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ON ORIGINALISM'S ORIGINALITY: THE SUPREME COURT'S HISTORICAL ANALYSIS OF THE FOURTH AMENDMENT FROM *BOYD* TO *CARPENTER*

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Though the late Justice Antonin Scalia's originalist approach was often controversial,[1] his Fourth Amendment jurisprudence proved something of an exception—many tributes after his passing portrayed him as a "defender" of that amendment.[2] In a line of cases from 1991 to 2013, Scalia reestablished the premise that the Fourth Amendment should be interpreted through the lens of the Founding era,[3] critiqued the "notoriously unhelpful" reasonable expectation of privacy standard created in *Katz v. United States*,[4] and established what may be termed a "property-plus" synthesis justified on the grounds that the Court's traditional approach toward Fourth Amendment cases had been tied to property rights, including most notably the common law of trespass.[5]

Why was Scalia's approach to the Fourth Amendment appreciated more widely than some of his other originalist work? This Article compares Scalia's originalism-in-practice to the Supreme Court's historical treatment of the Fourth Amendment and finds that—far from a revolution in legal affairs—his property-plus synthesis was largely consistent with the Court's approach in the nineteenth and early twentieth centuries and even holds some commonalities with that of the Warren Court. More important than Scalia's rhetorical return to the primacy of property rights and the common law of trespass was his successful effort to use the property line as a bulwark against erosion of the privacy right embedded in the Fourth Amendment. That is, Scalia returned to property law to expand privacy protections, not constrict them.

The first Part of this Article reviews Scalia's theory of originalism and its critics, while the second considers whether the origins of the Fourth Amendment are sufficiently knowable to allow for a strictly originalist mode of analysis. Specifically, Part II reviews the extensive work of legal historians on the original intent and meaning of the Fourth

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1. Cass R. Sunstein, *In Memoriam: Justice Antonin Scalia*, 130 HARV. L. REV. 1, 27 (2016); Jamal Greene, Heller *High Water? The Future of Originalism*, 3 HARV. L. & POL. REV. 325, 326 (2009) (arguing that *Heller* was a departure from Scalia's usual approach that may prove to be the doctrine's high-water mark).

2. *See, e.g.*, Justice Sonia Sotomayor, *A Tribute to Justice Scalia*, 126 YALE L.J. 1609, 1610–11 (2017); Connor Winn, *Justice Scalia: Defender of the Fourth Amendment*, HARV. C.R.-C.L. L. REV. AMICUS BLOG (Apr. 11, 2016), http://harvardcrcl.org/justice-scalia-defender-of-the-fourth-amendment/; Jonathan Blanks, *Justice Scalia: Underappreciated Fourth Amendment Defender*, CATO INSTITUTE (Feb. 15, 2016, 10:24 AM), http://www.cato.org/blog/justice-scalia-underappreciated-fourth-amendment-defender.

3. *See* Wyoming v. Houghton, 526 U.S. 295, 299 (1999); California v. Hodari D., 499 U.S. 621, 624–25 (1991).

4. Minnesota v. Carter, 525 U.S. 83, 97–98 (1998) (Scalia, J., concurring).

5. *See* Florida v. Jardines, 569 U.S. 1, 11 (2013); United States v. Jones, 565 U.S. 400, 409 (2012); Kyllo v. United States, 533 U.S. 27, 33–34 (2001).

Amendment, in particular its "persons, houses, papers, and effects" clause—the focus of this Article.[6] This provides the foundation necessary to analyze how the Court relied on history over time, discussing the pre-Revolutionary era common law origins of the Fourth Amendment on both sides of the Atlantic, in Revolutionary state constitutions, and in debates over the new Constitution and the drafting of the Fourth Amendment, with an original focus on the contributions of moderate Antifederalists whose ultimate cooperation was essential to ratification.

The next four Parts examine the Supreme Court's use of historical sources in its key Fourth Amendment decisions from the seminal *Boyd v. United States*[7] in 1886 through Scalia's passing. Part III considers what may be termed the traditionalist era, from the Founding through the early twentieth century. Typified by *Boyd*, the Court examined Founding-era documents and common law antecedents to discern the meaning of the Fourth Amendment—considering property rights, but keeping focus on broader principles. Part IV looks at the Court's formalist era, during the early-to-mid twentieth century. Typified by *Olmstead v. United States*,[8] the Court's literalist approach focused exclusively on property, but relied more on analogy to precedent than on historical work. Part V examines the legal realist approach of the Warren Court. Best known for *Katz v. United States*[9] but more typified by two lesser-known predecessors, the Court relied on consequentialism based in Founding-era principles. And Part VI looks at the ascendancy of originalism during Scalia's tenure, describing his mixture of principle and property law. Taken together, this survey demonstrates conclusively that the Court has been fairly consistent in applying quasioriginalist techniques, incorporating historical analysis to discern something like original meaning or original intent.

Finally, Part VII analyzes the three key Fourth Amendment cases of the Court's 2017–2018 term and offers cautious predictions about how it is likely to proceed. Most notably, the five opinions in *Carpenter v. United States*[10] represent three distinct alternatives: Chief Justice Roberts' majority opinion and Justice Kennedy's dissent look to *Katz* and the common law; Justices Thomas and Alito take a stridently originalist approach; and Justice Gorsuch—like Scalia before him—offers a careful mixture of the two. The Article concludes that Gorsuch's approach, like the Court's approach in the other two cases,[11] is in keeping with the traditional approach to Fourth Amendment jurisprudence—and projects that this paradigm is likely to once again become the dominant one in the years to come.

I. ORIGINALISM AND ITS CRITIQUES

The theory of originalism arose in reaction to the perceived excesses of the Warren Court.[12] Justice Scalia colorfully lampooned the "intoxicating" approach of common-law

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6. Scalia's other Fourth Amendment jurisprudence is also well-known, but this Article focuses on the enumerated places clause because of its centrality to the property-plus synthesis.
7. 116 U.S. 616 (1886).
8. 277 U.S. 438 (1928).
9. 389 U.S. 347 (1967).
10. 138 S. Ct. 2206 (2018).
11. Byrd v. United States, 138 S. Ct. 1518 (2018); Collins v. Virginia, 138 S. Ct. 1663 (2018).
12. *See, e.g.*, Robert J. Delahunty & John Yoo, *Saving Originalism*, 113 MICH. L. REV. 1081, 1089 (2015)

judging as contrary to "a trend in government that has developed in recent centuries, called democracy."[13] And he insisted that his preferred method of interpretation, originalism, offers a way for judges to reach a "correct" result—its difficulties and uncertainties negligible compared to a philosophy that allows the Constitution to change.[14] But for that to be true, it must not only be the case that common-law judges "get it wrong," but it must also be possible for originalism to "get it right." Subpart A steps through over three decades of arguments as to the latter point, while Subpart B examines more recent critiques of the theory's serious methodological limits and concludes that the critiques can be synthesized into an approach that could be called incremental originalism, a descriptive term for how the Supreme Court—including Scalia—generally used history in its Fourth Amendment jurisprudence.[15]

A. Proponents: Eliding History's Limits

The oft-cited origin of originalism is a 1971 law review article by Robert Bork that described the Warren Court as posing in "acute form" the issue of when the authority of the Supreme Court is legitimate.[16] Bork thought it "deplorable" to expect that "the nature of the Constitution will change, often quite dramatically, as the personnel of the Supreme Court changes."[17] Extending rather dramatically the argument of Herbert Wechsler,[18] Bork argued that the Court's legitimacy required it to apply "principles that are neutrally derived, defined, and applied."[19] Bork's discussion of *which* principles was limited, but he did say that there are only "two proper methods of deriving rights from the Constitution"—the first, those "rather specific values that text or history show the framers actually to have intended," and the second, those resulting "from governmental processes established by the Constitution."[20] The former became known as original intent.[21] This nascent precept soon appeared in the judiciary, though again more as critique than

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(connecting originalism to the Warren Court's desegregation decisions and describing it as, "in part, an expression of, and a response to, anxieties that were widely felt during the Nixon era and that had cultural and political roots, no less than legal ones").

13. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 7, 9 (1997).

14. *Id.* at 45–46.

15. Scalia himself might not have liked this term. *See* Josh Blackman, *Back to the Future of Originalism*, 16 CHAP. L. REV. 325, 341 (2013) (coining the term to critique the challengers to the Affordable Care Act as focused on "moving the Constitution towards original meaning without even arguing that non-originalist precedents should be overturned").

16. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 1 (1971).

17. *Id.*

18. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (critiquing the Court's frequent failure to articulate such principles in its decisions).

19. Bork, *supra* note 16, at 23 (applying his concepts to First Amendment law).

20. *Id.* at 17.

21. At least in a limited form, nonoriginalists did not necessarily see this principle as all that controversial. Paul Brest described a rather limited debate between moderate originalists "who acknowledge[] that the text and original history are often indeterminate . . . [b]ut adjudication may not proceed in the absence of authorization from some original source, and when the text or original history speaks clearly it is binding," and nonoriginalists, who treat "the text and original history as presumptively binding and limiting, but as neither a necessary nor sufficient condition for constitutional decisionmaking." Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 237–38 (1980).

theory.[22]

The Reagan Administration made the theory more explicit—and more political. In 1985, Attorney General Edwin Meese called for "a jurisprudence of original intention," declaring it Administration policy to "endeavor to resurrect the original meaning of constitutional provisions and statutes as the only reliable guide for judgment."[23] While Justice William Brennan impugned "original intentionism" as "arrogance cloaked in humility" given the sparseness and complexity of the historical record,[24] Meese confidently responded that "the meaning of the Constitution can be known."[25] His prescription for knowing it, however, was limited: specific language should be obeyed; consensus principles should be followed; and ambiguity should be resolved "so as to at least not contradict the text of the Constitution itself."[26]

Justice Scalia, confirmed to the Supreme Court in 1987, was similarly modest about the potential of originalism—terming it "the lesser evil" next to opinions "speaking in terms of broad constitutional generalities with no pretense of historical support."[27] He readily admitted that originalism's "greatest defect" is the "difficulty of applying it correctly," conceding that it is "a task sometimes better suited to the historian than the lawyer."[28] He further conceded that the method may be "medicine that seems too strong to swallow" absent *stare decisis* and perhaps even with it, and that there is often little difference between the "faint-hearted originalist and moderate nonoriginalist" in practice.[29] Although Scalia favored originalism because its chief weakness—the difficulty of historical research—leads "to a more moderate rather than a more extreme result," he confessed that, at least "in a crunch," he may "prove a faint-hearted originalist."[30] Indeed,

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22. *See, e.g.*, William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 695 (1976) (bemoaning living constitutionalism as "the substitution of some other set of values for those which may be derived from the language and intent of the framers").

23. Edwin Meese, III, U.S. Att'y Gen., Speech Before the American Bar Association (July 9, 1985), *in* ORIGINALISM: A QUARTER-CENTURY OF DEBATE 47–54 (Steven G. Calabresi ed., 2007).

24. Justice William J. Brennan, Jr., Speech to the Text and Teaching Symposium (Oct. 12, 1985), *in* ORIGINALISM, *supra* note 23, at 55, 58 ("One cannot help but speculate that the chorus of lamentations calling for interpretation faithful to 'original intention' . . . must invariably come from persons who have no familiarity with the historical record."). The most important article out of the academy regarding originalism that year argued that it did not matter because the Founders did not intend for future generations to seek to discern their intent. H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 885 (1985). *But see* Jack Rakove, *The Original Intention of Original Understanding*, 13 CONST. COMMENT. 159, 160–61 (1996) (describing extensive and serious criticism of Powell's conclusions). For a more detailed near-contemporaneous summary of the academic debate, *see* Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989).

25. Edwin Meese, III, U.S. Att'y Gen., Speech Before the D.C. Chapter of the Federalist Society Lawyers Division (Nov. 15, 1985), *in* ORIGINALISM, *supra* note 23, at 71, 74–75.

26. *Id.* at 76.

27. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852 (1989).

28. *Id.* Scalia commended an opinion by Chief Justice Taft that he saw as originalist, identified its gaps, and cited sources that Taft could have used to fill them.

29. *Id.* at 861–62 ("It is, I think, the fact that most originalists are faint-hearted and most nonoriginalists are moderate . . . which accounts for the fact that the sharp divergence between the two philosophies does not produce an equivalently sharp divergence in judicial opinions."). This difference between originalism-as-theory and originalism-in-practice may be attributed to the fact that originalism-as-theory was largely as a force of political reaction, while originalism-in-practice was largely in keeping with traditional approaches to judging (as evidenced by, for example, Scalia's discussion of the Taft opinion). *See infra* Part VIII.

30. *Id.* at 864 (referring to his reluctance to uphold a statute that would impose flogging as a punishment even

even though he later professed to have abandoned such faint-heartedness,[31] it is this version of originalism driving Scalia's Fourth Amendment jurisprudence.

B. Critiques: Recognizing History's Limits

Though Justice Scalia readily admits the "difficulty" of originalism, the most familiar critique of the theory is that its proponents elide the difficulty of neutral, honest application. Recognition of its limits, however, has strengthened its appeal. Over the past twenty years, a consensus has begun to emerge that, at least in some sense, we are all originalists.

By 1997, historian Jack Rakove noted that "the turn to originalism seems so general that citation is almost beside the point."[32] While Rakove rejected the idea "that the decisions of 1787-88 embedded a particular set of binding meanings into the fabric of the Constitution,"[33] he readily acknowledged that originalism could help with "narrowing and ranking the available range of meanings" and "demonstrating the sheer implausibility of particularly egregious misreadings" of text.[34] Similarly, in 1999, natural law theorist Randy Barnett wrote that, contrary to "the received wisdom among law professors that originalism is dead," it "has not only survived the debate of the eighties, but it has virtually triumphed over its rivals," at least to the extent that it could limit the construction of an ambiguous or underdeterminate text to "the bounds established by original meaning."[35] And in 2004, Keith Whittington argued that originalism can "point interpreters to the correct forms of evidence and argumentation" and suggests a "proper" (more limited) role for the judiciary.[36] Finally—and most relevant here—Bernadette Meyler in 2006

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if there was evidence it was neither cruel nor unusual in the Founding era).

31. Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 4, 2013), http://nymag.com/news/features/antonin-scalia-2013-10/ ("I described myself as that a long time ago. I repudiate that. . . . I try to be an honest originalist! I will take the bitter with the sweet!").

32. Jack N. Rakove, *Fidelity Through History (or to it)*, 65 FORDHAM L. REV. 1587, 1592 n.14 (1997).

33. *Id.* at 1609 ("As a theory of fidelity through history, originalism ultimately fails because it is false to the history it purports to describe.").

34. *Id.* at 1589 (citing as one example how historians can explain why Justice Scalia was mistaken to rely on the Declaration of Rights of Massachusetts of 1780 as evidence of how the 1787 drafters of the Constitution felt about the separation of powers). Other historians have similarly noted that lawyer's history is inherently limited—given constraints of time, resources, and expertise, not to mention the limits of historical sources, courts cannot be expected to produce history with sufficient rigor to justify the claim that originalism is a neutral approach to the law. *See, e.g.*, Saul Cornell, *The People's Constitution vs. The Lawyer's Constitution: Popular Constitutionalism and the Original Debate over Originalism*, 23 YALE J.L. & HUMAN. 295, 296 (2011) (arguing that public meaning originalism has not solved the problem of the absence of rigorous historical work in the movement); Morgan Cloud, *Searching Through History*, 63 U. CHI. L. REV. 1707, 1708 (examining the differences between "lawyer's histories" and "*history*").

35. Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 611–13, 645 (1999) (arguing that originalism is "now the prevailing approach to constitutional interpretation" even though no one had written "a definitive formulation" of the theory).

36. Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 611 (2004). To Whittington, this was particularly important in light of the "passage" of the "old originalism" to a "new" 1990s version that was "more comprehensive and substantive" than the old—and less inclined to judicial restraint (a shift that can be seen in Scalia's rhetorical abandonment of his own faint-heartedness). *Id.* at 603–06, 608–10. This "new" originalism focused on original public meaning rather than original intent. The vigorous debate over whether this approach does justice to history continues. *Compare* Jonathan Gienapp, *Constitutional Originalism and History*, PROCESS (Mar. 20, 2017), http://www.processhistory.org/originalism-history/, and Jonathan Gienapp, *Knowing How vs. Knowing That: Navigating the Past*, PROCESS, (Apr. 4, 2017), *with* Randy Barnett, *Challenging the*

advocated "common law originalism" to unify disparate strands of eighteenth-century common law on both sides of the Atlantic.[37] While originalists often act as if Blackstone's *Commentaries* was a comprehensive Founding-era summary of a single, universal body of common law,[38] the field was dramatically in flux at the time.[39] Meyler thus proposed abandoning an originalism "fixated upon particular, decontextualized answers"[40] and instead using the common law to "provide the parameters for debates about particular constitutional concepts, debates whose contours may shift over time, like the common law itself."[41]

Synthesizing these ideas leads to the concept of incremental originalism. This approach readily admits that interpretation requires judgment, but uses history—including original intent and original public meaning—to set the boundaries of debate. Willingness to create exceptions and admit limits is not the same as abandonment of principle. Incrementalism is the foundation of *stare decisis*, a principle that Scalia admitted is "a pragmatic *exception*" to his philosophy[42] that ensures originalism will not result in a "wrenching purge" of the Court's precedents. This Article will show that incremental originalism is the approach that Scalia took in his Fourth Amendment jurisprudence—consistent with the Court's traditional approach.

II. THE FOUNDERS' FOURTH AMENDMENT

A cursory review of research done by legal historians, let alone a careful examination of Founding-era primary sources, reveals that the original intent and original public meaning of the Fourth Amendment are incredibly difficult to discern with sufficient certainty to justify any firm conclusions about how the Founders would have decided a particular case. This Part conducts just such a cursory review of that research, from the common law antecedents in the decades leading up to the American Revolution through the drafting and ratification of state constitutions and the federal Constitution to the drafting and ratification of the Fourth Amendment. It relies in particular on the monumental work of William J. Cuddihy, whose dissertation Justice Sandra Day O'Connor called "one of the most exhaustive analyses of the original meaning of the

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Priesthood of Professional Historians, WASH. POST: VOLOKH CONSPIRACY (Mar. 28, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/03/28/challenging-the-priesthood-of-professional-historians/.

37. Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 551 (2006) (arguing the common law should "supply[] the terms of a debate about certain concepts, framing questions for judges but refusing them to settle them definitively").

38. *Id.* at 560–61.

39. *Id.* at 567–72. The Founders themselves disputed both the importance and content of the common law and distinguished the American and English traditions. *Id.* Meyler saw this not as a reason to attack originalism, "but rather [to] encourage its metamorphosis into a more dynamic creature, one with appeal to both originalists and living constitutionalists." *Id.* at 552.

40. *Id.* at 593.

41. *Id.* at 600.

42. SCALIA, MATTER OF INTERPRETATION, *supra* note 13, at 140 (writing in response to Lawrence Tribe's critique of his use of *stare decisis*); ANTONIN SCALIA & BRIAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 411–14 (2012).

Fourth Amendment ever undertaken."[43] Yet even his work leaves questions unanswered.[44] As such, this Part shows that, if any conclusion may be drawn from study of the history of the context, drafting, and ratification of the Fourth Amendment, it is that the Founders cared most about the broad principle the Supreme Court has repeatedly cited: government intrusion must be carefully limited and regulated.

A. Transatlantic Common Law

To understand the context from which the Fourth Amendment emerged, one must begin with the long path toward revolution. Conventional accounts begin with the growing hostility toward general warrants[45] on each side of the Atlantic in the years leading up to 1776 and conclude with ratification of the Fourth Amendment.[46]

1. The Colonies

For the first half of the eighteenth century, an array of laws allowed search and seizure in the colonies either without a warrant or, at most, with a general warrant.[47] Warrantless searches and seizures were nonetheless rare.[48] Customs searches were most common, and the "substantial violence" of general searches "bred intense resentment" in the colonies.[49] Massachusetts, a hotbed of resistance to searches, became the first colony to require specific warrants for many types of searches in 1756. That requirement was catalyzed by popular concerns that Parliament's Excise Act of 1754, which allowed tax collectors to question citizens about their consumption of spirits, would lead collectors to search their homes as well.[50] Privacy as much as physical safety thus motivated public opposition.[51]

But it was in 1761 that agitation in the colonies over general warrants came to a head with the Massachusetts controversy over writs of assistance. These writs were issued by a court to validate the authority of customs officers to conduct searches at will but were

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43. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 669–71 (1995) (O'Connor, J., dissenting) (conducting an originalist analysis of individualized suspicion). Curiously, the Court's opinion, which looked to reasonableness, was written by Justice Scalia. *Id.* at 652–57.

44. *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 571 (1999).

45. In contrast to modern particularized warrants, general warrants allowed government officials to search any number of houses and persons for potentially incriminating evidence.

46. *See generally* WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING, 602–1791 (2009); NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (1937); Osmond K. Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361, 362–66 (1921).

47. Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 939–41 (1997).

48. Thomas K. Clancy, *The Importance of James Otis*, 82 MISS. L.J. 487, 491 (2013). They were particularly rare relative to England: "New England had only about half as many statutory categories of promiscuous search and seizure as had old England," and that region had more than the remainder of the colonies. CUDDIHY, *supra* note 46, at 228.

49. CUDDIHY, *supra* note 46, at 253. For instance, in 1728, a customs officer and his men "twice went on a rampage of searches" of houses, warehouses, and ships, seizing contraband and non-contraband alike and threatening to shoot citizens in the process. *Id.* at 358.

50. Maclin, *supra* note 47, at 943–44.

51. CUDDIHY, *supra* note 46, at 356–57.

time-limited by the death of the sovereign.[52] Thus, when George II died in 1760, customs officials were required to apply for new writs—and, in an action known as Paxton's Case, James Otis petitioned the Massachusetts Superior Court to deny them on the ground that general warrants were unconstitutional and only specific warrants were allowed.[53] Otis complained that the writs made a citizen "the servant of servants" in his own home.[54] The court's chief justice sought information about use of the writs in England and, upon learning they were used there, "judged [it] sufficient to warrant the like practice in the province."[55] Although Otis lost, his arguments energized the public such that he successfully pushed the Massachusetts legislature to pass a bill (which was controversially vetoed) requiring particularized warrants in many circumstances,[56] and colonial courts began to decline granting writs of assistance.[57]

John Adams later dramatically recalled the dispute as "the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there, the Child Independence was born."[58] But even if it catalyzed the path to revolution, it did not directly inform the text of the Fourth Amendment. The case was mentioned only once in the debates over the Constitution and Bill of Rights.[59] Nonetheless, it was clearly part of a developing consensus against general warrants motivated by the politics of the time, a dramatic increase in the types and number of searches and seizures, and the violence accompanying them.[60]

2. England

Contemporaneously, a series of trespass cases brought by John Wilkes and his supporters served as the locus of opposition to general warrants in England. Fragmentary opposition to general warrants dated back centuries but crystalized into categorical outrage about the Crown's use of them to investigate and prosecute the authors and publishers of alleged political libels.[61] Wilkes was a member of parliament and publisher of a satirical newspaper whose attacks on George III earned him a charge of seditious libel in 1763.[62]

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52. Maclin, *supra* note 47, at 945.

53. *Id.* at 946. *See also* Davies, *supra* note 44, at 561. Otis had been the chief attorney of Massachusetts and resigned his office for the purpose of attacking the writs on behalf of Boston merchants. The merchants may have had additional reasons for opposing the writ beyond the principle of liberty, given the legal device was designed to fight smuggling. *See* CUDDIHY, *supra* note 46, at 381, 397.

54. Davies, *supra* note 44, at 578.

55. Thomas K. Clancy, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979, 993 (2011) (quoting THOMAS HUTCHINSON, THE HISTORY OF THE PROVINCE OF MASSACHUSETTS BAY, FROM 1749 TO 1774, 93–94 (1828)).

56. Maclin, *supra* note 47, at 946–47.

57. CUDDIHY, *supra* note 46, at 513–26, 533–36.

58. Letter from John Adams to William Tudor (Mar. 29, 1817), *in* THE WORKS OF JOHN ADAMS 244, 248 (Little Brown and Co. ed., 1846).

59. Akhil Reed Amar, *The Fourth Amendment, Boston, and the Writs of Assistance*, 30 SUFFOLK U. L. REV. 53, 76 (1996) (noting that Adams was writing with the benefit of more than a half-century of hindsight); *see also* Clancy, *Intent*, *supra* note 55, at 1011 (noting that mention of the English cases discussed below is notably absent from Adams' writing).

60. CUDDIHY, *supra* note 46, at 569.

61. *Id.* at 439–40.

62. Davies, *supra* note 44, at 562.

The search for evidence was widespread and violent, including seizure of the entirety of Wilkes's papers.[63] In response, Wilkes sued the government officials who conducted the searches for trespass.[64] The general warrant authorizing the search was rejected by the court as defense against the tort.[65]

Soon thereafter, in 1765, came the case that would become the best known in the colonies, *Entick v. Carrington*.[66] That case also dealt with a search for evidence in support of a seditious libel charge.[67] Lord Camden's opinion in the case, which similarly rejected the legality of general warrants for searches of this nature, focused on property: because "our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave," and "papers are often the dearest property a man can have," a general warrant to search his house and papers "is wholly illegal and void."[68] Despite this strong language, *Entick* was limited to searches aimed at censorship of the press.[69]

Although full case reports of *Entick* and the other Wilkes cases were not published in the colonies until later, a Blackstone summary of the developments and other news reports about the cases coincided with Parliament's passage of the Townshend Act in 1767, which reauthorized the general writ for customs searches.[70] That combination proved highly inflammatory, and a consensus against general warrants among colonial judges developed.[71] The controversy bubbled on into the Revolution.

B. Revolutionary State Constitutions

While there is relative consensus among legal historians about the slights that led the Founders to focus attention on the issue of search and seizure, there is considerable dispute about what they intended the Fourth Amendment to do about it—in large part because there is insufficient evidence available to justify strong conclusions. Many of these disputes focus on whether there is a warrant requirement or broad reasonableness standard and are therefore outside the scope of this Article.[72] Of interest here is the

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63. CUDDIHY, *supra* note 46, at 441–43 (describing searches in the dead of night, seizure of all the papers of several individuals, and forty-nine arrests).

64. Wilkes v. Wood, [1763] 98 Eng. Rep. 489 (K.B.).

65. *Id.* at 498–99.

66. [1765] 95 Eng. Rep. 807 (K.B.).

67. *Id.* at 807–08.

68. *Id.* at 817–18. The Founders seemingly neglected to note the opinion's conclusion: the court nonetheless stands against libel, and that laws against it must be enforced, for "tyranny is worse than anarchy, and the worst Government better than none at all." *Id.* at 818.

69. CUDDIHY, *supra* note 46, at 455–58.

70. Davies, *supra* note 44, at 563–64. Highlighting the transatlantic nature of the controversies, James Otis in 1765 cited Blackstone's earlier description in the Commentaries of the three key rights of Englishmen as being "the free enjoyment of personal security, of personal liberty, and of private property. Clancy, *Otis*, *supra* note 48, at 498 (citing James Otis, *A Vindication of the British Colonies* (1765), *reprinted in* 1 PAMPHLETS OF THE AMERICAN REVOLUTION 558 (Bernard Bailyn, ed. 1965)).

71. Davies, *supra* note 44, at 566.

72. *See, e.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994) (arguing that the warrant clause does not impose a warrant requirement, but only prohibits general warrants, a position often called "generalized reasonableness" construction); Maclin, *supra* note 47, at 955 (arguing that Amar's interpretation unjustly reduces the scope of the reasonableness clause, the more common "warrant preference" construction).

addition of the enumerated "persons, houses, papers, and effects" property clause, since that language is at the center of the line of Justice Scalia opinions that created the modern "property-plus" standard.[73]

The first appearance of the enumerated property clause was in the 1776 Pennsylvania declaration of rights, which introduced its prohibition on general warrants with reference to the people's "right to hold themselves, their houses, papers, and possessions free from search or seizure."[74] Enumeration served both to link the right to the property interests paramount under common law and to functionally limit the places where the right exists.[75] Similar language appeared in the 1780 Massachusetts constitution, which guaranteed the "right to be secure from all unreasonable searches and seizures of his person, his house, his papers, and all his possessions,"[76] and the 1783 New Hampshire constitution copied that clause verbatim.[77] That text, drafted by none other than John Adams, expanded the introductory clause to include the concepts of "secure" and "unreasonable."[78]

Similar language was debated by the Continental Congress as it considered whether and how to forward the draft Constitution to the states for ratification. Henry Richard Lee of Virginia proposed Congress send a bill of rights, including a provision written in language borrowed from Adams: a guarantee that "the Citizens shall not be exposed to unreasonable searches, seizure of their persons, houses, papers, or property."[79] The language appeared repeatedly after the federal Constitution was drafted and published for ratification as part of the broader debate between Federalists and Antifederalists as to whether it was a good idea to include an enumerated list of the common law rights that the Constitution would preserve.[80]

Antifederalist writers widely decried the fact that the draft Constitution lacked an explicit prohibition on general warrants in language similar to the state declarations of rights, including the enumeration of places to be protected.[81] Even an Antifederalist

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73. *See infra* Part VI.D–F. However, the fact that neither Cuddihy nor any of the other authors cited herein discuss why these specific enumerated places were chosen suggests that the reasons may well be unknowable, itself a statement as to history's limits.

74. Pa. Const. of 1776, art. X (Decl. of Rights).

75. Davies, *supra* note 44, at 680–81.

76. Mass. Const. of 1780, pt. 1, art. XIV.

77. N.H. Const. of 1783, pt. 1, art. XIX.

78. Clancy, *Intent*, *supra* note 55, at 1028.

79. *Id.* at 1030, 1030 n.336.

80. *See* CUDDIHY, *supra* note 46, at 673 & nn.13–14.

81. *See, e.g.*, Centinel [Samuel Bryan], *Centinel I*, Indep. Gazetter (Phila.), October 5, 1787, *reprinted in* THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION, PART ONE: SEPTEMBER 1787 TO FEBRUARY 1788, at 52, 52–53 (Bernard Bailyn ed., 1993) (arguing that citizens will determine with their vote on ratification "whether your *houses* shall continue to be your *castles*; whether your *papers*, your *persons* and your *property*, are to be held sacred and free from *general warrants*"); Centinel [Samuel Bryan], *Centinel II*, Freeman's J. (Phila.), October 24, 1787, *reprinted in* THE DEBATE ON THE CONSTITUTION PART ONE, at 77, 89 (complaining the Constitution lacks a declaration "[t]hat the people have a right to hold themselves, their houses, papers and possessions free from search or seizure," and that general warrants are "contrary to that right and ought not to be granted"); The Federal Farmer, *Letter IV*, October 12, 1787, *reprinted in* THE DEBATE ON THE CONSTITUTION PART ONE, 274, 279 (essential rights include the "freedom from hasty and unreasonable search warrants, warrants not founded on oath, and not issued with due caution, for searching and seizing men's papers, property, and persons"); A Columbian Patriot [Mercy Otis Warren], *Observations on the Constitution*, February 1788, *reprinted in* THE

argument stressing the importance of trial by jury raised general warrant searches as part of a parade of horribles that could be avoided through a jury trial guarantee—and did so in a way that graphically focused on the violence as well as the invasiveness of searches.[82] In sum, these complaints were hodgepodge but broad, rendering it difficult to draw conclusions about intent or even public understanding in the era.

Antifederalist grievances in turn duly made their way into the ratification convention debates.[83] First, in Pennsylvania, the minority dissent noted that general warrants are "grievous and oppressive."[84] And in New York, Maryland, Virginia, and North Carolina, ratification conventions passed a list of proposed amendments to the Constitution that each included a two-clause formulation, first expressing the right to be free from searches of persons and property, and second prohibiting the issuance of general warrants in violation of that right.[85]

C. The Bill of Rights

The Antifederalist push for an enumerated Bill of Rights led the First Congress to consider a series of amendments to the Constitution, drafted by James Madison with an aim toward bringing moderate Antifederalists on board.[86] Madison's draft Fourth Amendment merged the two-clause form of the state declarations of rights and most of the ratifying convention proposals into a single clause that focused on the general warrant prohibition—though it still included the enumerated property list.[87] It is noteworthy that

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DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION, PART TWO: JANUARY TO AUGUST 1788, at 284, 293 (Bernard Bailyn ed., 1993) (citing specifically and exclusively in a general complaint about the lack of a Bill of Rights "the insecurity in which we are left with regard to warrants unsupported by evidence," which could lead to "the insolence of any petty revenue officer to enter our houses, search, insult, and seize at pleasure"). *See generally* CUDDIHY, *supra* note 46, at 673–80.

82. A Democratic Federalist, *Reply to Wilson's Speech*, PENN. HERALD (Phila.), October 17, 1787, *reprinted in* THE DEBATE ON THE CONSTITUTION PART ONE, *supra* note 81, at 70, 73–74 ("Suppose . . . that a constable, having a warrant to search for stolen goods, pulled down the clothes of a bed in which there was a woman, and searched under her shift . . . in such cases a trial by jury would be our safest resource.").

83. *See generally* CUDDIHY, *supra* note 46, at 680–86.

84. *Dissent of the Minority of the Pennsylvania Convention*, PENN. PACKET (Phila.), December 18, 1787, *reprinted in* THE DEBATE ON THE CONSTITUTION PART ONE, *supra* note 81, at 526, 533.

85. *Ratification of the Constitution by the Convention of the State of New York*, *reprinted in* THE DEBATE ON THE CONSTITUTION PART TWO, *supra* note 81, at 536, 538 (declaring the "right to be secure from all unreasonable searches and seizures of his person, his papers or his property" and that general warrants are "grievous and oppressive" and therefore should not be granted); *Proposed Amendments by the Convention of the Delegates of the People of the State of Maryland*, *reprinted in* THE DEBATE ON THE CONSTITUTION PART TWO, *supra* note 81, at 552, 554 (proposing an amendment to declare that general warrants "to search suspected places, or to seize any person, or his property, are grievous and oppressive . . . and ought not to be granted); *Ratification Agreed to by the Convention of Virginia*, *reprinted in* THE DEBATE ON THE CONSTITUTION PART TWO, *supra* note 81, at 557, 560 (proposing an amendment to declare that "every freeman has a right to be secure from all unreasonable searches, and seizures of his person, his papers, and property," and general warrants are dangerous and ought not to be granted); *Declaration of Rights of the Convention of the State of North Carolina*, *reprinted in* THE DEBATE ON THE CONSTITUTION PART TWO, *supra* note 81, at 565, 567 (declaring that "every freeman has a right to be secure from all unreasonable searches, and seizures of his person, his papers, and his property" and general warrants are dangerous and ought not to be granted).

86. CUDDIHY, *supra* note 46, at 704–12 (describing Madison's plan to drive a wedge between "hard-core Antifederalists" who sought to revise the Constitution into something more like the Articles of Confederation and moderates genuinely concerned about the lack of enumerated rights).

87. Davies, *supra* note 44, at 697 ("The rights of the people to be secured in their persons, their houses, their

Madison's draft used the word "property," which appeared repeatedly in Antifederalist writing, rather than "effects," which was substituted later by the House's drafting Committee of Eleven—perhaps in an attempt to ensure the amendment did not enshrine an unlimited right.[88] A House floor amendment changing the proposal from Madison's draft into the two-clause form we know today is responsible for the aforementioned academic dispute over whether the amendment imposes a warrant requirement or a broad reasonableness standard.[89] Ratification by the states came relatively quickly as the Antifederalist coalition broke down.[90]

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The disparate viewpoints of academics reveal how difficult it is to pin down a "true" original meaning of—or even an original intent for—the Fourth Amendment. Beyond a broad consensus that the Founders near-universally opposed general warrants and meant to prohibit them, it is unclear whether the Amendment was also meant to require warrants in virtually all instances or merely to avoid "unreasonable" searches and seizures—whatever those might be. It is similarly murky whether the enumerated property clause was intended merely to tie the Amendment to the property interests paramount in common law or was also meant to draw limits around what rights it protected. What is clear, however, is that Antifederalist opposition to the Constitution led directly to the Amendment's drafting and ratification—even if it did not as directly inform its content.[91] To the extent that ratification of the Constitution was conditioned on enumerating the common law rights to be preserved, historical inquiry into the common law antecedents of the Fourth Amendment is essential to developing an originalist understanding of the right.

Cuddihy notes that "the Fourth Amendment expressed ideas that had been developing for centuries," a "family of ideas whose identity and dimensions developed in historical context."[92] The most important takeaway from this review of literature is that the project is too vast, and sources too sparse, for legal historians—let alone lawyers or the Court—to draw firm conclusions about the original intent of the Founders or the original meaning of the amendment. That, in turn, calls into question the Court's claims to doing so.

III. TRADITIONALIST BEDROCK

Although the Supreme Court's jurisprudence prior to the Warren Court era is

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papers, and their other property from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.").

88. *See id.* at 706–15 (arguing the change was so intended).

89. *Id.* at 716–24 (arguing that the Founders "adopted the text as a specific response to a specific grievance [the general warrant] that had arisen in a specific historical context and had been shaped by a specific vulnerability in the protections afforded by common-law arrest and search authority"). *But see* Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 209 (1993) ("The changes to Madison's draft escaped the notice of members of the House and Senate, and the altered provision was approved by Congress and ratified by the state constitutional conventions without extensive discussion regarding the precise language of what later became the Fourth Amendment to the Constitution.").

90. CUDDIHY *supra* note 46, at 712–24.

91. *Id.* at 725–26 ("Without the political urgency that Antifederalism imposed, Madison would not have written a right forbidding unreasonable searches and seizures.").

92. *Id.* at 670, 770.

sometimes treated as one continuous era of legal formalism, it is not true that the Court's decisions in the 170 or so years prior to the realist revolution took an identical approach to Fourth Amendment law. For most of the nineteenth century and even the first decades of the twentieth, the Court—aiming to avoid erosion of the underlying common law right—took a traditionalist approach that is not that dissimilar from what Justice Scalia suggested was "fainthearted originalism." This Part looks through three seminal cases—*Boyd v. United States*, *Weeks v. United States*, and *Gouled v. United States*—that sketched the outlines of Fourth Amendment doctrine and served as a model of how the Court would use history in key Fourth Amendment cases going forward.

A. Boyd v. United States *(1886)*

The Supreme Court's seminal Fourth Amendment decision did not come until 1886, more than a century after ratification.[93] From the beginning, then, the Court sought answers in history—and its effort in this regard remains to this day its most exhaustive. In *Boyd v. United States*, the Court answered the question whether an 1874 statute authorizing the search and seizure (or compulsory production) of private papers (customs invoices) violates the Fourth Amendment even though search and seizure of the contraband property itself (thirty-five cases of plate glass) did not.[94] In making its decision, the Court applied two classical interpretive maxims: *consuetudo est optimus interpres legume* (custom is the best interpreter of the law) and *contemporanea expositio est optima et fortissima in lege* (contemporaneous exposition is the best and strongest in law). The Court concluded that neither "long usage" nor "contemporary construction of the constitution" justified the statute: the government is entitled to possession of stolen or forfeited goods or contraband goods hidden from customs duties, but not to an individual's papers.[95]

While the Latin expression of the Court's interpretive methods is obscure today, both maxims are recognizable in principle. The first is in keeping with the traditions of common law judging and the second more or less analogous to original public meaning textualism. The majority in *Boyd* worked through both methods simultaneously, consulting sources from the then-recent past to determine what insight they could offer in either regard. This makes sense; given the recency of the sources consulted, even the common law approach was somewhat analogous to today's original meaning or intent originalism. To the *Boyd* Court, English and American common law antecedents both directly informed the original public meaning of the Fourth Amendment; the two interpretative maxims thus worked in tandem to create a cohesive common law originalist

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93. The Court's first Fourth Amendment case came a decade earlier, but it was decided based on Congress's power to regulate the mails. *See Ex Parte* Jackson, 96 U.S. 727, 733 (1877); *see also infra* note 129.

94. 116 U.S. 616, 617−18, 622 (1886). In modern terms, the question is whether a subpoena for papers proving possession of contraband violates the Fourth and Fifth Amendments when search and seizure of the contraband itself does not.

95. *Id.* at 622. Contraband itself is different because the government, not the defendant, "is entitled to possession of the property" at issue. *Id.* at 623. The same is true with regard to stolen goods, possession to which the victim of the crime is entitled. *Id.* at 625. *Boyd* thus formed the basis for the "mere evidence" doctrine that reached its apogee in *Gouled v. United States*, 255 U.S. 298 (1921), and was overturned in *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967) (describing the rule as distinguishing search and seizure of "items of evidential value only" from search and seizure of "instrumentalities, fruits, or contraband"). *See infra* note 138 and accompanying text.

analysis.

Although the Court did not often differentiate between the types of sources it used in conducting its historical analysis, they may be grouped into three distinct types: pre-Revolutionary English common law, colonial American law, and Founding-era legislation. While each of these sources is distinctive in terms of governmental structure, cultural assumptions, and other contexts, the fact that the Court blended the three into a cohesive analysis (the same way it conflated its two interpretive maxims) suggests that each was seen as an outgrowth of the one prior, dating back to the proverbial "time immemorial." This conclusion is strengthened by the order in which the *Boyd* Court proceeded with its analysis. The Court began by noting that even the colonial writs of assistance did not go as far as did the 1863 law at issue in the case, in stark contrast to the more limited searches long allowed by English statutes and common law.[96] It then began its in-depth analysis with the customs statute passed by the First Congress, turned to the colonial writs of assurance controversy, and finally examined the near-contemporaneous developments in English common law that informed that colonial reaction.[97]

The opinion's quasioriginalist analysis began with the country's first customs law, which the Court gave great interpretive credibility because the 1789 law was "passed by the same congress which proposed for adoption the original amendments to the constitution."[98] The historical rigor underlying that selection is commendable; later opinions would, by contrast, muddle together decades worth of sources as "contemporaneous" with the Founding.[99] Sections 23 through 26 of the 1789 statute allowed customs officers, on mere "suspicion of fraud," to open and examine packages, enter and search ships and vessels, and seize contraband.[100] To the *Boyd* Court, that was proof that these actions were not "unreasonable" to the body that drafted the Fourth Amendment.[101] The Court noted that other contraband, like excisable goods (searchable by revenue officers), unlawful objects, or "secreted property or credits" to satisfy a judgment, may also be searched and seized without a warrant.[102] Highlighting how the Court glided between history and common law, the Court made this move with just one citation to an 1841 Massachusetts case on lottery tickets.[103] After this litany, the Court strongly distinguished the "total unlikeness of these official acts and proceedings" from the 1873 law, which "attempts to extort from the party his private books and papers."[104]

The Court next turned to "the contemporary or then recent history of the

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96. *Boyd*, 116 U.S. at 623 & n.3.

97. *Id.* at 623–29.

98. *Id*. at 623. The Court also looked to the Judiciary Act of 1789 to bolster the conclusion that the First Congress believed that courts must determine when an individual would be forced to produce incriminating evidence, rather than allowing warrantless searches. *Id.* at 630–31. *See also* CUDDIHY, *supra* note 46, at lxvii ("The exclusion of most Congressional debates and other data beyond 1791 is intentional because such documentation reveals far less about what the amendment originally meant than about what it came to mean in the partisan blast furnace of the 1790s.").

99. *See, e.g.*, *infra* notes 156−158 and accompanying text.

100. Act of July 31, 1789, ch. 5, 1 Stat. 43 (regulating collection of the duties imposed by law on tonnage of ships or vessels and on goods, wares and merchandises imported into the United States).

101. *Boyd,* 116 U.S. at 623−24.

102. *Id.* at 624.

103. *See id.* (citing Massachusetts v. Dana, 2 Met. 329 (Mass. 1841)).

104. *Id.* at 624.

controversies" over searches and seizures "both in this country and in England," apparently to discern original intent—these, after all, "were fresh in the memories of those who achieved our independence and established our form of government."[105] The Court began with a paragraph on the writs of assistance controversy.[106] It quoted James Otis attacking the writs; cited the suits Otis brought against them, two treatises (one written by a member of the Court), and the memoirs of John Adams; and echoed Adams in describing the debate as "perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country."[107]

Curiously, the Court looked much more closely at the English common law heritage than the contemporaneous events in the colonies.[108] While describing an era that ran in Great Britain "from 1762, when the North Briton was started by John Wilkes, to April, 1766, when the house of commons passed resolutions condemnatory of general warrants,"[109] the Court focused the overwhelming majority of its attention to Lord Camden's 1765 opinion in *Entick v. Carrington*,[110] reasoning that "every American statesman" in the Founding era "was undoubtedly familiar with this monument of English freedom, and considered it as the true and ultimate expression of constitutional law"; thus, "it may be confidently asserted that its propositions were in the minds of those who framed the fourth amendment to the constitution."[111] Thus, the Court chose to "quote somewhat largely," to the tune of just over 1,000 words. The first 440 or so establish that, absent a written law empowering agents of the crown to seize a person's papers, such an act is a violation of the owner's property right, and thus a trespass.[112] The next 320 or so distinguish the act of search and seizure from stolen goods from seizure of papers.[113] Following that is a roughly 235-word excerpt on the problem with compelling self-accusation through compelled disclosure of papers (thus informing both the Fourth and Fifth Amendment issues implicit in *Boyd*).[114] The last forty-five words quoted are the holding.[115]

Perhaps because the largest block of quoted text deals with the nature of property—and includes the rather striking statement that, "[t]he great end for which men entered into society was to secure their property," *Boyd* is often treated as a decision about property rights.[116] Yet despite Lord Camden having given primacy of place to property rights, the *Boyd* Court limited it somewhat: "It is not the breaking of his doors, and the rummaging

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105. *See id.* at 625; *see also supra* notes 91−92 and accompanying text.

106. *See supra* Part II.A.1.

107. *Boyd,* 116 U.S. at 625–26 & n.4.

108. Although this may be attributable to Blackstone making the history of the English common law much more readily available than colonial history, it could also be understood as a recognition that the Bill of Rights was intended to incorporate the common law, not replace it. *See supra* Part II.C.

109. *Boyd*, 116 U.S at 625.

110. [1765] 95 Eng. Rep. 807 (K.B.) ("The great end for which men entered into society was to secure their property.").

111. *Boyd*, 116 U.S. at 626. Although this claim can today be easily documented, the *Boyd* Court made it without citation—perhaps because, little more than a century after the Founding, it felt like living memory.

112. *Id.* at 627−28.

113. *Id.* at 628−29.

114. *Id.* at 629.

115. *Id.*

116. *See Boyd*, 116 U.S. at 627 (quoting *Entick*, [1765] 95 Eng. Rep. 807, 807 (K.B.)).

of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property . . . which underlies and constitutes the essence of Lord Camden's judgment."[117] It was to avoid that invasion that the Founders passed the Fourth and Fifth Amendments; as a result, they would have rejected the 1873 law. "The struggles against arbitrary power in which they had been engaged for more than 20 years would have been too deeply engraved in their memories to have allowed them to approve of such insidious disguises of the old grievance which they had so deeply abhorred."[118]

The Court concludes its analysis with a strong statement about the importance of being "watchful" for "stealthy encroachments" that is worth quoting in full:

> It may be that [the subpoena power at issue] is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be obsta principiis.[119]

In short, after its historical analysis, the Court proceeded to reason from the history available to it, and in the process successfully captured the broad strokes of what the Fourth Amendment was designed to do—protect person and property from invasive government intrusion.

A concurrence in *Boyd* is worth brief discussion because it sharply diverges from the Court's opinion by taking a more literalist approach. While Justice Bradley wrote for the Court about *obsta principiis* and the threat of "stealthy encroachments," Justice Miller concurred that the *Fifth* Amendment right against self-incrimination prohibited use of the papers against the defendant, but wrote separately to express his view that no search nor seizure had occurred.[120] Sounding almost like Justice Scalia, he worried that:

> If the mere service of a notice to produce a paper to be used as evidence, which the party can obey or not as he chooses, is a search, then a change has taken place in the meaning of words, which has not come within my reading, and which I think was unknown at the time the constitution was made.[121]

For Miller, the Founders "only intended to restrain the abuse" of police power and sought only to abolish general warrants in the Fourth Amendment, "not abolish the power" to

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117. *Id.* at 630. This statement neglects the reality that the physical violence inherent in colonial searches and seizures was a large source of opposition to the general warrant. *See, e.g.*, *supra* notes 49, 63 and accompanying text. Nonetheless, what it gets right is the fact that Founding-era concerns were focused on privacy and security at least as much as property.

118. *Boyd*, 116 U.S. at 630.

119. *Id.* at 635 (emphasis added). The Court concludes its decision by running through conflicting opinions below.

120. *Id*. at 639 (Miller, J., concurring).

121. *Id*. at 641.

search altogether.[122] His is a far more restrained reading of the common law antecedents to the Fourth and Fifth Amendments, making secondary the property concerns motivating the Court. The distinction between the Court's robust approach (focused on avoiding erosion) and Miller's more crabbed reading (moving toward literalism) became crucial in the decades to follow.

B. Weeks v. United States *(1914)*

The next seminal Fourth Amendment case came nearly three decades later, in 1914. In *Weeks v. United States*, the Court answered the question whether papers seized by a United States marshal in a defendant's house without a warrant and without his consent may be used as evidence.[123] The Court's interpretive principle seems to be that of original intent, which the Court discerned by running through the historical work done by *Boyd* and two subsequent cases. It concluded that, if this were allowed, "the protection of the 4th Amendment . . . is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution."[124] Thus, the Court created the antecedent to the modern-day exclusionary rule that prohibits prosecutors from evidence collected in violation of a Fourth Amendment right.[125]

Weeks marks the beginning of the Court's shift away from original historical work to reliance on precedent. Unlike in *Boyd*, the Court did not elaborate interpretive principles, but merely proceeds through precedent—albeit with an eye toward Founding-era history. Rather than turning to *Boyd* for its precedential value, it considered the history "given with particularity" in that case: "the determination of the framers" to provide a Bill of Rights to secure "those safeguards which had grown up in England" against general warrants.[126] Citing contemporary treatises, the Court explained that resistance to the writs of assistance "established the principle which was enacted into the fundamental law in the 4th Amendment, that a man's home was his castle."[127] Here we see a clearer focus on the property-based rationale on which later decisions would explicitly rely, though the section of *Boyd* quoted in *Weeks* is the broader language of "personal security, personal liberty, and private property."[128]

The Court also discussed two other cases. First, it mentioned *Ex Parte Jackson*, an 1877 case where the Court held that letters and packages may not be opened without a warrant, despite the Constitutional power vested in Congress to establish post offices and roads, because papers that have been closed against inspection are to be secure from search and seizure wherever they may be located.[129] The Court used *Ex Parte Jackson* to show

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122. *Id.*
123. Weeks v. United States, 232 U.S. 383, 389 (1914).
124. *Id.* at 393.
125. *Id.* at 398.
126. *Id.* at 390.
127. *Id.*
128. *See Weeks*, 232 U.S. at 391 (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).
129. 96 U.S. 727, 733 (1877) ("[A]ll regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution."). In *Ex Parte Jackson*, the petitioner was before the Court on a Habeas challenge to the constitutionality of a law prohibiting obscene material in the mail on the originalist grounds that the power (and thus duty) to establish and regulate post offices and roads means that "a letter or a packet which was confessedly mailable matter at the time of the adoption of the

that "the principle of protection" goes beyond "one's own household" to protect letters and sealed packages in the mail, suggesting that it is at pains to make clear that the boundaries of the protection are not drawn by the property line of the aforementioned castle.[130]

Second, the *Weeks* Court quoted from *Bram v. United States*, an 1897 case holding that a defendant's confession was involuntary and violated the Fifth Amendment—but noting along the way, in discussing *Boyd*, that both the Fourth and Fifth Amendments

> contemplated perpetuating, in their full efficacy, by means of a constitutional provision, principles of humanity and civil liberty which had been secured in the mother country only after years of struggle, so as to implant them in our institutions in the fullness of their integrity, free from the possibilities of future legislative change.[131]

This quotation was used (perhaps in part because *Bram* was authored by Justice Edward White, who had, by the time of *Weeks*, become Chief Justice White) to affirm the intent and principles underlying the Fourth Amendment.

It is this mix of history and precedent that the Court relied on to conclude that the Fourth Amendment is of "no value" if illegally-seized papers were used as evidence—that doing so would "sacrifice . . . those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."[132] The Court then applied this principle to distinguish the chief cases put forward by the government. In *Adams v. New York*, the Court had held that materials were admissible because they were seized incidentally during an otherwise-legal search, a different procedural posture that "affords no authority."[133] In *Hale v. Henkel*, the Court had merely held that subpoenas in general did not violate the Fourth Amendment—but the subpoena at issue was "far too sweeping in its terms" to be reasonable. Thus, "a fortiori," the warrantless search in *Weeks* was unreasonable.[134] These two cases each cited and discussed *Boyd*, but, like *Weeks*, did so in a way that mixed *Boyd*'s historical work with the Court's other precedents.[135]

Constitution cannot be excluded from them." *Id.* at 731. The Court rejected that argument, noting that there was no evidence in the record as to how the evidence was collected, and therefore, "the only question for our determination relates to the constitutionality of the act; and of that we have no doubt." *Id.* at 737. This seems to suggest the Court's statements on the First and Fourth Amendment were technically dicta. Not only did the Court reject the petitioner's originalist argument, it did very little historical work: The statements about the Fourth Amendment were based entirely in principle; related First Amendment commentary looked to an 1836 debate in Congress but not to the Founding era. *Id.* at 733−34. That would have to wait for *Boyd.*

130. *See Weeks*, 232 U.S. at 343 (quoting *Ex Parte Jackson*, 96 U.S. at 733).

131. 168 U.S. 532, 544 (1897).

132. *See Weeks*, 232 U.S. at 393.

133. *Id.* at 394−96 (discussing Adams v. New York, 192 U.S. 585, 598 (1904)).

134. *Id.* at 396−97 (discussing Hale v. Henkel, 201 U.S. 43, 71–75 (1906)).

135. *See Hale*, 201 U.S. at 71−75 (citing *Boyd*, which "exhaustively considered" the construction of the Fourth Amendment, and a series of subsequent cases for the premise that it "was not intended to interfere with the power of courts to compel, through a subpoena duces tecum, the production, upon a trial in court, of documentary evidence"); *Adams*, 192 U.S. at 598 (citing *Boyd*, which "elaborately considered" the origin of the Fourth and Fifth Amendments, and, without citations, "the English, and nearly all of the American, cases" for the premise that the Amendments were "designed to prevent violations of private security in person and property and unlawful invasion of the sanctity of the home," but "were never intended to have [the] effect" of prohibiting evidence discovered incidentally during an otherwise legal "search for the instruments of crime" from being used as evidence). Note that the latter case again recognized that *Boyd* focused on privacy and security at least as much

While *Weeks* did not duplicate the primary source work of *Boyd*, it mirrored its goals and approach: it self-consciously turned to Founding-era history to reach conclusions about the principles and intent underlying the Fourth Amendment and apply them to the modern-day question at issue. What sets it apart is that it was not the first of its kind; as such, it has to consider precedent. Rather than opening with precedent and reasoning from there, however, it began with history and only then turned to precedent to see if it conflicts.

C. Gouled v. United States *(1921)*

The final case in the traditionalist era meriting discussion came soon thereafter, in 1921. In *Gouled v. United States*, the Court answered the question whether a warrant may authorize entry into a defendant's home to search for mere evidence (here, two contracts and an attorney bill allegedly related to the commission of a felony).[136] The Court began both its opinion and the relevant section with the plain text of the Fourth and Fifth Amendments, a look at how the Framers intended and viewed them, and how previous Courts had acted. While the Court relied heavily on *Boyd*, its reasoning was focused on the intent of the Founders, with common law precedent intermingled as a secondary consideration.[137] This case was the high-water mark of the "mere evidence" doctrine, under which warrants "may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding."[138]

The Court in *Gouled* opened by stating that it would deal with the questions before it in keeping with the "spirit" of the Framers and of *Boyd* and the Court's other decisions: the idea that the Fourth and Fifth Amendments "should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them."[139] In so doing, it returned to *Boyd*'s theme of avoiding erosion of the right. The Court took a textual originalist's approach: it looked to "the wording of the Fourth Amendment" to discern the fact that "the permission of the amendment has the same constitutional warrant as the prohibition [on unreasonable searches and seizures] has."[140] This interpretation, the Court said, was "abundantly recognized" in *Boyd* and *Weeks*,

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as property.

136. 255 U.S. 298, 306–08 (1921). The Court also held that entry "obtained by stealth instead of by force of coercion" invades the "security and privacy of the home or office and of the papers of the owner" just as much and "must therefore be regarded as equally in violation of his constitutional rights." *Id.* at 304–06. Again, note the appearance of violence and privacy alongside property.

137. *Id.* at 303–04, 308–09 (citing *Boyd*, *Weeks*, and Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920)). *Silverthorne Lumber* extended the exclusionary rule of *Weeks* to create the "fruit of the poisonous tree" doctrine without any resort to history; this would cut against an argument that cases in this era began with Founding-era thoughts but for the fact that *Weeks* had just six years earlier done that work and this very short opinion appears to take that for granted.

138. *Id.* at 309. Likewise, use of such evidence at trial violated the Fifth Amendment right against self-incrimination. *Id.* at 311. Even as *Gouled* provided the most clear articulation of the rule, countless exceptions were already in place, *see, e.g.*, *Hale*, 201 U.S. at 74–75 (holding that a corporation, as "a creature of the state," is subject to "a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers"; perhaps this was sufficient to give the government a property right in a corporation's books), and many more proliferated after.

139. *Gouled*, 255 U.S. at 303–04.

140. *Id.* at 308.

which looked to the era in which the Constitution was adopted to find that search warrants were authorized to look for "stolen or forfeited property, or property liable to duties and concealed to avoid payment of them, excisable articles and books required by law to be kept with respect to them, counterfeit coin, burglars' tools and weapons, implements of gambling 'and many other things of like character.'"[141]

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By building on historical inquiry into common law antecedents and the Founding era, the Court looked to original intent as it set out the contours of its Fourth Amendment doctrine—a relatively robust privacy right. The *Boyd* rule prohibiting subpoenas of private papers (and, to some extent, the mere evidence rule as expounded in *Gouled*) outlined an expectation of privacy in an individual's property, and the *Weeks* exclusionary rule created a powerful mechanism by which that expectation could be enforced.

IV. FORMALIST EROSION

As new technologies emerged and federal power grew during Prohibition, the Court began to limit the scope of Fourth Amendment. The Court limited its interpretation of *Entick* to a property-centric rationale, leaving behind the traditional rights-maximalist approach for a formalist (if not literalist) approach that focused on the enumerated list of protected places rather than on original intent.[142] Three cases—*Carroll v. United States*, which created the automobile exception, and *Olmstead v. United States* and *Goldman v. United States*, which drew the bounds of the privacy right at an individual's property line—eroded the strong privacy right that had been established by the traditionalist Court.

A. Carroll v. United States *(1925)*

The beginning of the literalist period began in 1925, just five years after the Eighteenth Amendment took effect. In *Carroll v. United States*, the Court answered the question whether a warrantless search for contraband (here, liquor) in a vehicle violated the Fourth Amendment if conducted with probable cause.[143] The question arose because the National Prohibition Act had prohibited searches of a "private dwelling" without a warrant, but allowed warrantless searches of any "other building or property" on probable cause.[144] The *Carroll* Court began its analysis not with constitutional principle or Founding-era history, but with examination of precedent.[145] It gave lip service to the theory that "[t]he Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will

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141. *Id.*

142. *See* Morgan Cloud, *The Fourth Amendment During the* Lochner *Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 573–81, 609–16 (1996) (arguing that *Boyd* is an example of the primacy of natural rights in the *Lochner* era).

143. 267 U.S. 132 (1925).

144. *Id.* at 146–47.

145. *Id.* at 147–49 (citing *Boyd*, *Weeks*, *Silverthorne Lumber*, *Gouled*, and Amos v. United States, 255 U.S. 313 (1921)). *Amos* held that concealed liquor found in a defendant's home during a warrantless search was inadmissible at trial because revenue officers had impliedly coerced his wife to gain entry in the defendant's absence. Like *Silverthorne Lumber*, the Court's opinion in *Amos* relied entirely on precedential cases—*Boyd*, *Weeks*, and *Silverthorne Lumber*—and the reasoning of *Gouled*, released the same day, rather than on history, Founding-era or otherwise.

conserve public interests as well as the interests and rights of individual citizens," the basic principles that underlie originalism.[146] But its analysis relied entirely on precedent and interpretation of post-Founding statutes, and it concluded that construction of the Amendment "practically since the beginning of the government" was consistent with its holding[147] that automobile searches are reasonable under the Fourth Amendment when the seizing officer has "reasonable or probable cause" to believe that the automobile was carrying contraband liquor.[148]

The Court's opinion in *Carroll*, written by Chief Justice Taft, began with the text of the Fourth Amendment and the portion of the National Prohibition Act at issue.[149] It moved quickly to legislative history intended to demonstrate that Congress intended "to make a distinction between the necessity for a search warrant in the searching of private dwellings and in that of automobiles and other road vehicles,"[150] and held that this distinction was reasonable.[151] To provide rationale for that holding, the Court looked first to its own precedent, but concluded that none of the cases cited were on point regarding the validity of a warrantless seizure "of contraband goods in the course of transportation and subject to forfeiture or destruction."[152] Nonetheless, "[o]n reason and authority the true rule is" that such a search and seizure is valid if an officer has probable cause. The Court said that the Fourth Amendment is to be construed "in the light of what was deemed an unreasonable search and seizure when it was adopted."[153]

In support of its view that a search on probable cause was not considered unreasonable in the Founding era, the Court quoted from *Boyd*'s discussion of the 1789 customs act. In the quoted passage, the *Boyd* Court distinguished contraband and "mere evidence," but it did not do so entirely in reliance on the 1789 act.[154] As noted above, the *Boyd* Court cited a series of things subject to warrantless search, but only provided Founding-era authority regarding contraband.[155] *Boyd* looked to Founding-era law on contraband and customs papers to hold that the Founders could not have seen such searches as unreasonable, while the *Carroll* Court excerpted the same sources to distinguish contraband from mere evidence. And it is notable what the *Carroll* opinion does not quote from *Boyd*: it contained no reference to English or colonial common law, nor to *Entick*, nor to its underlying principle of giving the Fourth Amendment a liberal construction.

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146. *Id.* at 149.
147. *Id.* at 149–53.
148. *Carroll*, 267 U.S. at 156.
149. *Id.* at 143–44.
150. *Id.* at 145–47 (referencing a Senate amendment that would have prohibited warrantless searches of any property, a House Judiciary Committee report expressing the view that such an amendment would "greatly cripple" enforcement by prohibiting warrantless automobile searches, and the resulting Conference Report that prohibited warrantless search of a "private dwelling" but allowed one of an "automobile or vehicle of transportation" when it is "not malicious or without probable cause"). As such, the automobile search exception was the product of both a Constitutional amendment and Congressional deliberation about how that amendment should be enforced. Query, then, whether it was inevitable that the exception would survive repeal of the amendment—and what it means that it has.
151. *Id.* at 147.
152. *Id.* at 149.
153. *Carroll*, 267 U.S. at 149.
154. *Id.* at 284 (quoting Boyd v. United States, 116 U.S. 616, 623 (1886)).
155. *See supra* notes 102–104 and accompanying text.

The *Carroll* Court next buttressed its logic with similar provisions in related laws passed in 1790, 1793, and 1799, describing each as passed "contemporaneously with the adoption of the Fourth Amendment," despite the decade that passed between that event and the passage of the last law.[156] Then it walked through similar provisions in statutes from 1815, 1816, 1865, and 1866, noting that none "has ever been attacked as unconstitutional," and that one was "treated as operative" by the Court.[157] Still further afield from the Founding, it referred to statutes allowing warrantless search and seizure on Indian territory (1820, 1834, and 1917) and in the Alaskan territory (1899).[158] The principle it drew from this "somewhat extended reference" to statutes "practically since the beginning of government" is the "necessary difference" between searches of structures and mobile property that "can be quickly moved."[159] But once again, the court extrapolated from statutes involving customs contraband and ships at a port of entry to make a broad conclusion about exigent circumstances more generally. It did not do original historical work to determine, for example, how contraband concealed in a saddlebag or on a buggy would have been treated in the Founding era. That makes sense as a matter of common law judging, but it is not in keeping with the Court's traditionalist approach.

From there, the opinion took an outright consequentialist turn. The Court distinguished the "right to free passage without interruption or search" on highways, unlike national borders, but concluded all that is necessary to overcome that right it is probable cause.[160] The Court looked to Congress's intent to thwart bootlegging by authorizing searches on probable cause in determining that such searches are reasonable.[161] Finally, the Court turned briefly to the common law to resolve a secondary issue: whether a seizure is limited by the common law tradition that one may only be arrested for a misdemeanor if it was committed in the officer's presence. The Court looked to its own precedent from 1885 and 1900, a treatise on English law, and an 1850 case from the Massachusetts Supreme Court before dismissing the argument on the ground that arrest followed discovery of contraband (which was found during the search and seizure justified by probable cause). It called this conclusion "a wise one because it leaves the rule one which is easily applied and understood and is uniform."[162] In this regard, *Carroll* was ahead of its time.

Challenging the majority's narrative of the underlying facts, Justice McReynolds' dissent argued that the defendants were arrested "upon mere suspicion," with the search of the car coming only thereafter—and noted that such an action was not authorized by the Prohibition Act, a law that McReynolds said intended to avoid warrantless search and seizure at least for first and second offenses, which were misdemeanors.[163] Noting that criminal statutes are "always to be strictly construed," McReynolds took a textualist approach to distinguish the Prohibition Act from the statutes discussed by the Court, which

156. *Carroll*, 267 U.S. at 150−51.
157. *Id.* at 152.
158. *Id.* at 152−53.
159. *Id.* at 153.
160. *Id.* at 154.
161. *See Carroll*, 267 U.S. at 154−56.
162. *Id.* at 157–59.
163. *Id.* at 163−64 (McReynolds, J., dissenting).

had "definitely empowered officers to seize upon suspicion."[164] And he issued a principled warning much more in keeping with the traditionalist era than the Court's opinion: "If an officer, upon mere suspicion of a misdemeanor, may stop one on the public highway, take articles away from him and thereafter use them as evidence to convict him of crime, what becomes of the Fourth and Fifth Amendments?"[165] Though McReynolds was hardly an ally of Justice Brandeis,[166] he had nonetheless set the tone for the latter's vigorous dissent in *Olmstead v. United States*.

B. Olmstead v. United States *(1928)*

The classic Fourth Amendment case in the formalist era was decided in 1928. In *Olmstead v. United States*, the Court answered the question whether warrantless wiretaps of telephone lines, "made without trespass upon any property of the defendants," violated the Fourth Amendment.[167] While the opinion appealed to the "well-known historical purpose"[168] of the Amendment, its analysis is focused on precedential opinions (five of them the same as those cited in *Carroll*; the sixth a decision released shortly after it).[169] After criticizing "the striking outcome" of the "sweeping declaration" of the exclusionary rule create by *Weeks* and the "extreme limit" of Fourth Amendment protections established in *Gouled*,[170] the Court applied a literal interpretation of "[t]he amendment itself," concluding that the enumerated list of protected places "shows that the search is to be of material things"; the Court thus held that wiretapping "did not amount to a search or seizure within the meaning of the Fourth Amendment."[171]

This sharp turn toward literalism is the most striking thing about *Olmstead*. The Court stated without citation to any historical sources that the "well-known historical purpose" of the Fourth Amendment "was to prevent the use of governmental force to search a man's house, his person, his papers, and his effects, and to prevent their seizure against his will."[172] Focusing on the enumerated list allowed the Court to limit protections

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164. *Id.* at 166–67.

165. *Id.* at 169. Justice McReynolds was particularly exercised by the facts of the case, quoting the arresting officer's testimony in its entirety and expressing disbelief about the notion that an arrest two and a half months after the event giving rise to suspicion could amount to probable cause: "Has it come about that merely because a man once agreed to deliver whisky, but did not, he may be arrested whenever thereafter he ventures to drive an automobile on the road to Detroit!" *Id.* at 174. Though Justice Scalia speculated in 2013 that he may someday be regarded as "the Justice Sutherland of the late-twentieth and early-21st century," Senior, *supra* note 31, here one can see some overlap with McReynolds.

166. *See* Adam Liptak, *Stevens, the Only Protestant on the Supreme Court*, N.Y. TIMES (Apr. 10, 2010), https://nyti.ms/2FvI7Ca (repeating the story, apocryphal story, of McReynolds' refusal to sit next to Brandeis for the Court's 1924 portrait).

167. 277 U.S. 438, 455−57 (1928) (explaining how a series of taps collected evidence disclosing "a conspiracy of amazing magnitude"), *overruled in part by* Katz v. United States, 389 U.S. 347 (1967).

168. *Id.* at 463 (doing no historical work to support its claim).

169. *Id.* at 458−62 (discussing *Boyd*, *Weeks*, *Silverthorne Lumber*, *Amos*, *Gouled*, and Agnello v. United States, 269 U.S. 20 (1925)). The *Olmstead* Court's discussion and quotation of *Boyd* focused on the sections of that opinion devoted to statutory interpretation of the 1874 act with regard to the Fifth Amendment, not the sections discussing Founding-era history or its common law antecedents. *See id.* at 458−59.

170. *Id.* at 462−64.

171. *Id.* at 464, 466.

172. *Olmstead*, 277 U.S. at 463. Note that the language again is tinged with the threat of violence—use of force against a citizen's will. That said, the closest the Court comes to considering whether this is in fact true is

to "material things," and thereby distinguish even the action in *Gouled* (which involved "actual entrance" and "taking away of something tangible") from a wiretap.[173] More dubiously, the Court additionally distinguished the sealed letters in *Ex Parte Jackson* in part on the ground that the government holds a monopoly on the carriage of letters, but "takes no such care of telegraph or telephone messages" carried by private companies.[174] Quoting *Carroll*'s statement that "the Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted,"[175] the Court held that even liberal construction "cannot justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight."[176] A person making telephone calls, the Court said, "intends to project his voice to those quite outside" his house; while "Congress may, of course, protect the secrecy" of such calls, for the Court to do so would be to adopt "an enlarged and unusual meaning" for the Fourth Amendment.[177]

Almost as striking as the majority's literalist approach is the amount of the opinion devoted to a direct attack on *Weeks*, described as "perhaps the most important" of the precedent cited.[178] And the one case it added to the five cited in *Carroll* was *Agnello v. United States*, in which the Court applied the exclusionary rule to overturn a conviction based on the use of unconstitutionally-seized drug contraband as evidence at trial.[179] Together, this suggests that much of what was at work here was the Court's horror that this carefully-collected evidence would go to waste—a strikingly consequentialist factor for a formalist Court to consider.

The sole place the Court considered traditional common law rather than its own precedent was with regard to *Weeks*. The Court argued that *Weeks* was in contrast to "ordinary common-law rules," which held that, "if the tendered evidence was pertinent, the method of obtaining it was unimportant."[180] This difference was used to reject the petitioner's fallback argument that the evidence should be excluded on the grounds that it was collected illegally: "The *Weeks* Case announced an exception to the commonlaw rule" only for purposes of evidence collected unconstitutionally; in cases of routine illegality, the common law rule must still apply.[181] Once again, the Court turned consequentialist,

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in reference to precedent, not Founding-era history:

> Neither the cases we have cited nor any of the many federal decisions brought to our attention hold the Fourth Amendment to have been violated as against a defendant, unless there has been an official search and seizure of his person or such a seizure of his papers or his tangible material effects or an actual physical invasion of his house 'or curtilage' for the purpose of making a seizure.

Id. at 466.

173. *Id.* at 463–64.

174. *Id.* at 464.

175. *Id.* at 465 (quoting *Carroll*, 267 U.S. at 149).

176. *Id.* at 465–66.

177. *Olmstead*, 277 U.S. at 465–66.

178. *See id*. at 460.

179. Agnello v. United States, 269 U.S. 20 (1925) (relying on *Boyd*, *Weeks*, *Silverthorne Lumber*, and *Gouled*, while distinguishing *Carroll* because the contraband at issue in *Agnello* was seized from a home, not a vehicle).

180. *Olmstead*, 277 U.S. at 462–63 (citing the same 1841 state law case as *Boyd* had to support the view that "the only remedy open to a defendant whose rights under a state constitutional equivalent of the Fourth Amendment had been invaded was by suit and judgment for damages," and *Entick*).

181. *Id.* at 467 (citing state law cases and a treatise in support).

worrying that "[a] standard which would forbid the reception of evidence, if obtained by other than nice ethical conduct by government officials, would make society suffer and give criminals greater immunity than has been known heretofore."[182]

In stark contrast to the Court's approach stands Justice Brandeis' well-known dissent, focused on the principle that "the right to be let alone" is "the right most valued by civilized men."[183] Brandeis' dissent presciently argued that the Court's literalism would allow new technology to erode Fourth Amendment protections.[184] To Brandeis, the historical purpose of the Amendment was not merely to prevent physical intrusion into a tangible space or physical violence against a person or their property, but rather to address the broader evil of government intrusion. In the Founding era, Brandeis wrote, "[f]orce and violence were then the only means known to man by which a government could directly effect self-incrimination"; the enumerated list was thus the Founders' manifestation of an aim to prevent that particular evil.[185] But in light of "subtler and more far-reaching means of invading privacy,"[186] it was important to "refuse[] to place an unduly literal construction" on the Fourth Amendment—as *Boyd* had illustrated.[187] This application of *Boyd* seems very familiar to the modern reader, but is quite different from the Court's use of the case for its statutory interpretation of the 1874 customs act at issue.[188] Brandeis marshaled a litany of other authorities to support this view, including both precedent[189] and Founding-era history and its common law antecedents.[190]

Just as the Court in *Weeks* had concluded that "the protection of the 4th Amendment . . . is of no value" without the exclusionary rule,[191] and Justice McReynolds had worried in dissent about "what becomes of the Fourth and Fifth Amendments" in the aftermath of the *Carroll* rule,[192] for Justice Brandeis, "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."[193] Thus—although the *Olmstead* Court criticized

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182. *Id.* at 468.

183. *Id.* at 478 (Brandeis, J., dissenting). While Brandeis expressed this thought most famously, Justice Field had made a similar case when he was a district court judge with language that eventually made its way into a Supreme Court decision: "Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all other rights would lose half their value." *In re* Pac. Ry. Comm'n, 32 F. 241, 250 (C.C.N.D. Cal. 1887), quoted in Interstate Commerce Comm'n v. Brimson, 154 U.S. 447, 479 (1894).

184. *Olmstead*, 277 U.S. at 474 (Bradley, J., dissenting).

185. *Id.* at 473. Brandeis' understanding of the right dates at least as far back as an 1890 law review article he published with Samuel Warren advocating for a common law right to privacy in tort. Samuel D. Warren & Louis D. Brandeis, *Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890) (describing the term "property" as comprising "intangible, as well as tangible" things).

186. *Olmstead*, 277 U.S. at 473 (Brandeis, J., dissenting).

187. *Id.* at 473–76 (quoting the "not the breaking of his doors . . . but it is the invasion of his indefeasible right of personal security, personal liberty and private property" passage from Boyd v. United States, 116 U.S. 616, 630 (1886)).

188. *See id*. at 458–59; *see also supra* note 169.

189. *See Olmstead*, 277 U.S. at 477–78 (citing *Ex Parte Jackson*, *Boyd*, *Weeks*, *Silverthorne Lumber*, *Gouled*, *Amos*, *Angello*, *Hale*, and *Carroll*, among others).

190. *Id.* at 474 (citing James Otis and Lord Camden).

191. Weeks v. United States, 232 U.S. 383, 393 (1914).

192. Carroll v. United States, 267 U.S. 132, 169 (1925) (McReynolds, J., dissenting).

193. *Olmstead*, 277 U.S. at 478.

Weeks for breaking with tradition by abandoning the common law—the real departure was in *Olmstead*, where the Court abandoned principle grounded in history for literalism grounded in precedent.

C. Goldman v. United States *(1942)*

Although *Olmstead* was controversial as soon as it was handed down, it survived for decades and was reaffirmed in a closely related case in 1942. In *Goldman v. United States*, the Court answered the question whether warrantless use of a "detectaphone" to "pick up and amplify" sound through the wall of an adjoining office in a multiunit building violated the Fourth Amendment.[194] The Court interpreted Section 605 of the 1934 Communications Act, which Congress passed in the aftermath of *Olmstead* to limit the use of evidence collected via warrantless wiretapping: because the microphone picked up the spoken words from next door, not from a telephone wire, the Act did not apply.[195] To resolve the constitutional issue, the Court straightforwardly applied *Olmstead*, providing little rationale for declining petitioners' invitation to distinguish or overrule that case, itself "the subject of prolonged consideration."[196]

While the Court in *Goldman* did no new historical research and the dissent only made passing references to it, the case is useful as the source of three types of evidence that belie any notion that *Olmstead* was noncontroversial.

The first is the fact that, six years after the decision was handed down (and little over a year into the Congress elected on Roosevelt's coattails), the 1934 Communications Act had limited the scope of what surveillance was permissible. Section 605 prohibited telecommunications company employees from divulging a communication to anyone other than its intended recipient absent a subpoena, and further provided that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person."[197] In 1937, the Supreme Court interpreted that provision to prohibit federal agents from testifying in court about intercepted communications, even though other bills intended to prohibit warrantless wiretapping altogether had not passed.[198] The Court found no relevant legislative history to determine Congressional intent, but thought it plausible that "[t]he same considerations may well have moved the Congress to adopt section 605 as evoked the guaranty against practices and procedures violative of privacy, embodied in the Fourth and Fifth Amendments of the Constitution"[199]—a connection that provided the rationale for *Katz v. United States* to overturn *Olmstead* three decades later. The decision was issued over a dissent by Justices McReynolds and Sutherland, who were in the *Olmstead* majority and took a similarly consequentialist approach here, worrying that "the necessity of public protection against

194. 316 U.S. 129, 131–32 (1942).
195. *Id.* at 133–34.
196. *Id.* at 135.
197. 47 U.S.C. § 605(a) (1934).
198. Nadrone v. United States, 302 U.S. 379, 382 (1937).
199. *Id.* at 383.

crime is being submerged by an overflow of sentimentality."[200]

The second source making clear the controversial nature of *Olmstead* is a passage at the end of *Goldman*:

> That case was the subject of prolonged consideration by this court. The views of the court, and of the dissenting justices, were expressed clearly and at length. To rehearse and reappraise the arguments pro and con, and the conflicting views exhibited in the opinions, would serve no good purpose. Nothing now can be profitably added to what was there said.[201]

That made quick work of the suggestion that *Olmstead* be overturned.

The third source illustrating the uneasiness about *Olmstead* are the two dissents in the case. First, Justices Stone and Frankfurter wrote that they "should have been happy to join" a majority in overturning *Olmstead*, but, having failed to achieve one, saw no reason to repeat the dissenting views from that case.[202] Second, Justice Murphy (citing *Entick v. Carrington* alongside *Boyd* and Brandeis's dissent in *Olmstead*) conceded that "a literal construction" of the Amendment might not cover the case, but argued that "it has not been the rule or practice of this Court to permit the scope and operation of broad principles ordained by the Constitution to be restricted, by a literal reading of its provisions, to those evils and phenomena that were contemporary with its framing."[203] Taking the same sort of original intent approach as the *Boyd* Court, Murphy compared "the conditions of modern life" to those of the Founding era and concluded that it was the Court's "duty" to ensure the Fourth Amendment continued to "serve the needs and manners of each succeeding generation."[204]

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The key cases of the formalist era—*Carroll*, *Olmstead*, and *Goldman*—established a literalist interpretation of the Fourth Amendment. But each saw vigorous dissents; the first two at a time when dissent was relatively rare. Each of those dissents applied Founding-era principles to attack the Court's decisions, showing that the formalists' crabbed reading of the Fourth Amendment was controversial even at the time. And, though *Carroll* survives in a different form to this day, *Olmstead* and *Goldman* would soon be overturned.

V. REALIST REACTION

Castigated by originalists for lack of faithfulness to the original text of the Constitution,[205] the Warren Court nonetheless halted the literalist erosion of the privacy right that resulted from strict adherence to the plain text of the Amendment's enumerated places clause. Although the *Goldman* Court announced fourteen years after *Olmstead* that there was "no good purpose" to revisiting the case, it would take less than two decades for

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200. *Id.* at 387 (Sutherland, J., dissenting).
201. 316 U.S. at 136.
202. *Id.* at 136 (Frankfurter, J. & Stone, C.J., concurring).
203. *Id.* at 138 (Murphy, J., dissenting).
204. *Id.* at 138–39 ("Surely the spirit motivating the framers of that Amendment would abhor these new devices no less.").
205. *See supra* Part I.A.

the Court to obliquely do just that. *Katz v. United States*, the key Warren Court decision that created the modern doctrine of the "reasonable expectation of privacy," cited two recent cases (*Silverman v. United States* and *Warden, Md. Penitentiary v. Hayden*) as evidence that the Court had moved so far away from the literalism of *Olmstead* that it was no longer controlling. In so doing, the Court arguably acted in a manner more in keeping with the original intent approach of the *Boyd* Court than it had done in the formalist decisions above.

A. Silverman v. United States *(1961)*

The first key Warren Court case to draw a line against the formalist position came in 1961. In *Silverman v. United States*, the Court answered the question whether warrantless use of a spike microphone pressed against a house's heating duct violated the Fourth Amendment.[206] The Court self-consciously sought to avoid "the large questions" about the Constitutional implications of the "frightening paraphernalia which the vaunted marvels of an electronic age may visit upon human society."[207] The Court distinguished *Olmstead* and *Goldman*, where "the eavesdropping had not been accomplished by means of an unauthorized physical encroachment within a constitutionally protected area."[208] Because this case was "based upon the reality of an actual intrusion into a constitutionally protected area," that is, a trespass, the surveillance violated the Fourth Amendment.[209]

At a glance, *Silverman* seems to have followed a property-based rationale. But the reality—as it was in *Boyd*—is more complex. The Court stated outright that "Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort or real property law,"[210] citing *Hester v. United States*, which found no Fourth Amendment violation for a technical trespass onto open fields,[211] *On Lee v. United States*, which found no violation when a defendant invited an undercover agent onto his property, even if it was a technical trespass ab initio,[212] and a series of cases in which defendants were found to have Fourth Amendment rights in other people's property.[213] Adding to this confusion, Justices Clark and Whittaker concurred on the grounds that the physical penetration "constituted sufficient trespass" to distinguish earlier decisions,[214] while Justice Douglas concurred on the prescient grounds that "the privacy of the home was invaded," with physical penetration "beside the point."[215]

Because the idea of a "constitutionally protected area" based vaguely in a property

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206. 365 U.S. 505, 506–07 (1961).
207. *Id.* at 509.
208. *Id.* at 510.
209. *Id.* at 512.
210. *Id.* at 511. *See also id.* at 512 ("But decision here does not turn upon the technicality of a trespass upon a party wall as a matter of local law.").
211. 265 U.S. 57, 59 (1924).
212. 343 U.S. 747 (1952) (doubting that "the niceties of tort law initiated almost two and a half centuries ago . . . are of much aid in determining rights under the Fourth Amendment").
213. Jones v. United States, 362 U.S. 257 (1960); United States v. Jeffers, 342 U.S. 48 (1951); McDonald v. United States, 335 US. 451 (1948).
214. *Silverman*, 365 U.S. at 512 (Clark, J., concurring).
215. *Id.* at 512 (Douglas, J., concurring).

right was set aside in *Katz*,[216] it is important to note that *Silverman* marked the first time it was used in the Court's Fourth Amendment jurisprudence—all four previous uses, two by the Court and two in dissents, were in the context of the First Amendment.[217] Moreover, it was used only four times with regard to the Fourth Amendment before *Katz* moved away from it—and two of those four uses dismissed petitioners' arguments that it applied.[218]

The takeaway from *Silverman* is that it was quite self-consciously a "this far and no farther"[219] decision that gave at least lip service to the "long history" of the Fourth Amendment. The Court cited *Entick* for the principle that the "very core" of the Fourth Amendment is the "right of a man to retreat into his own home and there be free from unreasonable governmental intrusion," and referred to *Boyd*'s motto of *obsta principiis*.[220] And it closed with the statement that, while the Court would not re-examine *Goldman*, it would "decline to go beyond it, by even a fraction of an inch."[221] Thus, even though *Katz* repudiated the *Silverman* Court's use of the phrase "constitutionally protected area," the case can be seen as a prototype of Justice Scalia's property-plus test—one that kept an easy case easy by concluding that a trespass had occurred.

B. Warden, Md. Penitentiary v. Hayden *(1967)*

The second key case of the realist era came in 1967, the same year as *Katz*. In *Warden, Md. Penitentiary v. Hayden*, the Court reconsidered—and eliminated—the "mere evidence" rule.[222] Rather than revisit primary sources, the Court cited sections from three cases from 1959 to 1965 to show that it had "examined on many occasions the history and purposes of the amendment,"[223] quoted *Boyd* in describing the Fourth Amendment as "intended to protect against invasions of 'the sanctity of a man's home and the privacies of life,'"[224] and referred to the text of the Amendment (focusing on the "right of the people to be secure").[225] These citations illustrate that the Warren Court's actions in this area did not occur without a look at Founding-era sources and their common law antecedents. Next, the Court walked through the erosion of property interests in Fourth Amendment

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216. *See infra* Part V.C.

217. *See* Uphaus v. Wyman, 360 U.S. 72, 100 (1959) (Brennan, J., dissenting); Barenblatt v. United States, 360 U.S. 109, 112 (1959); Kovacs v. Cooper, 336 U.S. 77, 104 (1949) (Black, J., dissenting); Carpenters & Joiners Union of Am., Local No. 213 v. Ritter's Café, 315 U.S. 722, 734 (1942).

218. *See* Berger v. New York, 388 U.S. 41, 44 (1967); Hoffa v. United States, 385 U.S. 293, 301 (1966); Lopez v. United States, 373 U.S. 427, 439 (1963); Lanza v. New York, 370 U.S. 139, 142 (1962).

219. *Cf.* Job 38:11.

220. *Silverman*, 365 U.S. at 511–12.

221. *Id.* at 512.

222. 387 U.S. 294, 295–96 (1967).

223. *Id.* at 301 (citing Stanford v. Texas, 379 U.S. 476, 481–85 (1965); Marcus v. Search Warrants of Prop. at 104 E. Tenth St., Kansas City, Mo., 367 U.S. 717, 724–29 (1961); Frank v. Maryland, 359 U.S. 360, 362–65 (1959)). The first two cases looked at length to English and colonial history—including, of course, the Wilkes cases—to review how the amendment interacted with the principle of press freedom. The third depicted the amendment's protections against official invasion as focused on privacy and self-protection. The fact that the Court did extensive historical research to justify the conclusion that the amendment was grounded in the right to privacy refutes the notion that the legal realists were purely consequentialist.

224. *Warden*, 387 U.S. at 301 (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).

225. *Id.* at 301–02.

jurisprudence,[226] and concluded with the consequentialist take that the transition to a privacy-based rule and the development of the exclusionary rule provided a "subtle interplay of substantive and procedural reform" that sufficed to protect the interests that the mere evidence rule once did.[227]

Hayden was thus the penultimate case in the transition to a privacy-centered Fourth Amendment regime. The Court stated that it had already "recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and ha[d] increasingly discarded fictional and procedural barriers rested on property concepts."[228] Similarly, the "remedial structure" had moved from a tort-based system to the exclusionary rule of *Weeks* (though the Court said that decision "was arguably explainable in property terms") before it "escaped the bounds of common law property limitations" in *Silverthorne Lumber* and *Gouled*[229]—both cases from the traditionalist era. While *Hayden* was straightforward that the Court had moved away from a property-based common law regime to a privacy-based structure, it did so with citation to a long series of cases that had walked through Founding-era intent in reaching the conclusion that privacy was at the core of the Fourth Amendment.

C. Katz v. United States *(1967)*

The best-known decision of the realist era came just months later. In *Katz v. United States*, the Court answered the question whether the warrantless recording of an individual's phone call with a microphone on top of an enclosed public telephone booth violated the Fourth Amendment.[230] The Court rejected the petitioner's framing of this question on two grounds—first, for building an inquiry around whether a particular physical space was a "constitutionally protected area," and second, for suggesting that the Amendment's protections could be "translated into a general constitutional 'right to privacy.'"[231] Then, in one of the era's classically consequentialist decisions,[232] the Court overturned *Olmstead* to hold that the Fourth Amendment did prohibit such surveillance, because it "protects people, not places."[233]

Katz is often treated as revolutionary not only because it overturned *Olmstead*, but also because, rather than conducting an historical inquiry, the Court looked to practicalities: the microphone had "violated the privacy upon which [Katz] justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment."[234] Justice Harlan, writing in concurrence, expounded the formulation the Court would use going forward: a "reasonable expectation

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226. *Id.* at 304–06 (discussing the "shift in emphasis from property to privacy" that started as early as *Silverthorne Lumber* and *Gouled*).

227. *Id.* at 305–10.

228. *Warden*, 387 U.S. at 304.

229. *Id.*

230. 389 U.S. 347, 348 (1967).

231. *Id.* at 350.

232. *See* David A. Sklansky, *Back to the Future:* Kyllo*,* Katz*, and Common Law*, 72 MISS. L.J. 143, 153–55 (2002) (arguing *Katz* and *Terry v. Ohio* took an "ahistorical approach" to the Fourth Amendment).

233. *Katz*, 389 U.S. at 351.

234. *Id.*

of privacy" (REP) test that looked for a subjective expectation of privacy that society was "prepared to recognize as 'reasonable.'"[235] That standard effectively limited the revolutionary nature of *Katz*, because it meant that physical property and space would remain at the forefront of Fourth Amendment jurisprudence—it quickly became evident that the REP standard often requires an expectation to be "backed by a right to exclude borrowed from real property law" to be considered reasonable.[236]

This tether to property law affirms the theory that *Katz* is better understood not as a revolution in Fourth Amendment law, but rather the culmination of a decades-long reaction to the formalist literalism of *Olmstead.* Certainly that is how the *Katz* Court saw its actions: it stated that its decisions since *Olmstead* and *Goldman* had effectively eroded what it termed "the 'trespass' doctrine" such that it was no longer controlling.[237] As shown above, those cases had discussed at length historical considerations and Founding-era principles.[238] Moreover, those cases were themselves echoes of the dissents from *Olmstead* and *Goldman*, which relied in part on similar sources.[239] On this theory, it is therefore *Olmstead* that is the outlier, not *Katz*—regardless of whether the latter explicitly relied on a historical foundation. If it is true that *Katz* was eliminating recent common law precedent that had fundamentally eroded rights the Founders would have intended to protect, it seems sufficient to rely implicitly on prior work.

Thus, while *Silverman* had declined to address the "large questions" posed by the "frightening paraphernalia" of the modern age,[240] *Katz* took them head on. In contrast to *Boyd*, which dealt with material (papers) that existed at the time of the Founding, or *Carroll*, which dealt with a mode of transport (the automobile) analogous to those of the Founding era, *Katz* finally grappled with revolutionary telecommunications technology with severe privacy implications. It certainly seems that the *Katz* Court saw itself as halting an ongoing erosion of rights in keeping with the Founders' intent. Describing the *Olmstead* Court as "closely divided" and calling its trespass-based interpretation of the Fourth Amendment a "narrow view,"[241] the *Katz* Court instead stated an assumption that "searches conducted outside the judicial process" are "per se unreasonable," subject only to "a few specifically established and well-delineated exceptions," such as the doctrines of

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235. *Id.* at 361 (Harlan, J., concurring) (noting, crucially, that determining *what* protection the Fourth Amendment offers people "generally . . . requires reference to a 'place'").

236. Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 809–12, 817–18 (2004) (arguing that *Katz* was less revolutionary than commonly thought, in keeping with the Court's norm of deference to statute with regard to new technologies); *see also* Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476 (2011). Notably, the "constitutionally protected area" term was not eliminated from the Court's Fourth Amendment jurisprudence by *Katz*. *See* United States v. Miller, 425 U.S. 435, 440 (1976) (conflating the phrase with a "zone of privacy").

237. *Katz*, 389 U.S. at 353 (citing *Silverman* and *Hayden*). Crucially, this suggests that the *Katz* Court saw *Olmstead* and *Goldman*—not *Boyd*—as creating the "trespass" doctrine.

238. *See supra* notes 210–213 and accompanying text on *Silverman*; *supra* notes 223–226 and accompanying text on *Hayden*.

239. *See supra* notes 183–190 and accompanying text on *Olmstead*; *see supra* notes 203–204 and accompanying text on *Goldman*.

240. Silverman v. United States, 365 U.S. 505, 509 (1961).

241. *Katz*, 389 U.S. at 353–54.

search incident to arrest, hot pursuit, and consent.[242] The Court depicted the government as "urg[ing] the creation of a new exception" for surveillance of a phone booth, and it saw no reason to do so.[243]

Further suggesting that *Katz* cannot be fairly criticized for its failure to explicitly rely on historical sources is the fact that the dissent ignored them too. Justice Black argued from the point of view of a textualist rather than what we would today call an originalist, arguing that "the words of the Amendment will [not] bear the meaning given to them by" the Court because the enumerated list of protected places describes only tangible things.[244] The second half of his dissent focused on *Olmstead* and the subsequent cases that the Court had said eroded that holding, redefining them as holding that the Fourth Amendment did not cover eavesdropping, rather than holding that the Fourth Amendment did not apply absent a trespass. But Justice Black did not go back to *Boyd*, let alone to Founding-era sources.[245]

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Though *Katz* became the touchstone of Fourth Amendment law, it is notable that the case itself pointed to other recent decisions as crucial in shoring up the erosion that resulted from the turn toward literalism in *Carroll* and *Olmstead*. It is particularly of note that *Silverman* appears as almost a prototype of the property-plus synthesis Justice Scalia would develop half a century later. Nonetheless, in light of the manner in which it incorporated the underlying assumptions of property law, the *Katz* reasonable expectation of privacy test proved flexible enough to persist for decades.

VI. ORIGINALIST RESTORATION

Upon ascending to the Supreme Court, Justice Scalia sought to apply his principles of textualism and originalism to the field of Fourth Amendment law. And, indeed, one of his most significant accomplishment was to re-anchor the Court's Fourth Amendment theory, if not its doctrine, to the Founding era.[246] Over the span of two decades, in *California v. Hodari D.*, *Minnesota v. Carter*, and *Wyoming v. Houghton*, Scalia rhetorically shifted the conversation to the eighteenth century, taking what he termed an original public meaning approach to find what was protected in the Founding era. But the keystone of that success was his creation of a "property-plus" synthesis in *Kyllo v. United States*, *Jones v. United States*, and *Florida v. Jardines*. That synthesis was designed as a bulwark against erosion of the right—and thus is not so different from *Boyd*, or even *Silverman*.

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242. *Id.* at 357–58.

243. *Id.* at 358.

244. *Id.* at 364 (Black, J., dissenting). Though writing in dissent, Black admitted that *Katz* was not a revolution but rather the final point on a trend line: "With this decision the Court has completed, I hope, its rewriting of the Fourth Amendment, which started only recently when the Court began referring incessantly to the Fourth Amendment not so much as a law against unreasonable searches and seizures as one to protect an individual's privacy." *Id.* at 373.

245. *Id.* at 367–72.

246. *See* Timothy C. MacDonnell, *Justice Scalia's Fourth Amendment: Text, Context, Clarity, and Occasional Faint-Hearted Originalism*, 3 VA. J. CRIM. L. 175, 232–34 (2015).

A. California v. Hodari D. *(1991)*

Justice Scalia began building the foundation for the property-plus test five years into his tenure, in 1991.[247] In *California v. Hodari D.*, the Court answered the question whether a show of authority (police calling for a fleeing suspect to halt) is a Fourth Amendment seizure when the suspect does not yield.[248] Writing for the Court, Scalia applied a relatively early version of his trademark textualism. He cited dictionaries from 1828, 1856, and 1981; cases from 1825, 1862, 1870, and 1874; and treatises from 1930 and 1934 to establish that the word "seizure" has meant, "[f]rom the time of the founding to the present," an act of "taking possession,"[249] and conclude that "the language of the Fourth Amendment" does not "sustain [the defendant's] contention" that a show of authority is a seizure.[250] After doing this work, Scalia took care to address the Court's more recent precedent on point.[251]

While self-consciously purporting to be a sea change, Scalia's review of history was neither rigorous nor particularly relevant to establishing what the text of the Fourth Amendment meant in the Founding era. The oldest dictionary he cited was published nearly four decades after the Fourth Amendment was ratified, so too his case citations. He offered no real justification for examining this hodgepodge of sources. Though writing a year after Cuddihy's dissertation, he did not cite to it. And his arguments under the plain meaning of the amendment and modern precedent do just as much work—if not more.

Justice Stevens argued in vigorous dissent that "the major premise underpinning the majority's entire analysis" is "seriously flawed" because *Katz* and *Terry v. Ohio* took an "expansive approach" that "unequivocally reject[ed] the notion that the common law of arrest defines the limits of the term 'seizure.'"[252] Writing as a legal realist, Stevens reasoned from the Court's most recent precedent and worried that the consequences of the Court's "literal-minded" holding would threaten "values that are fundamental and enduring."[253] Scalia responded to these critiques in footnotes, arguing that *Terry* only applied to what standard of suspicion was required to justify a clear-cut physical seizure

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247. Two of Scalia's earlier opinions suggested unease with *Katz* but did so only obliquely. In *Arizona v. Hicks*, Scalia wrote for the Court in holding that physically moving an object in an individual's home exceeds the scope of the plain view doctrine. 480 U.S. 321, 325 (1987). "A search is a search," Scalia wrote, acknowledging that "the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all." *Id.* at 329. And in *O'Connor v. Ortega*, Scalia concurred in the judgment but disagreed with the plurality's application of the *Katz* test. 480 U.S. 709, 731 (1987) (Scalia, J., concurring in the judgment) ("Where, for example, a fireman enters a private dwelling in response to an alarm, we do not ask whether the occupant has a reasonable expectation of privacy (and hence Fourth Amendment protection) vis-à-vis firemen, but rather whether-given the fact that the Fourth Amendment covers private dwellings-intrusion for the purpose of extinguishing a fire is reasonable."). Curiously, writing for the Court in another 1987 opinion, Scalia rejected a "procrustean proposal" that defendants had attempted to root in the common law—explaining that the Court has "never suggested that the precise contours of official immunity can and should be slavishly derived from the often arcane rules of the common law." Anderson v. Creighton, 483 U.S. 635, 645 (1987).

248. 499 U.S. 621, 626 (1991) (deciding the issue in order to determine whether drugs dropped by a suspect running from police were admissible evidence; the wrinkle being that the officer did not have probable cause to arrest the suspect until he dropped them).

249. *Id.* at 624–25.

250. *Id.* at 626.

251. *Id.* at 627–29 (citing, e.g., United States v. Mendenhall, 446 U.S. 544 (1980)).

252. *Id.* at 637 (Stevens, J., dissenting).

253. *Hodari D.*, 499 U.S. at 646–48.

and *Katz* only applied to expand what *items* can be seized (but declining to attack either directly),[254] and complaining that his usage of the common law was intended to "expand rather than contract" the meaning of seizure—that is, Scalia (like the Court in *Boyd*) saw himself as constructing a bulwark against erosion of the right.[255] But Scalia did not seriously challenge the notion that he should not be consulting common law sources to do so. Nor, given that he fully justified the holding with his discussion of *Mendenhall*, did he have to. If anything, the dissent gave the opinion more credit for taking a textualist approach than it deserved.

B. Minnesota v. Carter *(1998)*

Seven years later, Justice Scalia (joined by Justice Thomas) took the opportunity to write separately in a Fourth Amendment case to complain that the Court's recent case law "gives short shrift to the text of the Fourth Amendment."[256] In *Minnesota v. Carter*, the Court answered the question whether a defendant had a reasonable expectation of privacy in another person's apartment when he was only there for the purpose of packaging cocaine. The Court held that he did not.[257] Scalia agreed, but saw fit to answer a different question: "whether a search or seizure covered by the Fourth Amendment *has occurred*."[258] Consulting a range of sources from *Entick* through the Founding era, he concluded that it had not, because those sources confirm the "obvious meaning" of the amendment's use of the word "their," which is to protect an individual only "in *his own* person, house, papers, and effects."[259]

Scalia's historical research and application in *Carter* was more rigorous than it had been in *Hodari D.* (although Scalia still ignored Cuddihy—even though *Carter* came three years after Justice O'Connor had approvingly cited the work). Scalia began with four state constitutions that contained language similar to the Fourth Amendment, noting that two of them intentionally avoided any ambiguity about whose houses were covered, and that two state ratification conventions sought an amendment with protection specific to an individual's property.[260] He affirmed this understanding with a line of common law cases from both sides of the Atlantic, foregoing *Entick* for a line of cases dating back to 1604 that establish the "home is one's castle" maxim, and discussing an 1816 Massachusetts state supreme court case which he describes as the "leading" United States case.[261]

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254. *Id*. at 627 n.3.

255. *Id.* at 626 n.2; *see* MacDonnell, *supra* note 2466, at 191 ("Once the logical application of a Court-made test outpaces the [constitutional] text it is meant to implement, the test must yield to the actual words of the Amendment.").

256. Minnesota v. Carter, 525 U.S. 83, 91 (1998) (Scalia, J., concurring).

257. *Id.* at 85.

258. *Id.* at 92 (Scalia, J., concurring).

259. *Id.*

260. *Id.* at 93–94 (eliding the fact that one could apply a different canon of construction to conclude that the broader language was intentional merely by stating that there was "no indication anyone believed" that to be the case).

261. *Carter*, 525 U.S. at 94–95 (citing Oystead v. Shed, 13 Mass. 520 (1816) for the premise that the Fourth Amendment does not protect "only the Lord of the Manor who holds his estate in fee simple," but includes mortgagees, boarders, and so on—but not strangers or visitors taking refuge; query whether this really resolves the question whether a business guest is protected).

In contrast to this "clear text and 4-century-old tradition," Scalia wrote, stood "the notoriously unhelpful test" of *Katz*, which is "self-indulgent" and, when applied to determine whether a search has occurred, "has no plausible foundation in the text of the Fourth Amendment."[262] The dissent's rejoinder was that Scalia's "lively" concurrence "vividly recalls" Justice Black's *Katz* dissent, rather than the "majority opinion in *Katz*, which *stare decisis* and reason require [the Court] to follow."[263]

C. Wyoming v. Houghton *(1999)*

Justice Scalia's first move pushing the Court toward Fourth Amendment originalism came one year later. In *Wyoming v. Houghton*, the Court answered the question whether probable cause may justify the warrantless search of a car and containers within it, even if those container belong to a passenger.[264] To answer that question in the affirmative,[265] Scalia (writing for the Court) said that the Court "inquire[s] first whether the action was regarded as an unlawful search or seizure under the common law when the [Fourth] Amendment was framed."[266] This was a remarkable move that echoed the lip service *Carroll* had given to the same notion, but was an approach that in fact had long since been abandoned by the Court.[267] For support, Scalia cited a 1995 opinion by Justice Thomas saying the Court "may be guided by the meaning ascribed to [a term] by the Framers of the Amendment," and his own 1991 opinion in *Hodari D*.[268]

Two other things stand out about *Houghton*. First, in performing his historical analysis, Scalia did not cite a single historical source. Instead of eighteenth-century common law, he cited the work done already by the Court in *Boyd*, in *Carroll* and, at the most length, in a 1982 case, *United States v. Ross*, that itself relied on *Carroll*—essentially reasoning in the manner of a common law judge.[269] While Scalia's announced intention to begin with history was new, the nature of the work was not: it has much more in common with what the Court had done in case after case over two centuries (indeed, *Ross* itself was written by Justice Stevens). And second, despite the fact that Scalia stressed the need to "inquire first" into history, he actually devoted slightly more words to interest-balancing than to historical analysis.[270] Just as he did in *Hodari D.*, Scalia took a belt-and-suspenders approach to his analysis. Such an approach was necessary: Justice Breyer thought the

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262. *Id.* at 97–98.

263. *Id.* at 111 n.3 (Ginsburg, J., dissenting).

264. 526 U.S. 295, 297 (1999).

265. *Id.* at 307 (declining to replicate Scalia's *Carter* analysis of possible distinctions between whose property is protected by the Fourth Amendment).

266. *Id.* at 299.

267. *See supra* note 146 and accompanying text. The degree to which this is a departure should be clear from Justice Stevens' dissent in *Hodari D.*.

268. *Houghton*, 526 U.S. at 299 (citing Wilson v. Arkansas, 514 U.S. 927, 931 (1995) and *Hodari D.*, 499 U.S. at 624 (ignoring the fact that, as discussed in Part VI.A, *Hodari D.* itself did not cite Founding-era sources).

269. *Id.* at 300–01 (citing United States v. Ross, 456 U.S. 798, 806 (1982)). This matched the motivation of what Keith Whittington called the "old originalism," a theory developed in reaction to the Warren Court and those who would advocate for living constitutionalism. *See* Whittington, *New Originalism*, *supra* note 36, at 603–06. Perhaps all Scalia wanted at the time was a restoration of the *Boyd* model of judging. This approach is somewhat in keeping with the idea Scalia was a faint-hearted originalist who saw the limits of the theory.

270. *Houghton*, 526 U.S. at 300–02 (roughly 1,000 words including citations to history); *id.* at 303–06 (roughly 1,045 words including citations to cases applying balancing analysis).

originalist turn sufficiently troubling that he joined the Court but wrote separately to state that he did so only "with the understanding that history is meant to inform, but not automatically to determine, the answer to a Fourth Amendment question."[271]

D. Kyllo v. United States *(2001)*

Two years later, Justice Scalia wrote again for the Court, this time making strides toward a Fourth Amendment originalism acceptable to his fellow justices—albeit making some shaky claims in the process. In *Kyllo v. United States*, the Court answered the question whether the use of a heat-sensing thermal imaging device to detect heat levels within a defendant's home requires a warrant, even if done from a public street.[272] Citing *Boyd*'s lengthy quotations of *Entick* to establish that visual surveillance of a home is not protected, Scalia admitted it would be "foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology."[273] At least with regard to the home, he wrote—without citation to a single historical source—that "there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that exists, and that is acknowledged to be reasonable."[274] Prohibiting use of technology to reveal information that would otherwise be unobtainable without physical intrusion "assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted."[275] As in *Hodari D.*, Scalia saw himself as constructing a bulwark against erosion of the right.[276]

Kyllo may be seen as a triumph for Scalia in two senses: first, he found a way to get the Court to accept incorporation of Founding-era common law into its Fourth Amendment jurisprudence, thus re-rooting the amendment in the eighteenth century; and second, he did so in a way that advanced his favored theory of that history—one focused on property rights in general and the law of trespass in particular.

With regard to the first of these, Scalia was successful because he was able to create a synthesis approach that unified his preferred method with the rationale at the heart of *Katz*. In one way, this was a more sophisticated version of the belt-and-suspenders approach he took in *Houghton*. But unlike in *Houghton*, Scalia depicted the common law in the Founding era as a floor below which privacy may not erode, not a complete guide to modern protections (curiously, he did so once again without citation to a single historical source).[277] He moderated his criticism of *Katz*, saying that the test "has often been criticized as circular, and hence subjective and unpredictable,"[278] and embracing the fact

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271. *Id.* at 307 (Breyer, J., concurring). Academics at the time were similarly quite critical of Scalia's approach. *See, e.g.*, David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1813–14 (2000) (arguing that it is "unjustified" by either the text of the Amendment or the discernible intentions of its Framers).

272. 533 U.S. 27, 29 (2001).

273. *Id.* at 33–34.

274. *Id.*

275. *Id.*

276. *See supra* note 2555 and accompanying text.

277. Sklansky, *Back to the Future*, *supra* note 2322, at 182–84 (taking a more favorable view of Scalia's new tack); *see also* MacDonnell, *supra* note 247, at 243 (describing *Kyllo* as Scalia's compromise with Souter, Ginsberg, and Breyer—"three traditionally liberal justices").

278. *Kyllo*, 533 U.S. at 34 (citing a treatise, an article by Judge Posner, and his own concurrence in *Carter*).

that it had "rejected . . . a mechanical interpretation of the Fourth Amendment" to halt the encroachment of technology onto privacy rights.[279] Indeed, Scalia advanced a *Katz*-like concern about "what limits there are upon [the] power of technology to shrink the realm of guaranteed privacy."[280] *Katz* relied on case law to support the assumption that searches outside the judicial process were per se unreasonable, while Scalia explicitly said that he relies on Founding-era common law. But neither case cited historical sources, and both cases sought to ensure that the baseline of Fourth Amendment protections was not eroded by modern technology or police practice. This is a strange approach for a strong originalist to take, but defensible. At the same time, however, he did reintroduce the "constitutionally protected area" phrasing used in *Silverman* and abandoned in *Katz*.[281]

With regard to the second sense, Scalia opened with the claim that, "well into the 20th century, our Fourth Amendment jurisprudence was tied to common-law trespass."[282] As above, however, that version of events overstates reality—*Boyd* makes much of property rights, effectively as a floor, but it is really about the broader principle underlying the Fourth Amendment; *Hester*'s open fields doctrine similarly shows that the Fourth Amendment was *related* to common-law trespass, but not *tied* to it.[283] Not only that, but by citing *Goldman* and *Olmstead* to support his claim, Scalia singled out a brief literalist interregnum rather than the broader arc of the Court's jurisprudence. Despite his overbroad opening, however, what Scalia actually did with his opinion is very similar to what *Boyd* did: he created a floor (based in physical space and justified by property law) below which a "reasonable expectation" may not go, thereby building a bulwark against the possibility that the "circular" *Katz* test could erode Fourth Amendment rights in situations where an individual has lost a reason to expect privacy they once had.

E. United States v. Jones *(2012)*

Just over a decade later, in 2012, Justice Scalia had the chance to cement his property-rights baseline into the Court's Fourth Amendment test. In *United States v. Jones*, the Court answered the question whether attaching a GPS tracker to a vehicle without a warrant was a Fourth Amendment search.[284] Scalia briefly used *Entick* to argue that the "houses, papers, and effects" clause proves the primacy of property rights in the Founding era, though he otherwise relied on case citations rather than historical sources to how the Court has handled the issue over time.[285] Rather than making trespass the *exclusive* test, Scalia applied "an 18th-century guarantee against unreasonable searches" to ensure that the *Katz* REP test does not "eliminate[] rights that previously existed."[286] Scalia suggested that the two-tier check is the correct method because "[t]he *Katz* reasonable-expectation-

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279. *Id.* at 35.

280. *Id*. at 27, 34.

281. *Id.* at 34. *See also supra* notes 216–221 and accompanying text.

282. *Kyllo*, 533 U.S. at 31.

283. *See supra* notes 116–119 and accompanying text on *Boyd*; *supra* note 211 and accompanying text on *Hester*.

284. 565 U.S. 400, 402 (2012).

285. *Id.* at 405.

286. *Id.* at 411 (writing in response to Justice Alito's concurrence, which complained that the Court decided the case on "18th-century tort law," *id.* at 418 (Alito, J., concurring in the judgment)).

of-privacy test has been added to, but not substituted for, the common-law trespassory test."[287] Because a vehicle is an effect and installation of the tracker physically intruded onto it, it constituted a search.[288]

Once again, Scalia claimed that the Court's "Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century."[289] He doubled down by describing older cases like *Olmstead* as taking an "*exclusively* property-based approach,"[290] with the Fourth Amendment "understood to embody a particular concern for government trespass upon the areas . . . it enumerates."[291] On that understanding, he saw as determinative the fact that the government was "physically intruding on a constitutionally protected area" by installing the beeper.[292] Moreover, in *Jones*, he took the opportunity to resolve at least one way in which trespass law and Fourth Amendment protections are disconnected: an open field, he said, is not one of the areas enumerated in the Fourth Amendment.[293]

This property-rights focus drew critiques. Justice Sotomayor joined in the Court's opinion, but wrote separately to stress that "the Fourth Amendment is not concerned only with trespassory intrusions on property."[294] Sotomayor described *Katz* as "enlarg[ing]" the Court's "then-prevailing *focus* on property rights."[295] She embraced Scalia's depiction of "an irreducible constitutional minimum," in part because of a concern that technological advances will "shap[e] the evolution of societal privacy expectations," eroding *Katz*'s protections.[296] Specifically, she suggested that the scope of metadata that users voluntarily disclose to telecommunications service providers was so vast that warrantless disclosure of such material in the aggregate might violate the Fourth Amendment.[297] Given that Justice Sotomayor was the sole liberal justice to join Scalia's opinion, and given that her focus was that diminishing societal expectations of privacy might erode a constitutional right, it was reasonable to conclude that she had an outsize role in how Scalia shaped his

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287. *Id.* at 409. *Cf.* United States v. Knotts, 460 U.S. 276, 286 (1983) (Brennan, J., concurring in the judgment) ("Cases such as *Silverman* . . . hold that, when the government does engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment even if the same information could have been obtained by other means. I do not believe that *Katz*, or its progeny, have eroded that principle.").

288. *Jones*, 565 U.S. at 404. Three years prior Scalia had recognized the limits of originalism in noting that "the historical scope of officers' authority to search vehicles incident to arrest is uncertain." Arizona v. Gant, 556 U.S. 332, 351 (2009) (Scalia, J., concurring) (citing Thornton v. United States, 541 U.S. 615, 629–31 (2004) (Scalia J., concurring in the judgment)).

289. *Jones*, 565 U.S. at 405 (citing his opinion in *Kyllo* and Kerr, *New Technologies*, *supra* note 236).

290. *Id.* (emphasis added).

291. *Id.* at 406.

292. *Id.* at 406 n.3.

293. *Id.* at 410–11 (citing *Hester*, United States v. Dunn, 480 U.S. 294, 300 (1987), and Oliver v. United States, 466 U.S. 170, 176–77 (1984)).

294. *Jones*, 565 U.S. at 414 (Sotomayor, J., concurring).

295. *Id.* (emphasis added).

296. *Id.* at 414–15.

297. *Id.* at 418 ("I for one doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited in the last week, or month, or year."); *see infra* Part VII.C; *see generally* Brandon Teachout, *Gotta Collect It All!: Surveillance Law Lessons of Pokémon Go*, 69 STAN. L. REV. ONLINE 83 (2016).

"property-plus" test—a conclusion she affirmed in a tribute to him.[298]

By contrast, Justice Alito, joined by Justices Ginsburg, Breyer, and Kagan, concurred in the judgment with an opinion effectively written in dissent, complaining that the Court's opinion was based on whether the conduct at issue "might have provided grounds in 1791 for a suit for trespass to chattels."[299] Arguing that "the majority is hard pressed to find support in post-*Katz* cases for its trespass-based theory,"[300] Alito simply applied *Katz* and found that long-term GPS monitoring impinges on reasonable expectations of privacy.[301]

Finally, it is worth noting that this case is in keeping with Scalia's argument in his *Carter* concurrence that the *Katz* test is at its worst when it is used to determine whether a search occurred in the first place, but is more useful in determining whether that search is reasonable. One wonders, then, if he saw this case as a midway point to abolishing the *Katz* test.

F. Florida v. Jardines *(2013)*

The final step in the creation of Justice Scalia's "property-plus" test for the Fourth Amendment came in 2013. In *Florida v. Jardines*, the Court answered the question whether trespass onto an individual's porch with a narcotics detection dog, but without a warrant, violates the Fourth Amendment.[302] Scalia again cited *Entick* to stress the unique role of the home in Founding-era common law and its antecedents, and he again cited Blackstone to show that the principle that the curtilage of a home is part of the home has "ancient and durable roots"—but he otherwise focused on modern case law.[303] Scalia concluded that starting with a "property-rights baseline" and moving to the REP standard only when necessary "keeps easy cases easy."[304] Here, because the police physically intruded into a constitutionally protected area, a violation occurred.[305]

Scalia once again reiterated the idea that the "simple baseline" of property rights "for much of our history formed the exclusive basis" for Fourth Amendment protections,[306] and once again his focus generated conflicting views: here, a concurrence from Justice Kagan and dissent from Justice Alito. Kagan wrote to note that she "could just as happily have decided [the case] by looking to Jardines' privacy interests."[307] Like Justice Sotomayor's concurrence in *Jones*, her opinion seems designed to ensure that Scalia's overbroad presentation of property rights as *controlling* prior to *Katz* is not whole-

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298. Justice Sonia Sotomayor, *A Tribute to Justice Scalia*, 126 YALE LAW J. 1609, 1610–11 (2017) ("I lost count of the number of communications Justice Scalia and I exchanged with one another, tweaking words and phrases to keep his majority opinion open for my concurrence.").

299. *Jones*, 565 U.S. at 419 & n.2 (Alito, J., concurring in the judgment) (arguing in a footnote that, in fact, it would not have).

300. *Id.* at 424.

301. *Id.* at 430.

302. 569 U.S. 1, 3 (2013).

303. *Id.* at 6–8.

304. *Id.* at 11. Seeking this type of pragmatic, one-size-fits-all approach was, of course, a paramount concern for Scalia. *See* MacDonnell, *supra* note 246, at 206–18.

305. *Jardines*, 569 U.S. at 11.

306. *Id.* at 5.

307. *Id.* at 13 (Kagan, J., concurring).

heartedly accepted. Kagan noted that, were *Jardines* to be decided entirely on REP grounds, *Kyllo* would have resolved the matter. But a close look at *Kyllo* reveals that Scalia was already moving toward his "property-plus" test in that case, based on the idea that property rights controlled the Fourth Amendment until *Katz* came down.

For Alito, the action at issue—a police dog on the porch—would have been acceptable in the Founding era. Alito cited a series of treatises to show the common law allowed dogs to wander onto private property without committing a trespass, and a 1318 Scottish law prohibiting interference with a police tracking dog to show that dogs have been used by law enforcement for centuries.[308] Scalia rejected that point: for him, when police are trespassing, "the antiquity of the tools that they bring along is irrelevant."[309]

Finally, in a short 2015 per curium decision, the Court affirmed the conclusion that *Jones* and *Jardines* had definitively reestablished that physical intrusion on a constitutionally protected area—in that case, a suspect's body—is a search.[310]

* * *

While Justice Scalia's application of originalism in this line of cases fell short of his stated goal of deriving neutral constitutional meaning from history, it was certainly productive. Early in Scalia's career—around the time he described himself as a faint-hearted originalist—he conducted an analysis of historical sources to inform the meaning of "seizure" in *Hodari D.* By the time he was describing common law judging as contrary to democracy in the late 1990s, he staked out a more aggressive position in *Carter* and *Houghton*, pushing the Court to begin with the Amendment's original meaning. As he began his move toward the property-plus synthesis in the 2000s, each of his three key cases used that original meaning—defined through physical space—to build a bulwark against erosion of the Fourth Amendment privacy right. Even though the latter two cases came around the time that Scalia was repudiating his faint-heartedness and purportedly relying on the originalist method,[311] Scalia's "property-plus" synthesis looks a great deal like *Boyd* and *Silverman*—that is, it looks like the work of a common law judge.

VII. NOW WHAT?

With Justice Scalia's passing, the obvious question is whether his attempt to reshape the Court's approach to the Fourth Amendment will endure—particularly because unique majorities contributed to each case that contributed to the creation of the property-plus test. The Court's 2015 and 2016 terms offered little insight into the answer,[312] but three

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308. *Id.* at 23 (Alito, J., dissenting).

309. *Id.* at 11 (majority opinion).

310. *Grady v. North Carolina*, 135 S. Ct. 1368, 1371 (2015) (remanding for the lower court to determine whether the search was reasonable).

311. *See* SCALIA & GARNER, READING LAW, *supra* note 42, at 86–87 (citing *Kyllo* and *Jones* as examples of originalism encompassing "technology unknown when the operative words took effect").

312. While there were a handful of Fourth Amendment cases in the post-Scalia 2015 and 2016 terms, none of those cases directly implicated the enumerated places clause, and none of the opinions deciding them cited much history.

In *Utah v. Strieff*, the Court held that the Fourth Amendment exclusionary rule does not apply to suppress evidence seized incident to arrest when an illegal stop is attenuated by discovery of an outstanding arrest warrant. 136 S. Ct. 2056, 2064 (2016). Writing for the Court, Justice Thomas noted the exclusionary rule was a twentieth-century innovation but otherwise imported no historical material into his analysis of the *Brown* attenuation

cases from the 2017 term indicate that Scalia's incremental originalism will be a constant in the Court's consciousness—and, at least for Justice Gorsuch, a primary mode of analysis.

A. Byrd v. United States *(2018)*

In *Byrd v. United States*, the Court answered the question whether the driver of a rental car has a reasonable expectation of privacy in the vehicle when he has the renter's permission to drive the car but was not listed as an authorized driver on the rental agreement.[313] Writing for a unanimous Court, Justice Kennedy applied the reasonable expectation of privacy test but looked to the right to exclude another from one's property as the determinative factor.[314] Because the driver had lawful possession of the car—even if he breached a contract—he had the right to exclude others from it, and therefore a reasonable expectation of privacy in it.[315]

The Court and Justice Thomas (whose concurrence was joined by Justice Gorsuch) both noted that Byrd also argued that he had a common-law property interest in the car as a bailee; however, because he raised this argument for the first time on appeal to the Court, all declined to reach the issue.[316] Thomas did, however, express his "serious doubts" about the reasonable expectation of privacy test and noted that he would "welcome briefing and argument" on the bailee theory in a future case.[317] He set out several threshold questions that would have to be answered, including: "First, what kind of property interest do individuals need before something can be considered 'their . . . effec[t]' under the original meaning of the Fourth Amendment? Second, what body of law determines whether that property interest is present—modern state law, the common law of 1791, or something else?"[318]

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factors. *Id.* at 2061.

In *Birchfield v. North Dakota*, the Court held that punishing suspected drunk drivers for refusing to take a blood test violates the Fourth Amendment, while punishment for refusal to take a breath test is justified under the search-incident-to-arrest doctrine. 136 S. Ct. 2160, 2185 (2016). Writing for the Court, Justice Alito began with an eighteenth-century manual for justices of the peace, referenced the work of several legal historians, and cited a series of nineteenth-century cases—but his decision turned on recent precedent and a balancing test. *Id.* at 2174–75, 2184.

In *County of Los Angeles v. Mendez*, the Court overturned the Ninth Circuit's "provocation rule" on the grounds that it violated the "settled and exclusive framework" set forth in the Court's precedent on excessive force. 137 S. Ct. 1539, 1546–47 (2017).

Finally, in *Ziglar v. Abbasi*, the Court held that *Bivens* does not allow a suit for damages by post-9/11 detainees and that their guards enjoyed qualified immunity. 137 S. Ct. 1843, 1869 (2017). Writing for the Court, Justice Kennedy contrasted the Court's present attitude toward implied rights of action to the "*ancien regime*" of the 1970s but did not return to pre-*Bivens* history in so doing. *Id.* at 1855–58. Justice Thomas's concurrence in part complained that the Court had once again failed to look to the common law of 1867, as required by the Civil Rights Act of that year, which authorized the money damages underlying *Bivens*. *Id.* at 1870–72 (Thomas, J., concurring in part and concurring in the judgment).

313. 138 S. Ct. 1518, 1523 (2018).

314. *Id.* at 1526–27 (citing *Jardines* for the principle that *Katz* "supplements, rather than displaces," a property rule). The opinion also mentioned in passing the Founders' motivations for the Fourth Amendment. *Id.* at 1526 (quoting Chimel v. California, 395 U.S. 752, 761 (1969)).

315. *Id.* at 1528.

316. *Id.* at 1526–27; *id.* at 1531 (Thomas, J., concurring).

317. *Id.* at 1531 (Thomas, J., concurring).

318. *Byrd*, 138 S. Ct. at 1531. The tension between Thomas's concurrence and Justice Alito's concurrence,

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316. *Id.* at 1526–27; *id.* at 1531 (Thomas, J., concurring).

317. *Id.* at 1531 (Thomas, J., concurring).

318. *Byrd*, 138 S. Ct. at 1531. The tension between Thomas's concurrence and Justice Alito's concurrence,

B. Collins v. Virginia *(2018)*

In *Collins v. Virginia*, the Court answered the question whether the automobile exception permits a police officer, uninvited and without a warrant, to enter private property, approach a house, and search a vehicle (a motorcycle) parked a few feet from the house—that is, on its curtilage.[319] Writing for the Court, Justice Sotomayor examined the Court's precedent on the automobile exception and on curtilage, concluding that the former does not trump the latter.[320] Although the opinion ultimately turned on the property-based concept of curtilage, it did not explicitly focus on property. Rather, it took the classic common-law approach of reasoning from precedent. The opinion's sole historical reference—to the principle that the "most frail cottage" is entitled to the same privacy as "the most majestic mansion"—was made obliquely, quoting a 1982 decision that paraphrased remarks attributed to William Pitt rather than quoting Pitt himself.[321] That this reference was used to rebuke Virginia's position that only curtilage in the form of a "fixed, enclosed structure . . . like a garage" should trump the automobile exception[322] underscores the way that Scalia's property-plus test "makes easy cases easy" in a way that preserves the baseline protections of the Fourth Amendment.

The Court's opinion drew a dissent from Justice Alito, who argued that the search was reasonable under the meaning of the Fourth Amendment even though it took place on the suspect's curtilage.[323] For Alito, the sole value of the curtilage inquiry is to determine whether the Fourth Amendment applies at all; after concluding that it does, the Court should apply the automobile exception (and thus conclude that the search at issue was reasonable).[324] Alito's opinion, like the Court's, did not consider Founding-era principles—let alone sources.

C. Carpenter v. United States *(2018)*

In deciding its first major Fourth Amendment case since Justice Scalia's passing, the Court—or at least several of its members—grappled at last with historical sources. In *Carpenter v. United States*, the Court answered the question whether the warrantless seizure and search of comprehensive cell phone location records is permitted by the Fourth Amendment.[325] Writing for the Court, Chief Justice Roberts applied *Katz* and the common law to conclude that it is not: "In light of the deeply revealing nature of [the cell-site

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which suggested that the driver's reasonable expectation of privacy may not have been violated, *id.* at 1531–32 (Alito, J., concurring), echoed an exchange between Gorsuch and Justice Alito at oral argument, when Gorsuch advanced a property-focused theory and Alito noted that the word "property" does not appear in the Fourth Amendment. Damon Root, *Neil Gorsuch and Samuel Alito Butt Heads Over the Fourth Amendment, Again*, REASON: HIT & RUN BLOG (Feb. 1, 2018, 10:05 AM), http://reason.com/blog/2018/02/01/neil-gorsuch-and-samuel-alito-butt-heads.

319. 138 S. Ct. 1663, 1668 (2018).

320. *Id.* at 1671–73.

321. *Id.* at 1675 (quoting United States v. Ross, 456 U.S. 798, 822 (1982)).

322. *Id.* at 1674.

323. *Id.* at 1680–83 (Alito, J., dissenting).

324. *Collins*, 138 S. Ct. at 1681–82.

325. 138 S. Ct. 2206, 2211 (2018). Under the third-party doctrine, information voluntarily conveyed to a third party does not enjoy Fourth Amendment protection. Smith v. Maryland, 442 U.S. 735, 744 (1979); United States v. Miller, 425 U.S. 435, 442–43 (1976).

location information], its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection."[326] Quoting Brandeis in *Olmstead*, Roberts concluded that "the progress of science has afforded law enforcement a powerful new tool"—one that "risks Government encroachment of the sort the Framers . . . drafted the Fourth Amendment to prevent."[327] The majority opinion drew four dissents taking three separate tacks.

Justice Kennedy, like Roberts, applied *Katz* and the common law, but he came to the opposite conclusion: there is no reasonable expectation of privacy in the data because the cell-site location records are created and controlled by providers "which aggregate and sell this information to third parties," and because users voluntarily share location data for other purposes.[328] Kennedy thus made the case for exactly the type of Fourth Amendment erosion Justice Sotomayor warned about in her *Jones* concurrence.[329]

Justice Thomas wrote to advance a stridently originalist position against *Katz*, the test of which he said "has no basis in the text or history of the Fourth Amendment."[330] He recognized that the case was the culmination of a decade-long "retreat from *Olmstead*," a retreat that he said replaced the "organizing constitutional idea of the founding era," property, with a new one—privacy.[331] To show that the Founders did not focus on privacy, Thomas cited the absence of the word "search" in Founding-era legal dictionaries to conclude that it "was probably not a term of art," and—with citations indicating that the full extent of his research was a series of perfunctory electronic database keyword searches—notes the absence of the phrase "expectation(s) of privacy" in "pre-*Katz* federal or state case reporters, the papers of prominent Founders, early congressional documents and debates, collections of early American English texts, or early American newspapers."[332] More seriously, Thomas quickly quoted the usual suspects—the *Commentaries*, Coke, Locke, *Entick*, and *Wilkes*—to show that the Founders did focus on property.[333] Thomas took the position that the property line is not only a bulwark against

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326. *Carpenter*, 138 S. Ct. at 2223.

327. *Id.*

328. *Id.* at 2229–30, 2232 (Kennedy, J., dissenting).

329. *See supra* notes 294–298 & accompanying text. Kennedy seemed to recognize that fact and attempted to refute it, protesting that cell-site location information "could not reveal where Carpenter lives and works, much less his 'familial, political, professional, religious, and sexual associations,'" because the information "disclose[s] a person's location only in a general area." 138 S. Ct. at 2232 (Kennedy, J., dissenting) (quoting United States v. Jones, 565 U.S. 400, 415 (2012)). Even allowing *arguendo* that this is an accurate description of the limits of the technology, one can imagine a world without those limits—but the same legal logic as to expectations of privacy would apply.

330. *Carpenter*, 138 S. Ct. at 2236 (Thomas, J., dissenting). He also took a moment to observe that "the Founders would not recognize the Court's 'warrant requirement.'" *Id.* at 2244.

331. *Id.* at 2236, 2240.

332. *Id.* at 2238 & nn.2–5 (citing "NATIONAL ARCHIVES, LIBRARY OF CONGRESS, FOUNDERS ONLINE, https://founders.archives.gov (all Internet materials as last visited June 18, 2018)"; "A CENTURY OF LAWMAKING FOR A NEW NATION, U.S. CONGRESSIONAL DOCUMENTS AND DEBATES, 1774–1875 (May 1, 2003), https://memory.loc.gov/ammem/amlaw/lawhome.html"; "CORPUS OF HISTORICAL AMERICAN ENGLISH, https://corpus.byu.edu/coha; GOOGLE BOOKS (American), https://googlebooks.byu.edu/x.asp; CORPUS OF FOUNDING ERA AMERICAN ENGLISH, https://lawncl.byu.edu/cofea"; "READEX, AMERICA'S HISTORICAL NEWSPAPERS (2018), https://www.readex.com/content/americas-historical-newspapers").

333. *Id.* at 2239–40.

erosion of Founding-era rights, but a high-water mark as well.[334] Thus, because Carpenter did not have a property right in the provider's cell-site records, the Fourth Amendment did not protect him against their search.[335]

Justice Alito, joined by Thomas, also took a strident originalist position, but one focused on attacking the idea that a subpoena may be a search (while agreeing that the cell-site data was not Carpenter's property).[336] Alito cited Blackstone for the proposition that the subpoena dates to the fourteenth century and relied on sixteenth and seventeenth century treatises to trace its development through to the Founding era.[337] In discussing that period, he cited the Judiciary Act of 1789 (which allowed subpoenas) and two more-or-less contemporaneous English cases (but notably no American counterparts) to show that the use of subpoenas were routine and wide-ranging.[338] Alito looked to the Founders' extensive concern about the violence of physical searches as support for his conclusion that the enumerated places clause shows that "American colonists rebelled against the Crown's physical invasions of their persons and their property, not against its acquisition of information by any and all means."[339] Like Thomas, then, Alito saw Founding-era property law as creating both a floor and a ceiling for Fourth Amendment rights.

Finally, like Scalia before him, Justice Gorsuch applied a mixture of common law and originalist analysis to conclude that—in some future case, because "Carpenter forfeited perhaps his most promising line of argument" by not advancing it below—the Court will have to consider whether an individual has a property interest in data collected about him.[340] First, he critiqued the third-party doctrine, arguing that "[c]onsenting to give a third party access to private papers that remain my property is not the same thing as consenting to a search of those papers by the government."[341] Next, he critiqued *Katz*, citing the standards—*Entick*, *Wilkes*, and the Writs of Assistance case—for the proposition that the Founders sought to limit "the government's intrusion on privacy," but only "in particular places and things" and "against particular threats."[342] The *Katz* test, he said, provides insufficient guidance to ensure courts stay within these limitations—and, in data privacy cases, may go the other direction.[343] Gorsuch then brought good news: "There is another way"—a "traditional approach" based in positive law.[344] He then advanced the most obvious doctrinal claim for a Fourth Amendment right in papers or effects held by a third party: that they remain an individual's property but are held by another as a

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334. *Id.* at 2245–46. Notably, Thomas also looks to the development of the enumerated places clause, speculating that the changes "might have narrowed the Fourth Amendment," or "might have broadened" it. "Or it might have done both." *Id.* at 2241. But he declined to draw from this indeterminacy an explicit recognition of the limitations of a purely historical approach.

335. *Carpenter*, 138 S. Ct. at 2242–43 (Thomas, J., dissenting).

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

337. *Id.* at 2247–48.

338. *Id.* at 2248–50.

339. *Id.* at 2251–52. With all of that said, Alito acknowledges that the Court does now evaluate subpoenas under the Fourth Amendment—albeit under a lower standard than a physical search—but argues that the majority fails to follow that standard. *Id.* at 2252–57.

340. *Carpenter*, 138 S. Ct. at 2267–72 (Gorsuch, J., dissenting).

341. *Id.* at 2263.

342. *Id.* at 2264.

343. *Id.* at 2265–67.

344. *Id.* at 2267–68 (citing Florida v. Jardines, 569 U.S. 1, 11 (2013)).

bailment.[345] While citing cases from the early twentieth century rather than the Founding era, Gorsuch readily acknowledged that he was raising more questions than answers—and practically begged for future petitioners to bring forth the latter so that the Court can ensure that the "constitutional floor" of the Fourth Amendment is maintained.[346]

While the five opinions in *Carpenter v. United States* represent three distinct alternatives for the rhetorical direction the Court may take, the likely path forward is somewhat clearer. The Court's opinion was focused on a principle dating back to *Boyd*: there is a baseline of Fourth Amendment protection that shall not be eroded. While Gorsuch dissented, his opinion squarely followed Scalia's footsteps—and exhorts litigants to do the same. From *Jones*, we know that Sotomayor—who joined the *Carpenter* majority but did not write—shares an appreciation for that approach. And Thomas and Alito, who clearly reach very different conclusions, remain serious about taking a historical approach. Thus, taken as a whole, the opinions in *Carpenter* suggest that Scalia's property-plus synthesis will endure.

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While we were once famously said to be "all realists,"[347] we are now said to be "all originalists."[348] It is past time to be realistic about originalism. Even if Scalia's originalism-in-practice was not as novel as he claimed, his use of history not always that rigorous, and his description of the Court's traditional focus on property overdrawn, the three key Fourth Amendment cases of the post-Scalia era strongly suggest that his effort to return the Court to its traditional use of Founding-era sources and their common law antecedents—that is, his incremental originalism—will prove a legacy worthy of the Court's embrace.

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345. *Carpenter*, 138 S. Ct. at 2268–69 (Gorsuch, J., dissenting) (citing *Ex Parte* Jackson, 96 U.S. 727 (1878)).

346. *Id.* at 2268–72 ("Neglecting more traditional approaches may mean failing to vindicate the full protections of the Fourth Amendment. . . . These omissions do not serve the development of a sound or fully protective Fourth Amendment jurisprudence.").

347. *See* Michael Steven Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915, 1917 & nn. 1–2 (2005) (citing usage).

348. *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 62 (2010).