to render “persons” and “houses” singular. As a model of textual reading, this invites a charge that Justice Scalia is reading the Constitution to say what he thinks it ought to say rather than what it actually says.<sup>348</sup>

As confirmation for his claim that the Amendment should be read to say “their respective houses,” he notes the contrast among similar founding-era state constitutional provisions. For example, Pennsylvania’s Constitution provided “[t]hat *the people* have a right to hold themselves, their houses, papers, and possessions free from search and seizure . . . .”<sup>349</sup> By contrast, Massachusetts’s Constitution provided: “*Every subject* has a right to be secure from all unreasonable searches, and seizures, of his

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345. *Id.*

346. *Id.*

347. *Id.*

348. This is precisely the kind of complaint Justice Scalia levies against those engaged in what he calls “The Living Constitution” method of constitutional interpretation, which, as he explains, reads the Constitution “in order that the Constitution might mean what it *ought* to mean . . . . If it is good, it is so. Never mind the text that we are supposedly construing.” SCALIA, *supra* note 316, at 39; *see also* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861–64 (1989). As we have already noted, in an opinion by Justice Scalia, the Court held that the “right of the people” in the Second Amendment was a personal right. Regarding the reasoning of this opinion, Reva Siegel notes: “*Heller*’s account of the Second Amendment’s original public meaning invokes authorities from before and after the founding, relies on common law-like reasoning, endows judges with vast amounts of interpretive discretion, and, in these respects, resembles the practice of living constitutionalism that Justice Scalia often condemns.” Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 196 (2008).

349. PA. CONST. art. X (1776) (emphasis added).

person, his houses, his papers, and all his possessions.”<sup>350</sup> Justice Scalia concluded that “[t]here [was] no indication anyone believed” that there was a difference in the protections afforded depending on whether “his” or “their” was used.<sup>351</sup> That might be true regarding a claim about who might seek a remedy for the violation of the right, but there is a big difference in theory and practice between a right of a “subject” and one of “the People.” Provisions protecting a “right of the people,” paired with a plural possessive pronoun, indicate a different understanding of the right and the right holder than provisions referencing “every subject.” “[T]he People” refers to the sovereign political body, whereas “every subject” seems to refer to individual subjects of a governing body. This difference is important for reading the Fourth Amendment as protecting a right of a political body, not just a right of the person subject to a governing authority. Justice Scalia ignores this important textual difference in his constitutional revision.

In rejecting the *Carter* defendants’ claim invoking a Fourth Amendment right to privacy in the home of another person, the Court’s decision implicated important forms of social life. As a matter of everyday social practice, we live in the company of others, sharing our private spaces as well as our private thoughts with others.<sup>352</sup> If a person sheds her Fourth Amendment right the moment she leaves the sanctity of her own house and enters that of another, then the Fourth Amendment fails to apply to much of our shared social practices.<sup>353</sup> If Fourth Amendment protections are based on “reasonable expectations of privacy,” however, and if we regularly share our lives with others in each others’ homes with the full expectation that government officials will not intrude upon that privacy, then a person should have Fourth Amendment protections even when in the home of another. Moreover, Fourth Amendment text—absent any rewriting—explicitly supports such a view by its use of the plural possessive pronoun “their” with the plural noun “houses.” Despite the majority’s holding that the *Carter* defendants did not have a protected

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350. MASS. CONST. art. XIV (1780) (emphasis added).

351. *Carter*, 525 U.S. at 93–94 (Scalia, J., concurring).

352. See Coombs, *supra* note 11, at 1635 (“A view of the world that recognizes the essential interconnectedness of people and the importance of intimacy and sharing is foreign to the atomistic social theory underlying the Court’s present doctrine.”).

353. Concerning the Court’s conclusion that “society recognizes and permits no expectation of privacy, except for the persons on whose premises the encounter took place,” Professor Weinreb claims that “[t]he assertion is so plainly incorrect that one has to wonder not whether it is mistaken but only how the mistake can have been made.” Lloyd L. Weinreb, *Your Place or Mine? Privacy of Presence Under the Fourth Amendment*, 1999 SUP. CT. REV. 253, 263.



right of privacy while bagging cocaine in Ms. Thompson's apartment, five Justices supported the view that, at minimum, "almost all social guests have a legitimate expectation of privacy, and hence protection against unreasonable searches, in their host's home."<sup>354</sup> Four Justices went further, claiming that "people are not genuinely 'secure in their . . . houses . . . against unreasonable searches and seizures,' if their invitations to others increase the risk of unwarranted governmental peering and prying into their dwelling places."<sup>355</sup> If we take seriously the actual forms of shared social life, as well as Fourth Amendment grammar, we have a right to be secure in our houses—yours and mine.

A problem concerning standing nonetheless remains—whether we emphasize the "right of the people" or "a personal right"<sup>356</sup> of individuals. Can I have an enforceable right against the illegal search of your person, papers, or effects?<sup>357</sup> Perhaps not, but I do have a right to live in a society free from illegal searches, just as I enjoy a right to live in a society uninhibited in the free exchange of ideas. For me to invoke a judicially enforceable remedy for the illegal search of your effects might very well be "absurd," as Justice Scalia asserts.<sup>358</sup> My privacy is not invaded when your papers are searched. Nor is my privacy invaded when your person is searched. Even if "the People" have a right to be secure in "their . . . persons," it is difficult to understand how I could have an enforceable right to a remedy when the police violate your right to be secure from unreasonable searches or seizures. This difficulty derives from the nature of the remedy sought: exclusion of evidence.

Since the right and the exclusionary rule are closely related, if the Court wishes to limit the use of the exclusionary rule, it may limit the scope of the right. But not always. In *Michigan v. Hudson*, the Court refused to apply the exclusionary rule where a clear violation of the Fourth Amendment had occurred.<sup>359</sup> Reasoning that the Fourth Amendment protected the common-law rule that police must knock and announce their

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354. *Carter*, 525 U.S. at 99 (Kennedy, J., concurring). Someone with a stronger connection to the homeowner and the dwelling, such as an overnight guest, has a Fourth Amendment protected expectation of privacy. See *Minnesota v. Olson*, 495 U.S. 91 (1990); *Jones v. United States*, 362 U.S. 257 (1960).

355. *Carter*, 525 U.S. at 108 (Ginsburg, J., dissenting) (quoting U.S. CONST. amend. IV).

356. *Id.* at 88 (majority opinion).

357. The Court has held that "[a] person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed." *Rakas v. Illinois*, 439 U.S. 128, 134 (1978).

358. *Carter*, 525 U.S. at 92 (Scalia, J., concurring).

359. 547 U.S. 586 (2006).

presence before entering a dwelling,<sup>360</sup> the Court nonetheless concluded that the social cost of not admitting evidence that police were entitled to discover outweighed the harm perpetrated by the constitutional violation.<sup>361</sup> As we have already seen, the Court extended this rationale in *Herring v. United States*, arguing that the exclusionary rule's primary purpose is to deter police misconduct.<sup>362</sup> Under the Court's cost-benefit analysis, when the social cost is high and the deterrence is low, even admitted constitutional violations do not merit exclusion of the illegally obtained evidence. By contrast, in other cases, the Court has narrowed the scope of the right in order to avoid the exclusion of evidence. For example, in *Illinois v. Rakas*, the Court held that a vehicle passenger could not obtain the benefit of the exclusionary rule when the vehicle owner's constitutional rights were violated.<sup>363</sup> The Court claimed that "since the exclusionary rule is an attempt to effectuate the guarantees of the Fourth Amendment, . . . it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the rule's protections."<sup>364</sup> Because the passenger does not have a property interest or an expectation of privacy in the car owned by another, the passenger has no Fourth Amendment right that can be violated. In part, therefore, the apparent "absurdity" in my having a right to your person not being illegally searched is related to a separate question about who may claim the benefit of the exclusionary rule and when they may do so. Two considerations complicate the Court's interpretation.

First, if we divorce the right from the remedy, it is not at all clear why it would be "absurd" for me to have "a constitutional right not to have your person unreasonably searched."<sup>365</sup> In other contexts, I can invoke another person's right. For example, I can invoke third-party rights in the First Amendment context to vindicate the free speech rights of others.<sup>366</sup> I may not be able to collect damages for the constitutional harm perpetrated, but I can obtain a declaratory judgment or an injunction. The First Amendment harm arises from a restraint on speech because the

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360. See, e.g., *United States v. Banks*, 540 U.S. 31 (2003); *Wilson v. Arkansas*, 514 U.S. 927 (1995).

361. See *Hudson*, 547 U.S. at 594–99.

362. 129 S. Ct. 695 (2009); see *supra* notes 141–68 and accompanying text.

363. 439 U.S. 128 (1978).

364. *Id.* at 134 (citations omitted).

365. *Carter*, 525 U.S. at 92 (Scalia, J., concurring).

366. See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255 (2002) (employing overbreadth analysis); *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (same). See generally Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853 (1991).

background constitutional assumption is that persons should not be chilled in their ability to engage in public discussion, “[f]or speech concerning public affairs is more than self-expression; it is the essence of self-government.”<sup>367</sup> As the Court so eloquently explained:

The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity . . . .<sup>368</sup>

When a government official censors a particular person’s speech, “the People” suffer. They suffer not merely because they have a right to hear, but because public discourse requires a multiplicity of voices. In a republic in which “the People” are sovereign, “debate on public issues should be uninhibited, robust, and wide-open”<sup>369</sup> in order to foster democratic deliberation over the pressing issues of the day. We cannot always anticipate what views others might express, what new ideas they may contribute, or what futures they may seek to create. More than a personal interest in the individual’s own ability to speak, we share an interest in each other’s unconstrained capacity to speak. In order to establish informed views on public matters, one must be able to hear what others have to express and engage them in reciprocal debate.<sup>370</sup> If in the First Amendment context it is not “absurd” to think that one person might have an interest in another person’s free speech rights, perhaps the Fourth Amendment provides similar protections for “the People’s” right to be free from unreasonable searches and seizures.

Second, even if exclusion of evidence were unavailable, it would not necessarily follow that I could have no right to the security of your person, papers, and effects against unreasonable searches and seizures. Just because I cannot claim a remedy for a specific violation of your Fourth

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367. *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964).

368. *Cohen v. California*, 403 U.S. 15, 24 (1971).

369. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

370. To emphasize the public deliberative value of the First Amendment, one need not commit to Alexander Meiklejohn’s view that “[t]he primary purpose of the First Amendment is . . . that all the citizens shall, so far as possible, understand the issues which bear upon our common life.” ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 75 (1960); see also OWEN M. FISS, *THE IRONY OF FREE SPEECH* (1996); Owen M. Fiss, *Free Speech and Social Structure*, 71 *IOWA L. REV.* 1405, 1408–11 (1986) [hereinafter Fiss, *Free Speech and Social Structure*].

Amendment right to be secure in your papers does not mean that I do not have a right as one of “the People” to live in a society free from this kind of government interference. If police regularly violate our neighbors’ rights to their security, we can have no security in our own homes against illegal searches and seizures. Even if we cannot seek judicial remedies, especially through the exclusion of evidence, against officials who violate our neighbors’ rights, the polity nonetheless suffers from the constitutional violation. Like a chilling effect on the public sphere that undermines public deliberative participation, placing pressure on persons to return to their individual “private” worlds to seek refuge from government searches and surveillance diminishes the public sphere’s security. Words spoken to oneself in the privacy of one’s home fail to further First Amendment values, and life lived secreted away from others in a sphere of personal privacy fails to fulfill the Fourth Amendment’s promise. Linking the First and Fourth Amendment interests in public deliberation, Justice Douglas dissented in *United States v. White* from the Court’s “assumption of risk” rationale that rendered unprotected any information revealed to others.<sup>371</sup> He wrote:

Monitoring, if prevalent, certainly kills free discourse and spontaneous utterances. Free discourse—a First Amendment value—may be frivolous or serious, humble or defiant, reactionary or revolutionary, profane or in good taste; but it is not free if there is surveillance. . . . This is the essence of the idea of privacy implicit in the First and Fifth Amendments as well as in the Fourth.<sup>372</sup>

In another confidential informant case, as we saw at the beginning of this Article, Justice Douglas warned of government practices “when the most confidential and intimate conversations are always open to eager, prying ears. When that time comes, privacy, and with it liberty, will be gone.”<sup>373</sup> In these impassioned dissents, Justice Douglas treats the constitutional harm as one that “the People” suffer, not merely one that the individual criminal defendant endures. But to see this harm, one must capture a wider vision of the Fourth Amendment’s purpose. Focused on the narrow question of regulating police practice and the sometimes uncomfortable exclusionary remedy, the Court regularly fails to see the broader implications of a collective “right of the people” to be secure in the liberty

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371. *United States v. White*, 401 U.S. 745 (1971) (Douglas, J., dissenting).

372. *Id.* at 762–63.

373. *Osborn v. United States*, 385 U.S. 323, 354 (1966) (Douglas, J., dissenting).

of multiple aspects of their lives. When the question concerns a personal right of privacy, these collective harms go unnoticed.

As Supreme Court doctrine has developed, Fourth Amendment privacy has become primarily a right to keep information to oneself. “It is well settled that when an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities,”<sup>374</sup> with no Fourth Amendment constraints. Under this “third-party” doctrine, one assumes the risk of exposing to government officials anything one fails to keep entirely to oneself. Because the Court has construed privacy narrowly, the Fourth Amendment fails to protect much about our social lives shared in the company of other persons.<sup>375</sup> Understood in this manner, it would indeed be “absurd” to think that I have any constitutional interest in the invasions of your privacy. Privacy, so construed, is intrinsically personal. On this account, “the right of the people” could only be the isolated personal right of the private individual.

Narrowly focusing on a personal right to privacy ignores the “numeric problem” of “the right of the people,” who appear in different guises as individual persons and as a collective people. Persons can be viewed as *individual* persons who enjoy the particular “Blessings of Liberty” in their private lives and homes, and simultaneously they can be viewed as part of a *collective* political body that has a popular sovereign right to the “Blessings of Liberty” in their public and political lives. To appreciate this dual aspect, we must recognize that, at times, something more than an individual right is at stake. For example, a First Amendment “right of the people to peaceably assemble” is one that can be invoked by individual persons while simultaneously protecting collective interests. Privacy protections are only particular manifestations of political liberties. More than self-expression, the First Amendment protects a value that is collective and public. “At the heart of our jurisprudence lies the principle that in a free nation citizens must have the right to gather and speak with other persons in public places.”<sup>376</sup> They do so in order to make possible

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374. *United States v. Jacobsen*, 466 U.S. 109, 117 (1984).

375. I develop this argument further in Thomas P. Crocker, *From Privacy to Liberty: The Fourth Amendment After Lawrence*, 57 UCLA L. REV. 1, 32–48 (2009).

376. *Int’l Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672, 696 (1992) (Kennedy, J., concurring). As Alexander Meiklejohn recognized in the First Amendment context, I have an interest in your right to speak so that I might decide how to vote. MEIKLEJOHN, *supra* note 192, at 26 (“What is essential is not that everyone shall speak, but that everything worth saying shall be said.”). Owen Fiss captured the thought best: “We allow people to speak so others can vote. Speech allows people to vote intelligently and freely, aware of all the options and in possession of all the relevant information.” FISS, *Free Speech and Social Structure*, *supra* note 370, at 1410. *But see* Robert Post, *Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1117

the political realization of popular sovereignty, the very people the Fourth Amendment seeks to protect. More than personal privacy, the Fourth Amendment protects a value of noninterference in our everyday lives that makes possible the political appearance of popular sovereignty, “the [very] People” on whom the First Amendment depends. Recognizing the textual significance of protecting a “right of the people” allows the Court to see the individual case as part of a collective interest.

In order to see the Fourth Amendment’s broader role within the Constitution that does more than regulate police practice, we must take seriously the fact that the Fourth Amendment’s textual purpose is to secure a “right of the people,” which places it textually alongside the First, Second, and Ninth Amendments that similarly seek to protect “rights of the people.” “[T]he People” who assemble in the First Amendment and “the People” who have a right “to keep and bear arms” in the Second are “the [same] People” who have a right “to be secure in their persons, houses, papers, and effects.” This same political body created a new polity out of a commitment to words ordained in the voice of “We the People.”<sup>377</sup> To ignore the political importance of the Fourth Amendment’s protections, and to remain anachronistically focused on the practices of an institution whose existence was not yet imagined, is to miss entirely an available guiding feature of constitutional text and design.<sup>378</sup> It also misses important conceptual connections among the various constitutional values that form the system of liberties whose blessings the Constitution seeks to secure.

#### IV. SECURING LIBERTY AS A FOURTH AMENDMENT VALUE

Privacy is not the only right at stake. The Fourth Amendment also protects rights to security and liberty.<sup>379</sup> In an early and still relevant case, the Supreme Court observed: “It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but

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(1993) (“The difficulty with Meiklejohn’s analysis . . . is that it reflects an insufficiently radical conception of the reach of self-determination . . .”).

377. See generally H. JEFFERSON POWELL, *A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS* (2002).

378. Amar first argued that “[p]lacing the Fourth Amendment in criminal procedure thus distorts, causing us to see things that are not there.” AMAR, *supra* note 26, at 2.

379. See Clancy, *supra* note 35, at 307; Rubinfeld, *supra* note 35, at 131 (arguing that the Fourth Amendment should be focused on asking “whether the search-and-seizure power the state has asserted could be generalized without destroying the people’s right of security”); see also Crocker, *From Privacy to Liberty*, *supra* note 375, at 56 (arguing that “Fourth Amendment jurisprudence should be refocused in light of the protections provided interpersonal liberty”).

it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . .”<sup>380</sup> Similarly, in his persuasive dissent in *Olmstead v. United States*, Justice Brandeis observed: “Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen.”<sup>381</sup> Although neither security nor liberty have been central to recent Fourth Amendment jurisprudence—focused as it has been on the *Katz* expectations of privacy framework—it does not follow that they are not core values the Amendment also seeks to protect. The importance of security is made explicit in the Amendment’s text, and “secur[ing] the Blessings of Liberty”<sup>382</sup> defines a central constitutional purpose.

The “right of the people” contemplates popular and public acts constitutive of a political body. It may not appear in revolutionary garb, assembled and ready to petition for redress of grievances or ready to embark on a constitutional convention. “[T]he People’s” failure to appear is one reason why the privacy rights of particular persons are always readily in view. Everyday constitutional claims bring the individual criminal defendant into view, making it difficult to see “‘a more majestic conception’ of the Fourth Amendment.”<sup>383</sup> But appearances can be deceiving. When employing the exclusionary rule, we sometimes set the guilty free when state officials violate constitutional constraints, not merely to protect the innocent, but to establish a constitutional culture in which constitutional commitments matter to daily life. Constitutional commitments are not merely abstract principles existing in some rarified Platonic form, awaiting a “bevy of guardians” to give them authoritative interpretation.<sup>384</sup> Rather, constitutional commitments shape our everyday experiences through our interactions with governing officials.

By initiating a privacy revolution in constitutional criminal procedure, *Katz* was right to focus on social (public) aspects of life. *Katz* was wrong, however, to focus solely on what social expectations thought about personal privacy as a way of regulating police practice.<sup>385</sup> Even though

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380. *Boyd v. United States*, 116 U.S. 616, 630 (1886).

381. 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting), *overruled by Katz v. United States*, 389 U.S. 347 (1967), and *Berger v. New York*, 388 U.S. 41 (1967).

382. U.S. CONST. pmbl.

383. *Herring v. United States*, 129 S. Ct. 695, at 707 (2009) (Ginsburg, J., dissenting) (quoting *Arizona v. Evans*, 514 U.S. 1, 18 (1995) (Stevens, J., dissenting)).

384. See LEARNED HAND, *THE BILL OF RIGHTS* 73 (1958) (objecting to being “ruled by a bevy of Platonic Guardians”).

385. For one thing, “Fourth Amendment doctrine . . . is circular, for someone can have a reasonable expectation of privacy in an area if and only if the Court has held that a search in that area

protecting a space of private repose free from unwarranted government intrusion may be necessary to enable the full political participation of persons, it is not sufficient. Protection for the public appearance of “the People” in their everyday social practices is also necessary. The additional Fourth Amendment question *Katz* left unasked is what social expectations exist for liberty that enable persons to conduct a public life free from unwanted and unwarranted intrusion.

The Court in *Lawrence v. Texas* provides a basis for reading the Fourth Amendment as part of a Constitution focused on protecting liberty and not only on privacy.<sup>386</sup> Justice Kennedy begins the majority opinion in *Lawrence v. Texas* without citations, bringing together principles derived from cases protecting both privacy and liberty.<sup>387</sup> These principles have different doctrinal locations situated among the Constitution’s rights-protecting clauses. From the first word of the opinion, however, the textual focus is on liberty, not privacy:

Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions.<sup>388</sup>

Beginning like a Fourth Amendment case, the opinion quickly moves through substantive due process concerns over “spheres of our lives” to First Amendment values of “freedom of thought, belief, and expression,” suggesting that the Constitution protects liberty through an interrelated web of textual connections.<sup>389</sup> Without citations, we are invited to read the Constitution’s protection for liberty holistically as purposing to “secure the Blessings of Liberty” in all their manifestations. Moreover, Justice Kennedy acknowledges that liberty is realized in multiple ways, unlike the Court’s increasingly narrow understanding of privacy as secret.

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would be unreasonable.” Michael Abramowicz, *Constitutional Circularity*, 49 UCLA L. REV. 1, 60–61 (2001).

386. *Lawrence v. Texas*, 539 U.S. 558 (2003).

387. *Id.* at 562.

388. *Id.*

389. *Id.*



*Lawrence* has already proven frustrating for lower courts, as well as scholars, who cannot locate clear decision rules to implement the announced constitutional norms.<sup>390</sup> As the dissent argues, the majority opinion resists implementing a doctrinal framework of “tiered scrutiny” and identification of fundamental rights under due process.<sup>391</sup> In the dissent’s eyes, this is a fundamental flaw. What tiered scrutiny does, however, is ask the Court to calibrate its vision within a specific doctrinal framework before it ever confronts substantive constitutional issues.<sup>392</sup> By resisting this doctrinal straitjacket, the *Lawrence* Court is able to look more broadly at the effects on the liberty and dignity of the persons subject to stigmatizing criminal laws. The focus is directed to the liberty interests persons have when they share their lives in interpersonal relationships with others, not on how exactly the Court should examine these liberty interests. “The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.”<sup>393</sup> Without a rigid application of tiered scrutiny, we are invited to look more holistically at enduring liberty interests protected by the Constitution that “persons in every generation can invoke . . . in their own search for greater freedom.”<sup>394</sup> When we do so, we readily see how the Constitution protects “spheres of our lives and existence, outside the home, where the State

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390. The Ninth Circuit held, concerning the military’s Don’t Ask, Don’t Tell policy, that “when the government attempts to intrude upon the personal and private lives of homosexuals, in a manner that implicates the rights identified in *Lawrence*,” it must justify its intrusion to satisfy a heightened standard of judicial review. *Witt v. Dep’t of the Air Force*, 527 F.3d 806, 819 (9th Cir. 2008); *see also* *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 746 (5th Cir. 2008) (“The case . . . is about controlling what people do in the privacy of their own homes because the State is morally opposed to a certain type of consensual private intimate conduct. This is an insufficient justification for the statute after *Lawrence*.”). *But see* *Williams v. Att’y Gen. of Ala.*, 378 F.3d 1232 (11th Cir. 2004) (an Alabama antiobscenity statute prohibiting the sale of sex toys did not violate a fundamental right under *Lawrence*). Although *Lawrence* has been widely applauded by scholars, there remain many unanswered interpretive questions. *See, e.g.*, Mary Ann Case, *Of “This” and “That” in Lawrence v. Texas*, 2003 SUP. CT. REV. 75, 76 (“[T]he language and reasoning of the opinion frequently point in a direction, but when the careful reader follows the text in that direction, it reverses itself or dissolves into ambiguity.”); Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1113 (2004) (“The Court in *Lawrence* strikes down the Texas law without characterizing its test for doing so . . .”); Pamela S. Karlan, *Loving Lawrence*, 102 MICH. L. REV. 1447, 1449 (“*Lawrence* is a case about liberty that has important implications for the jurisprudence of equality.”); Cass R. Sunstein, *Liberty After Lawrence*, 65 OHIO ST. L.J. 1059, 1060 (2004) (“I am not comfortable with the *Lawrence* opinion, partly because of its opacity, partly because of its breadth and ambition, and partly because of its use of the idea of substantive due process.”).

391. *Lawrence*, 539 U.S. at 594 (Scalia, J., dissenting) (“Not once does [the Court] describe homosexual sodomy as a ‘fundamental right’ or a ‘fundamental liberty interest’ . . .”).

392. *See* Thomas P. Crocker, *Envisioning the Constitution*, 57 AM. U. L. REV. 1, 3 (2007).

393. *Lawrence*, 539 U.S. at 567.

394. *Id.* at 579.

should not be a dominant presence.”<sup>395</sup> These spheres contain the same interests in political liberty the Fourth Amendment purposes to protect.

*Lawrence* is no doubt a due process case, striking down a criminal statute that denigrated the lives and dignity of homosexual persons. But *Lawrence* also makes salient the Constitution’s protections for liberty across a number of doctrinal frameworks, purposefully glossing over the specific decision rules designed to implement constitutional principles.<sup>396</sup> As a model of constitutional interpretation, it suggests that specific substantive issues can be addressed by examining larger constitutional contexts. The *Lawrence* Court did not first decide a tier of scrutiny and then balance the state’s interests and chosen means against the nature of the right affected. *Lawrence* began where the Constitution itself begins, with the “Blessings of Liberty” that “We the People” sought to secure.

Using *Lawrence* as a model for examining Fourth Amendment issues requires courts to look at the broader implications of everyday social practice when making particular decisions. Moreover, it requires rethinking the “third-party” doctrine. Having a certain amount of security in the ability to interact with other persons free from the fear that they are effective agents of the state is analogous to speaking without fear of seditious libel. Security in everyday commerce with others is part of the essence of political liberty. Although the “third-party” doctrine provides scant privacy protection against pervasive government surveillance through data mining and other activities, a Fourth Amendment attuned to the liberty interests of persons would provide more robust grounds for regulation. Just as First Amendment activities may be chilled by overly broad regulations of speech, “the People’s” political life lived in the company of others, both in and out of doors, can be chilled. And just as the First Amendment is doctrinally attuned to this prospect, a reoriented Fourth Amendment should be as well.

It remains to be seen how a reoriented Fourth Amendment doctrine will interact with Fourth Amendment remedies. This Article is motivated in part by the lack of remedies for intrusive government practices where it is plausible to think that remedies should exist. Conceptualizing the right to privacy narrowly as what remains undisclosed to others narrows the need for remedies, as does attending to the needs of police practices. Likewise, emphasizing the burden of demonstrating substantial deterrent effects on police practice limits the exclusionary rule’s use. To militate against this

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395. *Id.* at 562.

396. *Id.*

narrowing remedial trend, new articulations of Fourth Amendment rights will occasion further interactions with remedial circumstances. While this Article's argument need not be taken as an example of "rights essentialism" that rigidly separates questions of constitutional meaning from remedies,<sup>397</sup> it does proceed from the assumption that constitutional reconstruction occurs when social practices interact with constitutional principles. Writing against the view that there is a formal separation between the meaning of the Constitution and its implementation, Professor Hills argues that "pragmatically speaking, the meaning of a constitutional provision is its implementation."<sup>398</sup> But implementation can take many forms, and in so doing, the life of a constitutional provision takes place within multiple and mutually informing practices. My argument need not appeal to a conception of constitutional rights so robust as to invoke the "true meaning of the Constitution,"<sup>399</sup> but it does appeal to an existing conception in need of further articulation and implementation.<sup>400</sup> Protecting a right of the people to engage in shared public political life is one available meaning of the Fourth Amendment. It may not be its essence, but it is a meaning that responds to growing pressures of an interactive, digitally networked social world, giving life to a constitutional provision increasingly moribund under the weight of its own present doctrinal implementation. Moreover, as we have seen in the case of *Herring*, even Justices who implement the exclusionary rule seem willing to admit a gap exists between acknowledged unconstitutional behavior and the decision rule the Court applies. In time, this gap may disappear as we come to think of the right as extending no further than the remedy. But for now, the relationship between right and remedy is unsettled, as the shifting majorities and contrasting narratives of *Gant* and *Herring* demonstrate. The unsettled state of the doctrine, combined with social practices affected

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397. Daryl Levinson criticizes "rights essentialism" as the view that "begins with the identification or definition of the constitutional right, and only then proceeds to application of the right in a real world context, where thoughts of remedy first come into play." Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 861 (1999).

398. Roderick M. Hills, Jr., *The Pragmatist's View of Constitutional Implementation and Constitutional Meaning*, 119 HARV. L. REV. F. 173, 175 (2006).

399. Roosevelt, *supra* note 176, at 1653.

400. On the view that there is a gap between the Supreme Court's implementation of constitutional rights and constitutional meaning, see Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 5 (2004); Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 57 (1997); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978).

by government practices, make it possible to reconceptualize the Fourth Amendment narrative.

What makes one Fourth Amendment narrative more salient than another?<sup>401</sup> Why might an anachronistic fixation on regulating police prove nonetheless compelling? As we have seen, narratives of both police regulation and privacy protection circulate through Supreme Court opinions, constructing sometimes incongruent rationales applied to disparate factual settings. One explanation, institutional in origin, is that the Warren Court expanded constitutional protections for criminal procedures, focusing on protecting individual rights, while the Burger, Rehnquist, and now Roberts Courts have curtailed those protections, emphasizing public order.<sup>402</sup> As we have seen, these differences depend on different constitutional visions of what constitute the core purposes of the Fourth Amendment. Another explanation is that these differences are driven by pressures created by policing practices.<sup>403</sup> Responding to widespread reports of police abuse, the Court used constitutional principles to cabin police discretion. When the modern police force became more professionalized and more democratically accountable, the need for robust constitutional regulation waned. As the Court itself has argued, a “development over the past half-century that deters civil-rights violations is the increasing professionalism of police forces.”<sup>404</sup> Each of these explanations no doubt plays a role, making clear that no single metanarrative explains the ultimate choice between operative Fourth Amendment narratives.

Each narrative, however, must be responsive to intergenerational constitutional conversations.<sup>405</sup> After all, it is a constitution we are interpreting.<sup>406</sup> When the Court focuses on specific doctrinal decisional

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401. Making particular issues constitutionally relevant is the first step in deriving constitutional answers. Which issues and what answers create the framework for a constitutional culture. See Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1768 (2004) (defining “constitutional salience—the often mysterious political, social, cultural, historical, psychological, rhetorical, and economic forces that influence which policy questions surface as constitutional issues and which do not”).

402. See Steiker, *supra* note 90, at 2468 (“[T]he Court has clearly become less sympathetic to claims of individual rights and more accommodating to assertions of the need for public order.”).

403. See, e.g., David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699 (2005) (examining the complex changing relationship between democracy, our changing understandings of democratic practices, and police practices).

404. *Hudson v. Michigan*, 547 U.S. 586, 598 (2006).

405. See Ackerman, *The Living Constitution*, *supra* note 316, at 1805 (making the “case for a conversation between the generations . . . based on a realistic assessment of contemporary democratic life”).

406. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

rules in relative isolation from other constitutional principles, it is blind to the overall import of broader constitutional norms. Narratives focused on regulating police or protecting privacy each risk blinding us to the Fourth Amendment's broader constitutional setting. By looking at the historic origins of the Fourth Amendment in relation to substantive First Amendment concerns, and by examining the textual significance of protecting a "right of the people," this Article argues that the two dominant narratives overlook a central political purpose of the Fourth Amendment. The political Fourth Amendment seeks to protect the political liberties of the sovereign People who live their lives in public and shared spaces. Reading the Fourth Amendment's protection for the "rights of the people" in relation to the First Amendment's guarantees of free speech and "the right of the people to peaceably assemble and petition" allows us to see how free speech can depend on the security of persons occupying both public and private places.

#### CONCLUSION

The political Fourth Amendment may not change many doctrinal outcomes. It does, however, provide a constitutional basis for closer examination of more pervasive practices of public surveillance. Adding a substantive inquiry into the effects on political liberty of state practices could increase the cost of criminal law enforcement. Police work could become more difficult if, in addition to expectations of privacy, the police were limited by the liberty and dignity interests of persons. There is no avoiding the fact that using the Constitution to regulate criminal procedure increases the cost of criminal investigations. But the costs of continuing dissonance between the perception of protected constitutional liberties and the doctrinal reality of protecting privacy and regulating police may be even worse. We are led to believe that the Constitution protects against widespread surveillance when it, in fact, does not. As Carol Steiker has argued, under the present system, people often believe that the Constitution provides robust procedural protections, reducing the need for democratic pressure on the enactment, investigation, and prosecution of criminal laws.<sup>407</sup> The public frequently may have false beliefs about constitutional criminal procedure, thereby distorting public policy. A more robust protection of liberty interests could aid in removing some of this

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407. See Steiker, *supra* note 90, at 2550 ("There is good reason to fear that the public's over-estimation of the constraints on law enforcement induced by acoustic separation currently skews public policy.").

distortion, reorienting actual constitutional protections with popular political conceptions.

What is more, a robust conception of Fourth Amendment liberty has an impressive conceptual, textual, and historical basis. Conceptually, we can associate our interests in public deliberation with our interests in security from government interference in both our private and public lives. If we take seriously the fact that the Fourth Amendment's textual purpose is to secure a "right of the people," which places it textually alongside the First, Second, and Ninth Amendments that similarly seek to protect "rights of the people," it is far easier to see the Fourth Amendment as part of a broader constitutional narrative. In this expanded narrative, we see much more than an invitation to regulate police practice or to protect privacy. Instead, we see a mandate to secure liberties necessary for the democratic flourishing of the polity through social and public interaction. Let me hasten to add that text and history do not compel us to reconstruct the Fourth Amendment in this manner. Rather, text and history make available a way of understanding how the Fourth Amendment connects with other liberty-protecting provisions, such as the First Amendment, to protect public life. The responsibility remains ours—citizens, legal practitioners, and judges—to implement these available meanings.

It is my contention that doctrinal development follows from constitutional vision. How the Court sees the constitutional issue, and what the Court sees as the governing values and purposes, will drive doctrinal development. This is not to make a claim about social cognition.<sup>408</sup> Rather, it is a conceptual claim about how constitutional meanings work. No doubt, social cognition influences one's ability to see the salience of issues and arguments. But social cognition must be driven by the availability of particular conceptual and discursive materials. My argument focuses on this possibility of constructing new constitutional visions from rearticulated constitutional conceptualizations. Reading the Fourth Amendment back into the Constitution makes available new grounds for the Constitution's relevance in an age of pervasive electronic surveillance.

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408. See generally Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 147 (2006); Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115 (2007).