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Lawrence Rosenthal



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## BINARY SEARCHES AND THE CENTRAL MEANING OF THE FOURTH AMENDMENT

Lawrence Rosenthal\*

### INTRODUCTION

Few constitutional commands offer less textual guidance than the Fourth Amendment's prohibition on "unreasonable search and seizure."<sup>1</sup> One scholar called this phrase "about the most unhelpful guidepost one could have concocted . . . . [R]easonableness as an analytical concept is maddeningly frustrating."<sup>2</sup> It may come as little surprise that Fourth Amendment doctrine, constructed with so little textual guidance, strikes many as chaotic; numerous commentators have long regarded Fourth Amendment doctrine as deeply confused, if not chaotic.<sup>3</sup> Identifying an intelligible principle to animate the concept of constitutional "reasonableness" is accordingly

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<sup>1</sup> U.S. CONST. amend. IV.

<sup>2</sup> John D. Castiglione, *Human Dignity Under the Fourth Amendment*, 2008 WIS. L. REV. 655, 656–57.

<sup>3</sup> See, e.g., AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 1 (1997); Ronald J. Allen & Ross M. Rosenberg, *The Fourth Amendment and the Limits of Theory: Local Versus General Theoretical Knowledge*, 72 ST. JOHN'S L. REV. 1149, 1149 (1998); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 349–50 (1974); Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 474–75 (1991); Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468–70 (1985); Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 UTAH L. REV. 977, 978; Roger B. Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329, 364–68 (1973); Joseph D. Grano, *Rethinking the Fourth Amendment Warrant Requirement*, 19 AM. CRIM. L. REV. 603, 603 (1982); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 383–86 (1988); Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 19–20 (1988); Lloyd L. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 49–50 (1974); Larry W. Yackle, *The Burger Court and the Fourth Amendment*, 26 U. KAN. L. REV. 335, 427 (1978).

of considerable importance. A principled and coherent Fourth Amendment jurisprudence surely requires an equally principled and coherent conception of Fourth Amendment reasonableness.

Justice Brennan once famously identified protection for “criticism of official conduct” as “the central meaning of the First Amendment,”<sup>4</sup> a point to which the Court repeatedly turned in the subsequent doctrinal evolution of the constitutional protection for freedom of speech.<sup>5</sup> Fourth Amendment jurisprudence would surely benefit if a similar polestar were identified. To be sure, some commentators, most prominently Cass Sunstein, argue for judicial minimalism—narrow and incompletely theorized decisions that can enhance deliberative democracy and reduce risks of error.<sup>6</sup> Even Professor Sunstein, however, does not embrace minimalism when its consequence is doctrinal confusion.<sup>7</sup> Sometimes, an incompletely theorized decision may be a virtue; on other occasions, it may produce chaos.

The need for doctrinal coherence is particularly great at present, when Fourth Amendment law faces so many challenges borne of advancing technology. Consider what some courts and commentators have called a “binary” search, in which an investigative technique discloses no more than probable cause to believe a particular location otherwise hidden from public contains contraband.<sup>8</sup> At present, issues relating to binary searches arise most frequently in litigation about whether the Fourth Amendment permits the use of trained narcotics-detection dogs to determine whether contraband is present in a location otherwise concealed from public view.<sup>9</sup> The binary

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<sup>4</sup> N.Y. Times Co. v. Sullivan, 376 U.S. 254, 273 (1964).

<sup>5</sup> See, e.g., Bartnicki v. Vopper, 532 U.S. 514, 534–35 (2001); Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 771–78 (1986); Gertz v. Robert Welch, Inc., 418 U.S. 323, 342–48 (1974). For the seminal commentary on the significance of Justice Brennan’s observation for First Amendment doctrine, see generally Harry Kalven, Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 SUP. CT. REV. 191.

<sup>6</sup> See CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3–54 (1999) (describing and defending judicial minimalism).

<sup>7</sup> See *id.* at 54–57 (describing the problems with judicial minimalism).

<sup>8</sup> See, e.g., United States v. Colyer, 878 F.2d 469, 474 (D.C. Cir. 1989); *Stabler v. State*, 990 So. 2d 1258, 1261 (Fla. Dist. Ct. App. 2008), *quashed and remanded*, 90 So. 3d 267 (Fla. 2012); *State v. Rabb*, 920 So. 2d 1175, 1190 (Fla. Dist. Ct. App. 2006); *People v. Caballes*, 851 N.E.2d 26, 55–57 (Ill. 2006); *Fitzgerald v. State*, 837 A.2d 989, 1030 (Md. Ct. Spec. App. 2003), *aff’d*, 864 A.2d 1006 (Md. 2004); David A. Harris, *Superman’s X-Ray Vision and the Fourth Amendment: The New Gun Detection Technology*, 69 TEMP. L. REV. 1, 36–37 (1996); Renée McDonald Hutchins, *Tied Up in Knots? GPS Technology and the Fourth Amendment*, 55 UCLA L. REV. 409, 440–42 (2007); Ric Simmons, *The Two Unanswered Questions of Illinois v. Caballes: How to Make the World Safe for Binary Searches*, 80 TUL. L. REV. 411, 413, 424–27 (2005).

<sup>9</sup> See, e.g., Simmons, *supra* note 8, at 424–27. For a discussion of the development of electronic means of detecting scents and similar emanations through what may amount to binary search techniques, see Mary Costantino, *Electronic Sniffers’ Place: The Use of Electronic Sniffers Under the Search and Seizure Clause of the Fourth Amendment*, 2 CHARLOTTE L. REV. 333 (2010).

search is not limited to this context, however, and will become of increasing import; any technological advance that enables the authorities to identify the presence of contraband in an otherwise concealed location would present the same constitutional question, such as the potential development of a computer search program that could identify the location of illegal materials, such as pirated software or child pornography, on any computer connected to the Internet.

Justice Frankfurter, for one, saw the need for an animating principle to guide Fourth Amendment doctrine.<sup>10</sup> For him, the central meaning of the Fourth Amendment, derived from its history, was that when discretion is afforded to law-enforcement officers to engage in search and seizure, it is all too likely to be abused, and accordingly searches and seizures not previously authorized by a warrant should be condemned in the absence of strict necessity.<sup>11</sup> For a time, Justice Frankfurter's position seemed ascendant, as when the Court took the position that search and seizure is constitutionally reasonable only if authorized by warrant or falling within one of the limited exceptions to the warrant requirement.<sup>12</sup> This insistence on warrants as a vehicle to curb official discretion, however, did not prosper in subsequent Fourth Amendment jurisprudence. Perhaps the central problem is that a warrant preference is difficult to square with the Fourth Amendment's text, which, rather than preferring warrants, expressly limits the authority of courts to issue them, and otherwise requires no more than that search and seizure be "reasonable."<sup>13</sup> In its landmark decision in *Terry v. Ohio*,<sup>14</sup> the Court acknowledged the textual difficulty with a warrant requirement, observing that, although the text of the Fourth Amendment forbids the issuance of a warrant in the absence of probable cause, when the police act without a warrant, "there is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search

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<sup>10</sup> See, e.g., *United States v. Rabinowitz*, 399 U.S. 56, 70–75 (1950) (Frankfurter, J., dissenting).

<sup>11</sup> See *id.* at 70 ("With all respect I suggest that it makes a mockery of the Fourth Amendment to sanction search without a search warrant."). For a more recent statement along the same lines, see Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 228–47 (1993).

<sup>12</sup> See, e.g., *Coolidge v. New Hampshire*, 403 U.S. 443, 454–55 (1971) (plurality opinion); *Vale v. Louisiana*, 399 U.S. 30, 34 (1970); *Mancusi v. DeForte*, 392 U.S. 364, 370–71 (1968); *Katz v. United States*, 389 U.S. 347, 356–57 (1967); *United States v. Ventresca*, 380 U.S. 102, 105–07 (1965).

<sup>13</sup> The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

<sup>14</sup> 392 U.S. 1 (1968).

[or seizure] entails.”<sup>15</sup> Applying that test, the Court held that a brief detention and protective search of an individual comports with the Fourth Amendment “where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous.”<sup>16</sup>

Nothing illustrates the failure of Justice Frankfurter’s advocacy of a warrant requirement to cabin official discretion more vividly than the *Terry* doctrine which, despite its many critics who echo Justice Frankfurter’s fear of arbitrary or discriminatory enforcement,<sup>17</sup> is now firmly established as settled doctrine.<sup>18</sup> Indeed, the Court’s enthusiasm for a warrant requirement has markedly waned; as Justice Scalia later observed, “the ‘warrant requirement’ ha[s] become so riddled with exceptions that it [i]s basically unrecognizable.”<sup>19</sup> In the past few decades, although the Court

<sup>15</sup> *Id.* at 21 (quoting *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 536–37 (1967)).

<sup>16</sup> *Id.* at 30.

<sup>17</sup> See, e.g., Tovah Renee Calderón, *Race-Based Policing from Terry to Wardlow: Steps Down the Totalitarian Path*, 44 HOW. L.J. 73, 85–94 (2000); I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 30–34 (2011); Devon W. Carbado, *(E)Racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002); Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment “Reasonableness,”* 98 COLUM. L. REV. 1642, 1648–63 (1998); Frank Rudy Cooper, *The Unbalanced Fourth Amendment: A Cultural Study of the Drug War, Racial Profiling and Arvizu*, 47 VILL. L. REV. 851, 852–54 (2002); Lewis R. Katz, *Terry v. Ohio at Thirty-Five: A Revisionist View*, 74 MISS. L.J. 423, 485–97 (2004); Cynthia Lee, *Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis*, 81 MISS. L.J. 1133, 1150–57 (2012); Tracey Maclin, *Terry v. Ohio’s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 ST. JOHN’S L. REV. 1271, 1276–79 (1998); Thomas B. McAfee, *Setting Us Up for Disaster: The Supreme Court’s Decision in Terry v. Ohio*, 12 NEV. L.J. 609, 612–21 (2012); Thomas Regnier, *The “Loyal Foot Soldier”: Can the Fourth Amendment Survive the Supreme Court’s War on Drugs?*, 72 UMKC L. REV. 631, 662–64 (2004); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2059–72 (2011); Omar Saleem, *The Age of Unreason: The Impact of Reasonableness, Increased Police Force, and Colorblindness on Terry “Stop and Frisk,”* 50 OKLA. L. REV. 451, 482–88 (1997); Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. REV. 956, 983–98 (1999). For more sympathetic accounts of *Terry*, see Lawrence Rosenthal, *Pragmatism, Originalism, Race, and the Case against Terry v. Ohio*, 43 TEX. TECH L. REV. 299, 346–56 (2010), and Stephen A. Saltzburg, *Terry v. Ohio: A Practically Perfect Doctrine*, 72 ST. JOHN’S L. REV. 911, 952–70 (1998).

<sup>18</sup> See, e.g., *Hiibel v. Sixth Judicial Dist. Court of Nev.*, 542 U.S. 177, 185–89 (2004); *United States v. Arvizu*, 534 U.S. 266, 273 (2002); *Illinois v. Wardlow*, 528 U.S. 119, 123–28 (2000); *Alabama v. White*, 496 U.S. 325, 330–31 (1990); *United States v. Sokolow*, 490 U.S. 1, 7 (1989); *United States v. Hensley*, 469 U.S. 221, 227–29 (1985).

<sup>19</sup> *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring). For a helpful summary of the Court’s inconsistent allegiance to a warrant requirement, see, for example, THOMAS K. CLANCY, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION* 466–515 (2008), and 2 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* 446–51, at § 4.1(b) (4th ed. 2004).

has occasionally concerned itself with excessive police discretion,<sup>20</sup> in the main, efforts to circumscribe discretion have not been at the heart of Fourth Amendment jurisprudence.<sup>21</sup> Beyond that, curbing police discretion seems, at best, an incomplete account of the central meaning of the Fourth Amendment. After all, official discretion could be eliminated by a regime that searches everyone; yet that hardly seems an attractive account of the constitutional prohibition on unreasonable search and seizure.<sup>22</sup> Fourth Amendment jurisprudence has refused to make the absence of discretion a safe harbor; the Court has generally condemned search and seizure undertaken in such a dragnet fashion except in carefully confined circumstances involving what the Court characterizes as a “special need” beyond the general interest in law enforcement.<sup>23</sup> Curbing official discretion may be an important means to some larger end, but, in itself, it is an unlikely candidate for the central meaning of the Fourth Amendment.

Beyond concern with official discretion, two other candidates for the central meaning of the Fourth Amendment’s command of reasonableness have appeared. The first is essentially libertarian in character; it understands the Fourth Amendment as establishing a constitutional boundary of the government’s investigative powers. On this view, the Fourth Amendment keeps society free by limiting the government’s

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<sup>20</sup> See, e.g., *Arizona v. Gant*, 556 U.S. 322, 345 n.5 (2009); *Delaware v. Prouse*, 440 U.S. 648, 653–54 (1979); *United States v. Ortiz*, 422 U.S. 891, 895–97 (1975).

<sup>21</sup> See, e.g., *Samson v. California*, 547 U.S. 843, 850–57 (2006) (upholding searches of parolees absent individualized decision over a claim of excessive discretion); *Atwater v. City of Lago Vista*, 532 U.S. 318, 345–54 (2001) (rejecting a proposed rule limiting officers’ authority to make custodial arrests for nonjailable offenses); *Whren v. United States*, 517 U.S. 806, 810–19 (1996) (rejecting arguments that authority to arrest on probable cause should be limited when officers act on a pretextual or otherwise unjustifiable basis). Indeed, in recent years, even many advocates of a robust warrant requirement make their case in terms of objectives other than curbing official discretion. See, e.g., Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U.L. REV. 1609, 1638–52 (2012) (arguing that warrants more effectively promote compliance with the Fourth Amendment than ex post remedies for warrantless search and seizure).

<sup>22</sup> Cf. Erik G. Luna, *Sovereignty and Suspicion*, 48 DUKE L.J. 787, 789 (1999) (“The primary vice of the antidiscrimination model is its failure to provide a constitutional floor protecting individuals and constraining government. If the political majority wants to reside in a police state marked by absolute power to search and seize, the model poses no barrier so long as the burden is shared by the entire community.”); Wasserstrom & Seidman, *supra* note 3, at 101 (asserting that tactics focused at particular segments of the community “might reflect a sensible, non-prejudiced judgment that law enforcement gains would be achieved at a lesser privacy cost by focusing the privacy loss on a smaller group of people. If th[is] . . . judgment is correct, then it seems bizarre to insist, in the name of the fourth amendment, that the government achieve its ends by imposing greater and unnecessary privacy losses”). Nevertheless, some argue that when search-and-seizure is broad-based, the political process can generally be trusted to check abuse. This position is considered in Part II.E below.

<sup>23</sup> See, e.g., *City of Indianapolis v. Edmond*, 531 U.S. 32, 41–42 (2000); *Chandler v. Miller*, 520 U.S. 305, 313–22 (1997).



investigative reach. The second understands the Fourth Amendment in terms of freedom against unjustified government intrusion. It is therefore essentially pragmatic in character, requiring an effort to balance liberty and law-enforcement interests.<sup>24</sup>

This Article inquires into these competing conceptions of Fourth Amendment reasonableness. Whatever the virtues of judicial minimalism, Fourth Amendment jurisprudence has embraced fundamental principles to animate the constitutional conception of reasonableness, but it has embraced different fundamental principles at different times. Part I demonstrates that, at different times, the Supreme Court has embraced fundamentally differing libertarian and pragmatic conceptions of Fourth Amendment reasonableness; both conceptions have enjoyed periods of ascendance and decline, and both continue to influence Fourth Amendment doctrine. This libertarian-pragmatic divide is of increasing importance because, after a long period in which pragmatism seemed triumphant, libertarianism has enjoyed an important resurgence. Indeed, the debate between libertarianism and pragmatism has become central to contemporary Fourth Amendment jurisprudence.

To be sure, in many cases, the Court's failure to choose between the libertarian and pragmatic conceptions of the Fourth Amendment is understandable; most cases do not require such a choice. Often, both conceptions can be employed in support of a given result, and in such cases, perhaps the minimalist virtues argue for a decision that can be supported by libertarians and pragmatists alike. Part II accordingly focuses on the decision in *Florida v. Jardines*.<sup>25</sup> *Jardines* involved police officers' use of a narcotics-detection dog that alerted to the presence of contraband while on the porch outside the front door to Jardines's home.<sup>26</sup> The use of a reliable narcotics-detection dog can be characterized as a binary search—binary because it reveals no more than whether there is probable cause to believe that an otherwise concealed area contains contraband.<sup>27</sup>

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<sup>24</sup> Although prior scholarship has not dichotomized the competing conceptions of the Fourth Amendment in precisely this way, the dichotomy proposed here is much like one previously offered by Morgan Cloud, who distinguished between Fourth Amendment pragmatism and what he calls "principled positivism," which is much like the libertarian conception of the Fourth Amendment described above. See Morgan Cloud, *Pragmatism, Positivism, and Principle in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 293–301 (1993). Thomas Clancy has suggested a similar dichotomy by asking whether "the Fourth Amendment [is] designed to regulate law enforcement practices or . . . to protect individuals from overreaching governmental intrusions?" Thomas K. Clancy, *The Purpose of the Fourth Amendment and Crafting Rules to Implement That Purpose*, 48 U. RICH. L. REV. 479, 481 (2014). Also along similar lines is a dichotomy offered by Jack Nowlin involving what he calls the "protected interests" and the "reasonable expectation of privacy" views of the Fourth Amendment. See Jack Wade Nowlin, *The Warren Court's House Built on Sand: From Security in Persons, Houses, Papers, and Effects to Mere Reasonableness in Fourth Amendment Doctrine*, 81 MISS. L.J. 1017, 1031–41 (2012).

<sup>25</sup> 133 S. Ct. 1409 (2013).

<sup>26</sup> *Id.* at 1413.

<sup>27</sup> See, e.g., Simmons, *supra* note 8, at 415–17.

In a true binary search, the competing conceptions of the Fourth Amendment point toward different outcomes. On the libertarian conception, the Fourth Amendment would regard as unreasonable granting the government effectively unlimited power to scrutinize otherwise private space—accordingly depriving individuals of any zone from which they are free from official scrutiny, at least absent adequate predication. On the pragmatic conception, a binary search conducted that discloses nothing more than the probable presence of contraband is supported by powerful law-enforcement interests, and conducted in a manner unlikely to threaten any legitimate liberty interest of the innocent, could readily be regarded as constitutionally reasonable even if unsupported by individualized suspicion of wrongdoing.

In *Jardines*, by a five-to-four vote, the Court embraced the libertarian conception. Writing that “[a]t the Amendment’s ‘very core’ stands ‘the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion,’”<sup>28</sup> the Court held that “[t]he government’s use of trained police dogs to investigate the home and its immediate surroundings is a ‘search’ within the meaning of the Fourth Amendment.”<sup>29</sup> *Jardines*’s libertarianism, however, is stunted and incomplete; the Court’s holding can be readily circumvented by investigative techniques that stop short of a physical intrusion, and might even leave binary searches unregulated if they are ultimately deemed constitutionally reasonable, even if considered a “search.” Thus, *Jardines*’s libertarianism offers little more to libertarians than pragmatists. This should be unsurprising; Part II concludes that given our current understanding of the scope of governmental regulatory power, the binary search demonstrates the absence of a coherent justification for a libertarian conception of the Fourth Amendment. Searches with no potential to compromise the interests of the innocent—such as a true binary search—are constitutionally unobjectionable in a regime that recognizes no legitimate interest in even the entirely “private” possession of items that the government may deem unlawful to possess. Thus, the persistence of the libertarian conception comes with the inevitable cost of a loss of conceptual coherence. Moving beyond the particulars of the binary search debate, Part II concludes that although the pragmatic conception leaves plenty of room for debate over the proper scope of investigative authority, only the pragmatic conception has any real power to rationalize Fourth Amendment jurisprudence.

#### I. THE COMPETING CONCEPTIONS OF FOURTH AMENDMENT REASONABLENESS

Fourth Amendment jurisprudence has oscillated between two competing conceptions of unreasonable search and seizure. The first is libertarian, having its roots

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<sup>28</sup> *Jardines*, 133 S. Ct. at 1414 (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

<sup>29</sup> *Id.* at 1417–18. Justice Alito dissented, joined by Chief Justice Roberts, Justice Kennedy, and Justice Breyer. *Id.* at 1420–26 (Alito, J., dissenting).

in the seminal decision in *Boyd v. United States*.<sup>30</sup> This view conceives of the Fourth Amendment as granting freedom from government intrusion on what is regarded as a protected zone of liberty, a principle originally derived from property law, but which contemporary scholars, and some recent opinions of the Supreme Court, seek to move beyond its property-law roots. The second is pragmatic in character, having its origins in Justice Brandeis's dissenting opinion elevating privacy over property-law interests in *Olmstead v. United States*.<sup>31</sup> This view regards the essence of the Fourth Amendment as a right to be free from "unjustifiable intrusion by the Government upon the privacy of the individual."<sup>32</sup> This conception broadens Fourth Amendment protection beyond that recognized by the law of property but also narrows protection by acknowledging that, on sufficient justification, the government may intrude even on those interests traditionally protected by the law of property or otherwise.

*A. Libertarianism as the Central Meaning of the Fourth Amendment*

The earliest cases in which the Supreme Court treated the Fourth Amendment reflect a libertarian conception of reasonableness. This conception used the law of property to demarcate both the zone of constitutionally protected interests and the limits on investigative authority.

*Boyd* was "the first Supreme Court decision in which the [F]ourth [A]mendment looms large."<sup>33</sup> Addressing the constitutionality of a customs statute authorizing a court to order an importer to produce relevant business records in a proceeding seeking the forfeiture of merchandise allegedly imported without payment of required duties, the Court concluded that "a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution . . . because it is a material ingredient, and effects the sole object and purpose of search and seizure."<sup>34</sup> Considering whether the search and seizure effected by the compulsory production of business records was constitutionally reasonable, the Court distinguished it from a "search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof," because "[i]n the one case, the government is entitled to the possession of the property; in the other it is not."<sup>35</sup> Similarly, when search and seizure is undertaken in order to inspect property subject to tax or tax records that must be made available for inspection, to locate contraband or identify property subject to seizure to satisfy a judgment, or to recover stolen goods, the government

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<sup>30</sup> 116 U.S. 616 (1886).

<sup>31</sup> 277 U.S. 438 (1928).

<sup>32</sup> *Id.* at 478 (Brandeis, J., dissenting).

<sup>33</sup> TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION: SEARCH, SEIZURE, AND SURVEILLANCE AND FREE TRIAL AND FAIR PRESS 53 (1969).

<sup>34</sup> *Boyd*, 116 U.S. at 622.

<sup>35</sup> *Id.* at 623.

or the creditor are intruding on no property rights, “[w]hereas, by the proceeding now under consideration, the court attempts to extort from the party his private books and papers.”<sup>36</sup>

Noting that the Fourth Amendment emerged from colonial grievances against the use of general warrants and writs of assistance,<sup>37</sup> the Court quoted extensively from “Lord Camden’s memorable discussion of the subject”<sup>38</sup> in *Entick v. Carrington*,<sup>39</sup> in which Lord Camden opined that “every invasion of private property, be it ever so minute, is a trespass,” and that

[p]apers are the owner’s goods and chattels; they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away the secret nature of those goods will be an aggravation of the trespass.<sup>40</sup>

Writing that “[t]he principles laid down in this opinion affect the very essence of constitutional liberty and security,” the Court concluded that “any forcible and compulsory extortion of a man’s . . . private papers . . . is within the condemnation of that judgment.”<sup>41</sup>

One potential implication of *Boyd* was that items to which the owner has a legitimate right to possess under the law of property are immune from search or seizure even on a warrant or other compelling justification. This implication became a holding in *Gouled v. United States*.<sup>42</sup> There, citing *Boyd*, the Court reasoned that papers are subject to search and seizure

only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken.<sup>43</sup>

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<sup>36</sup> *Id.* at 624.

<sup>37</sup> *Id.* at 625–26.

<sup>38</sup> *Id.* at 626.

<sup>39</sup> 19 How. St. Tr. 1029, 1066 (C.P. 1765).

<sup>40</sup> *Boyd*, 116 U.S. at 627, 627–28 (quoting *Entick*, 19 How. St. Tr. at 1066) (internal quotation marks omitted).

<sup>41</sup> *Id.* at 630.

<sup>42</sup> 255 U.S. 298 (1921).

<sup>43</sup> *Id.* at 309.

Thus, according to *Boyd*, even a warrant could only authorize a search for and seizure of contraband or stolen property.<sup>44</sup> On that basis, the Court in *Gouled* held that the seizure of business records for use as evidence in a fraud prosecution violated the Fourth Amendment because the government could assert no right in these documents superior to that of their owners, even though they were seized pursuant to warrants, the validity of which had gone unchallenged.<sup>45</sup> It followed that papers “of ‘evidential value only’” should not have been admitted in evidence.<sup>46</sup>

To the contemporary eye, used to the Court’s more recent expressions of concern about the social costs of excluding probative evidence of guilt,<sup>47</sup> what is perhaps most striking about *Boyd* and *Gouled* is the Court’s lack of attention to the law-enforcement interests compromised by the immunity it had recognized from search for and seizure of probative evidence of guilt. This was the logical consequence of conceptualizing the Fourth Amendment as identifying a set of protected interests on which the government may not intrude. To identify protected interests, *Boyd* and *Gouled* looked to the law of property to define the limits of the government’s powers of search and seizure.<sup>48</sup> The right of an owner of property to enforce the trespass laws or otherwise assert property interests, of course, is not dependent on the owner’s innocence, and when Fourth Amendment law was tied to property-law conceptions, innocence played naturally little role in Fourth Amendment jurisprudence.<sup>49</sup> The result was to sharply circumscribe the ability of the government to obtain and use probative evidence of guilt; perhaps an alarming outcome to some contemporary eyes, but a logical consequence of identifying the scope of protected liberty with the right of property owners to exclude others. Indeed, when the Court announced an exclusionary rule prohibiting the use of evidence obtained in violation of the Fourth Amendment in *Weeks v. United States*,<sup>50</sup> it invoked the right of the owner of property wrongfully seized to demand its return.<sup>51</sup>

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<sup>44</sup> *Boyd*, 116 U.S. at 623–24.

<sup>45</sup> *Gouled*, 255 U.S. at 309–11.

<sup>46</sup> *Id.* at 312–13.

<sup>47</sup> See, e.g., *Davis v. United States*, 131 S. Ct. 2419, 2427 (2011); *Herring v. United States*, 555 U.S. 135, 141 (2009); *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 364–65 (1998); *United States v. Leon*, 468 U.S. 897, 905 (1984).

<sup>48</sup> *Gouled*, 255 U.S. at 310; *Boyd*, 116 U.S. at 627, 630.

<sup>49</sup> For a helpful discussion on the relationship between this line of cases and traditional property-law conceptions of trespass, see George C. Thomas III, *Stumbling Toward History: The Framers’ Search and Seizure World*, 43 TEX. TECH L. REV. 199, 221–25 (2010). For a somewhat different view, contending that the original understanding of search and seizure is not so closely tied to technical conceptions of trespass, see Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 70–86.

<sup>50</sup> 232 U.S. 383 (1914).

<sup>51</sup> *Id.* at 392–93, 398. As the Court later observed, “[t]he remedial structure at the time even of *Weeks v. United States* . . . was arguably explainable in property terms.” *Warden v. Hayden*, 387 U.S. 294, 304 (1967) (citation omitted); see also Morgan Cloud, *The Fourth*

Although this understanding of the central meaning of the Fourth Amendment produced something close to absolute protection for what were regarded as property interests, the limits on property rights also defined the limits on Fourth Amendment protection. For example, in *Marron v. United States*,<sup>52</sup> the Court upheld, as a search incident to arrest, the search of a tavern and the seizure of a ledger and bills because any location used as an illegal tavern was declared “by the National Prohibition Act to be a common nuisance,”<sup>53</sup> and “[t]he authority of officers to search and seize the things by which the nuisance was being maintained, extended to all parts of the premises used for the unlawful purpose” and to all items “used to carry it on.”<sup>54</sup> Thus, just as the law of nuisance limits the scope of property rights, it limited the scope of Fourth Amendment protection. Similarly, in *Olmstead v. United States*,<sup>55</sup> the Court, relying on the framing-era rule that only a physical trespass was thought to be an unlawful invasion of the privacy of the home, held that wiretapping unaccompanied by a physical trespass to the home was not a “search” within the meaning of the Fourth Amendment.<sup>56</sup> In short, expansive property-law protections led to expansive Fourth Amendment protection, but the limitations on property-law rights led to concomitantly limited Fourth Amendment protection.

### *B. Pragmatic Balancing as the Central Meaning of the Fourth Amendment*

The libertarian regime’s effort to use property rights to define the limits of governmental search-and-seizure power proved problematic for a number of reasons.

First, there was a textual problem. The Fourth Amendment does not protect “property,” but rather “persons, houses, papers, and effects” against “unreasonable search and seizure.”<sup>57</sup> This textual formulation, of course, does not track those interests protected by the law of property. For example, the Court held that a trespass onto an “open field” did not violate the Fourth Amendment because it did not compromise any of the interests identified as protected in the Fourth Amendment’s text.<sup>58</sup> Beyond that, as we have seen, *Boyd* acknowledged that even a trespass to the home could be justified by a warrant authorizing a search for and seizure of contraband or

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*Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 587–92 (1996); William C. Heffernan, *On Justifying Fourth Amendment Exclusion*, 1989 WIS. L. REV. 1193, 1220–29; Sina Kian, *The Path of the Constitution: The Original System of Remedies, How It Changed, and How the Court Responded*, 87 N.Y.U. L. REV. 132, 169–73 (2012); Roger Roots, *The Originalist Case for the Fourth Amendment Exclusionary Rule*, 45 GONZ. L. REV. 1, 50–52 (2009).

<sup>52</sup> 275 U.S. 192 (1927).

<sup>53</sup> *Id.* at 198.

<sup>54</sup> *Id.* at 199.

<sup>55</sup> 277 U.S. 438 (1928), *overruled in part by* *Katz v. United States*, 389 U.S. 347 (1967).

<sup>56</sup> *Id.* at 465–66.

<sup>57</sup> See U.S. CONST. amend. IV.

<sup>58</sup> See *Hester v. United States*, 265 U.S. 57, 59 (1924).

stolen or forfeitable property.<sup>59</sup> Warrantless search and seizure of automobiles were subsequently permitted on the basis of probable cause to believe that they obtained contraband on the theory that the moveable character of the property made an immediate search imperative.<sup>60</sup> In these cases, law enforcement interests were thought to justify a limitation on the right of the owner of property to exclude others. If sufficiently weighty law-enforcement interests could limit the rights of property owners, however, then the law of property failed to provide an adequate measure of Fourth Amendment reasonableness.

Second, the Court came to conclude that protection of Fourth Amendment rights required protection even for those who asserted no property rights in the items seized by the authorities. On this point, push came to shove in *Agnello v. United States*,<sup>61</sup> in which the Court rejected an argument that an accused could not seek suppression of cocaine recovered as the result of an unconstitutional search and seizure because a rule that required the accused to acknowledge ownership of contraband in order to vindicate his Fourth Amendment rights would effectively require him to incriminate himself in violation of the Fifth Amendment.<sup>62</sup> Thus, the Court acknowledged the difficulties with making Fourth Amendment rights turn on an assertion of property rights.

Third, the Court came to see that property-law rules developed to regulate the relations of private parties were often a poor fit when applied to search and seizure. For example, the Court came to hold that despite a landlord's property-law right to enter leased property, a landlord's consent to a search of a leased residence would not sustain a search under the Fourth Amendment.<sup>63</sup> The Court similarly held that a hotel proprietor's state-law right to enter leased rooms did not mean that the proprietor's consent to a police search of a guest's room could validate an otherwise unreasonable search.<sup>64</sup> Similarly, the Court held that a guest lawfully on the searched premises but having no property interest in those premises could nevertheless complain of an allegedly unlawful search and seizure.<sup>65</sup> Thus, the Court came to regard some interests left unprotected by the law of property as worthy of Fourth Amendment protection.

It was this final point that proved fatal to the libertarian regime of *Boyd* and its progeny. *Olmstead*'s holding that nontrespassory wiretapping was not a "search" or "seizure" within the meaning of the Fourth Amendment provoked Justice Brandeis's famous dissenting opinion, in which he wrote that "[c]lauses guaranteeing to the

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<sup>59</sup> See *supra* notes 44–45 and accompanying text.

<sup>60</sup> See *Carroll v. United States*, 267 U.S. 132, 153–59 (1925).

<sup>61</sup> 269 U.S. 20 (1925).

<sup>62</sup> *Id.* at 34–35.

<sup>63</sup> See *Chapman v. United States*, 365 U.S. 610, 616–17 (1961).

<sup>64</sup> See *Stoner v. California*, 376 U.S. 483, 487–90 (1964).

<sup>65</sup> See *Jones v. United States*, 362 U.S. 257, 265–67 (1960), *overruled by United States v. Salvucci*, 448 U.S. 83 (1980).

individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world.”<sup>66</sup> Since the framing era, Justice Brandeis argued, “[s]ubtler and more far-reaching means of invading privacy have become available to the Government.”<sup>67</sup> In particular, “[w]henver a telephone line is tapped, the privacy of the persons at both ends of the line is invaded. . . . As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire-tapping.”<sup>68</sup> Justice Brandeis contended that “every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.”<sup>69</sup> This view became law when, in *Katz v. United States*,<sup>70</sup> the Court famously wrote that “the Fourth Amendment protects people, not places,”<sup>71</sup> and on that basis repudiated *Olmstead* and held that wiretapping fell within the scope of the Fourth Amendment even if it involved no trespass to a home.<sup>72</sup> The Court went on to hold that the warrantless wiretapping in that case amounted to an unreasonable search and seizure because it had not been authorized by a warrant.<sup>73</sup>

The triumph of Justice Brandeis’s view that all invasions of privacy require appropriate justification meant that search-and-seizure authority would have to be tied to an appropriate law-enforcement justification rather than property-law conceptions. The revolution that this approach produced in Fourth Amendment jurisprudence was not limited to wiretapping. For example, the new regime revolutionized the law of search incident to arrest. In *Marron*, as we have seen, the Court held that it is constitutionally reasonable to search incident to an arrest all premises used to carry on an unlawful nuisance, relying on the limitations that the law of nuisance places on property rights.<sup>74</sup> Once, however, the justification to search was based not on the lack of a property right to prevent the search but on the law-enforcement justification for the search, the *Marron* doctrine could not stand. The Court subsequently held that because the pragmatic rationale for a search incident to arrest was to protect the arresting officer’s safety, the search must be limited to the grabbable area within the arrestee’s immediate control.<sup>75</sup>

Viewed through the lens of pragmatism, the obvious objection to expanding the Fourth Amendment is that constraining the ability of authority to search for and

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<sup>66</sup> *Olmstead v. United States*, 277 U.S. 438, 472 (1928) (Brandeis, J., dissenting).

<sup>67</sup> *Id.* at 473.

<sup>68</sup> *Id.* at 475–76.

<sup>69</sup> *Id.* at 478.

<sup>70</sup> 389 U.S. 347 (1967).

<sup>71</sup> *Id.* at 351.

<sup>72</sup> *Id.* at 352–53.

<sup>73</sup> *Id.* at 354–59.

<sup>74</sup> See *supra* notes 52–54 and accompanying text.

<sup>75</sup> See *Chimel v. California*, 395 U.S. 752, 762–68 (1969); see also *Arizona v. Gant*, 556 U.S. 322, 343 (2009) (applying this rule to searches of vehicles incident to an arrest).



seize evidence of a crime has the undesirable consequence of inhibiting the apprehension of the guilty. There is, however, a pragmatic answer to be found in Fourth Amendment jurisprudence—constraining search-and-seizure authority protects the innocent against overzealous officials. The Court came to justify the exclusionary rule, for example, based on its ability to deter official misconduct.<sup>76</sup> Similarly, the Court has reasoned that the virtue of a warrant requirement is that it ensures that the decision to undertake a search is made “by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime . . . leav[ing] the people’s homes secure only in the discretion of police officers.”<sup>77</sup> Justice Frankfurter made this very point in support of his conception of the Fourth Amendment as a limitation on enforcement discretion in *United States v. Rabinowitz*, writing that the Fourth Amendment “subordinate[s] police action to legal restraints, not in order to convenience the guilty but to protect the innocent.”<sup>78</sup> Thus, the concern in Fourth Amendment jurisprudence with official discretion may ultimately rest on a pragmatic rationale for protecting the innocent against the potentially overzealous officer. Indeed, a number of legal scholars have argued that a central concern of contemporary Fourth Amendment jurisprudence is with protecting the innocent.<sup>79</sup>

Yet, protection of the innocent against unjustified search and seizure is an incomplete account of the change wrought by the demise of the libertarian regime of *Boyd* and its progeny. After all, if the objective of the Fourth Amendment were merely to protect the innocent against unjustified search and seizure, it would have banned search and seizure altogether. The innocent, however, require more than protection against official scrutiny; they also require protection against lawbreakers. Hence, any complete account of reasonableness, at least on the pragmatic conception, must take account of law enforcement interests as well.

Indeed, Justice Brandeis’s view that the Fourth Amendment prohibited “unjustifiable intrusion by the Government upon the privacy of the individual”<sup>80</sup> implied

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<sup>76</sup> See, e.g., *Davis v. United States*, 131 S. Ct. 2419, 2426–27 (2011); *Herring v. United States*, 555 U.S. 135, 141–42 (2009); *United States v. Leon*, 468 U.S. 897, 906 (1984); *Stone v. Powell*, 428 U.S. 465, 485–86 (1976).

<sup>77</sup> *Johnson v. United States*, 333 U.S. 10, 14 (1948) (citation omitted); accord, e.g., *Steagald v. United States*, 451 U.S. 204, 212–13 (1981); *Payton v. New York*, 445 U.S. 573, 585–86 (1980); *United States v. U.S. Dist. Court for E. Dist. of Mich.*, 407 U.S. 297, 316–17 (1972); *McDonald v. United States*, 335 U.S. 451, 455–56 (1948).

<sup>78</sup> *United States v. Rabinowitz*, 339 U.S. 56, 82 (1950) (Frankfurter, J., dissenting).

<sup>79</sup> See, e.g., L. Rush Atkinson, *The Bilateral Fourth Amendment and the Duties of Law-Abiding Persons*, 99 GEO. L.J. 1517, 1533–48 (2011); Sherry F. Colb, *Innocence, Privacy, and Targeting in Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1476–502 (1996); Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1244–48 (1983); Alexander A. Reinert, *Public Interest(s) and Fourth Amendment Enforcement*, 2010 U. ILL. L. REV. 1461, 1491–93.

<sup>80</sup> *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

that upon what is regarded as sufficient justification, intrusions on privacy should be regarded as constitutionally reasonable. That implication had already been realized by the time of *Katz v. United States*; earlier that term in *Warden v. Hayden*,<sup>81</sup> the Court had rejected *Gouled*'s rule that the Fourth Amendment permitted the seizure of fruits or instrumentalities of crime but not "mere evidence."<sup>82</sup> The Court reasoned that "the principal object of the Fourth Amendment is the protection of privacy rather than property."<sup>83</sup> The Court added: "The requirement that the Government assert in addition some property interest in material it seizes has long been a fiction, obscuring the reality that government has an interest in solving crime."<sup>84</sup> Subsequently, the Court also rejected the view that using an accused's papers recovered in the course of a search and seizure as evidence against him violated the Fifth Amendment's prohibition on compulsory self-incrimination on the ground that a seizure of private papers by the authorities does not compel the accused to become a witness against himself.<sup>85</sup> Accordingly, the new regime rejected the view that there was a truly private realm free from the threat of official scrutiny regardless of the strength of the government's proffered justification for a contested search or seizure.<sup>86</sup>

Thus, a regime focused on unwarranted invasion of privacy would not be a slave to property-law conceptions, but it would also accommodate the law-enforcement interests. This view accordingly narrowed Fourth Amendment protections when compared to the libertarian conception in the face of sufficiently compelling governmental interests. Indeed, as we have seen, not long after *Katz*, the *Terry* doctrine emerged to authorize a stop-and-frisk when an officer reasonably suspects that a suspect is engaged in crime and could be dangerous.<sup>87</sup> *Terry* is a classic example of the pragmatic conception of Fourth Amendment reasonableness, cautioning that "there is no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails."<sup>88</sup> Other cases have applied the concept of unjustified intrusion to seizures of property in

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<sup>81</sup> 387 U.S. 294 (1967).

<sup>82</sup> *Id.* at 300.

<sup>83</sup> *Id.* at 304.

<sup>84</sup> *Id.* at 306 (footnote omitted). Thus, *Hayden* paved the way for *Katz*, as the Court acknowledged when it wrote, "[t]he premise that property interests control the right of the Government to search and seize has been discredited." *Katz*, 389 U.S. at 353 (quoting *Hayden*, 387 U.S. at 304) (internal quotation marks omitted).

<sup>85</sup> See *Andresen v. Maryland*, 427 U.S. 463, 470–77 (1976).

<sup>86</sup> For useful discussion on the import of *Hayden* for a libertarian conception of the Fourth Amendment, see Morgan Cloud, *A Liberal House Divided: How the Warren Court Dismantled the Fourth Amendment*, 3 OHIO ST. J. CRIM. L. 33, 55–64 (2005), and Nowlin, *supra* note 24, at 1063–75.

<sup>87</sup> See *supra* text accompanying notes 14–16.

<sup>88</sup> *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (quoting *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 536–37 (1967)) (internal quotation marks omitted).

which possessory rather than liberty or privacy interests are at stake.<sup>89</sup> Utilizing a balancing of protected privacy, liberty, or possessory interests against law enforcement justifications for a challenged search or seizure, the Court has even, on what it regarded as sufficient justification, dispensed with the traditional probable-cause and warrant requirements.<sup>90</sup> In fashioning this doctrine, the protection of the innocent has not been the only relevant consideration; the Court has made plain that the *Terry* standard “falls considerably short of satisfying a preponderance of the evidence standard,”<sup>91</sup> and “accepts the risk that officers may stop innocent people.”<sup>92</sup> Thus, as some commentators have observed, the emergence of the *Katz* conception of the Fourth Amendment cannot properly be characterized as libertarian.<sup>93</sup> Instead, as we have seen, this era represents the triumph of pragmatic balancing as the central meaning of the Fourth Amendment.<sup>94</sup>

Accordingly, the pragmatic conception of the Fourth Amendment as directed at unjustified intrusions is not concerned only with protecting the innocent, but rather with balancing the intrusion on protected interests—including the interests of the innocent—against law-enforcement interests. As perhaps the leading criminal procedure scholar of recent decades writing in the pragmatic tradition, the late William Stuntz, once put it, the task of Fourth Amendment jurisprudence, on the pragmatic account, is to “bring the Fourth Amendment’s balance closer to the true balance of social costs and social benefits that attend different sorts of police work.”<sup>95</sup>

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<sup>89</sup> See, e.g., *Soldal v. Cook Cnty., Ill.*, 506 U.S. 56, 61–64, 71 (1992).

<sup>90</sup> See, e.g., *Samson v. California*, 547 U.S. 843 (2006) (search of parolees); *Illinois v. Lidster*, 540 U.S. 419 (2004) (checkpoint seeking information about prior hit-and-run); *Bd. of Educ. of Ind. Sch. Dist. No. Ninety-Two v. Earls*, 536 U.S. 822 (2002) (drug testing of students engaged in extracurricular activities); *Mich. Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990) (sobriety checkpoint); *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656 (1989) (drug testing of federal employees engaged in drug interdiction or carrying firearms); *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985) (detention at border of individual suspected of alimentary canal smuggling); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (search of purse of student suspected of possessing cigarettes); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (immigration checkpoint near the border).

<sup>91</sup> *United States v. Arvizu*, 534 U.S. 266, 274 (2002).

<sup>92</sup> *Illinois v. Wardlow*, 528 U.S. 119, 126 (2000).

<sup>93</sup> See, e.g., Eric J. Miller, *The Warren Court’s Regulatory Revolution in Criminal Procedure*, 43 CONN. L. REV. 1, 36–43 (2010).

<sup>94</sup> For useful discussions of this understanding of the implications of *Katz*, see CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT* 21–47 (2007), and Nowlin, *supra* note 24, at 1039–41.

<sup>95</sup> William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 853 (2001); see also, e.g., Ric Simmons, *Ending the Zero-Sum Game: How to Increase the Productivity of the Fourth Amendment*, 36 HARV. J.L. & PUB. POL’Y 549, 554–64 (2013); Daniel J. Solove, *Fourth Amendment Pragmatism*, 51 B.C. L. REV. 1511, 1527–33 (2010).

*C. The Persistence of Libertarianism in Fourth Amendment Jurisprudence*

The apparent triumph of Justice Brandeis's pragmatism in *Katz* proved not to mark the end of a libertarian conception that tied Fourth Amendment protections to the property owner's right to exclude others. After all, it is easy to understand the objections to pragmatic balancing; many have argued that balancing tests are likely to systematically undervalue liberty interests in favor of more tangible law-enforcement objectives.<sup>96</sup> Beyond that, as we have seen, prior to *Katz*, there was a long tradition that understood the Fourth Amendment concept of reasonableness as embodying a limitation on the reach of investigative authority, regardless of law-enforcement justifications.

Given the power of the libertarian conception, it may be unsurprising that it continued to influence Fourth Amendment jurisprudence even after *Katz*. For example, as it held that the Fourth Amendment does not regulate the inspection of garbage left for collection on a public curb or street, the Court stressed that such material is accessible not only to garbage collectors but to any other member of the public.<sup>97</sup> Similarly, as it held that an aerial inspection of a fenced backyard did not infringe on a reasonable expectation of privacy, the Court stressed that members of the public had the right to overfly the yard from navigable airspace and view what lies below.<sup>98</sup> In

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<sup>96</sup> See, e.g., Cloud, *supra* note 24, at 242–47; Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1187–93 (1988). For what is perhaps the canonical attack on balancing in constitutional law, see T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 972–1004 (1987). Some have also criticized Fourth Amendment balancing in particular as unacceptably indeterminate. See, e.g., Lee, *supra* note 17, at 1149–50; Gerald S. Reamey, *When “Special Needs” Meet Probable Cause: Denying the Devil Benefit of Law*, 19 HASTINGS CONST. L.Q. 295, 299–300, 327 (1992); Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 855 (1994). This objection is more easily answered. Fourth Amendment pragmatism need not produce mere ad hoc decisionmaking; there are powerful pragmatic arguments for bright-line rules that provide necessary doctrinal predictability. Cf. *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001) (“[W]e have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need . . . . Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made.” (citation omitted)).

<sup>97</sup> See *California v. Greenwood*, 486 U.S. 35, 40 (1988).

<sup>98</sup> See *California v. Ciraolo*, 476 U.S. 207, 212–14 (1986). This holding was subsequently extended to an overflight at four-hundred feet by a helicopter operating at a lower altitude than is permitted for fixed-wing aircraft, with four Justices stressing that the overflight was lawful under applicable laws and regulations and therefore infringed no reasonable expectation of privacy. See *Florida v. Riley*, 488 U.S. 445, 449–52 (1989) (plurality opinion). Justice O'Connor concurred in the result, but her agreement was based on her view that the defendant had not established that overflights at this altitude are sufficiently rare to establish a reasonable expectation of privacy. *Id.* at 454–55 (O'Connor, J., concurring in the judgment).

*Smith v. Maryland*,<sup>99</sup> the Court held that there is no reasonable expectation of privacy in records of the telephone numbers dialed from a subscriber's home phone, reasoning that the information at issue was customarily retained in the telephone company's business records, bringing the case within the rule that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties."<sup>100</sup> The Court relied on its earlier decision in *United States v. Miller*,<sup>101</sup> in which the Court held that a subpoena calling for the production of bank records of a depositor's financial records infringed no reasonable expectation of privacy of the depositor because the depositor "can assert neither ownership nor possession" over the records,<sup>102</sup> and they contained only information that the depositor had voluntarily disclosed to the bank and about which federal law requires records to be maintained and made available by subpoena to law enforcement.<sup>103</sup> Indeed, the Court has acknowledged that *Katz* did not inter entirely the property-based libertarian regime: "[B]y focusing on legitimate expectations of privacy in Fourth Amendment jurisprudence, the Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by that Amendment."<sup>104</sup>

The Court's refusal to read *Katz* as requiring constitutional protections over this swath of activities and information ordinarily shielded from public scrutiny has provoked enormous criticism from legal commentators who deride what they regard as *Katz*'s failure to provide principled and coherent Fourth Amendment protection for privacy interests.<sup>105</sup> Yet, it is far from clear that the problem is *Katz*, or instead the failure of *Katz* to displace entirely the property-based libertarian conception of the Fourth Amendment that dates to the era of *Boyd* and *Gouled*.

In any event, although the property-based conception has often been used to reject Fourth Amendment claims, it has also operated to sustain such claims beyond that offered by *Katz* itself. For example, in *Alderman v. United States*,<sup>106</sup> the Court held that the homeowner may challenge the government's use of a recording of a

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<sup>99</sup> 442 U.S. 735 (1979).

<sup>100</sup> *Id.* at 743–44.

<sup>101</sup> 425 U.S. 435 (1976).

<sup>102</sup> *Id.* at 440.

<sup>103</sup> *Id.* at 442–43.

<sup>104</sup> *Rakas v. Illinois*, 439 U.S. 128, 144 n.12 (1978).

<sup>105</sup> See, e.g., SLOBOGIN, *supra* note 94, at 151–64; Gerald G. Ashdown, *The Fourth Amendment and the "Legitimate Expectation of Privacy,"* 34 VAND. L. REV. 1289, 1313–17 (1981); Sherry F. Colb, *What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119, 126–59 (2002); Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-First Century*, 65 IND. L.J. 549, 565–69 (1990); Loewy, *supra* note 79, at 1254–56; Christopher Slobogin, *Subpoenas and Privacy*, 54 DEPAUL L. REV. 805, 828–31 (2005); Solove, *supra* note 95, at 1536–38; Scott E. Sundby, *"Everyman"'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1757–58 (1994).

<sup>106</sup> 394 U.S. 165 (1969).

conversation that was intercepted as a result of an unlawful entry for purposes of placing a listening device in his home even if the homeowner was not a participant in the conversation because “[t]he rights of the owner of the premises are as clearly invaded when the police enter and install a listening device . . . as they are when the entry is made to undertake a warrantless search for tangible property.”<sup>107</sup> Thus, it was the owner’s property right to exclude others from his home, not his interest in the privacy of his conversations, that sustained the owner’s Fourth Amendment claim.<sup>108</sup>

The persistence of the libertarian conception has become even clearer in a series of opinions written by Justice Scalia, beginning with *Kyllo v. United States*.<sup>109</sup> In that case, the Court addressed the question whether the use of a thermal imaging device positioned on public property outside of a home that discloses “the relative heat of various rooms in the home,”<sup>110</sup> amounts to a “search” within the meaning of the Fourth Amendment.<sup>111</sup> For the dissenters, thermal imaging did not implicate the Fourth Amendment under *Katz* and its progeny because homeowners have no reasonable expectation of privacy in the manner in which heat is emitted from a residence.<sup>112</sup> The Court, in contrast, acknowledged that “[t]he *Katz* test . . . has often been criticized as circular, and hence subjective and unpredictable,”<sup>113</sup> and then reasoned:

While it may be difficult to refine *Katz* when the search of areas such as telephone booths, automobiles, or even the curtilage and uncovered portions of residences is at issue, in the case of the search of the interior of homes—the prototypical and hence most commonly litigated area of protected privacy—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*. To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment. We think that obtaining by sense-enhancing technology any information regarding the interior of the

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<sup>107</sup> *Id.* at 179–80.

<sup>108</sup> The Court later explained that, despite *Katz*, it “ha[d] not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by that Amendment,” adding that “[n]o better demonstration of this proposition exists than the decision in *Alderman*.” *Rakas*, 439 U.S. at 144 n.12. For a helpful discussion of the persistence of property-law concepts in Fourth Amendment jurisprudence, see Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 809–27 (2004).

<sup>109</sup> 533 U.S. 27 (2001).

<sup>110</sup> *Id.* at 35 n.2.

<sup>111</sup> *Id.* at 31–33.

<sup>112</sup> *Id.* at 41–44 (Stevens, J., dissenting).

<sup>113</sup> *Id.* at 34 (majority opinion).

home that could not otherwise have been obtained without physical intrusion into a constitutionally protected area . . . constitutes a search—at least where (as here) the technology in question is not in general public use.<sup>114</sup>

Based on this understanding, the Court held that the use of the thermal imager amounted to the “search” of a house that had not been authorized by a warrant and therefore violated the Fourth Amendment.<sup>115</sup> It did not matter that the thermal imager disclosed only limited information about the pattern by which heat was emitted from the home since “[i]n the home . . . *all* details are intimate details, because the entire area is held safe from prying government eyes.”<sup>116</sup> Thus, for the *Kyllo* majority, any effort to learn about the interior of a residence otherwise concealed from public view is subject to the Fourth Amendment’s warrant requirement. It seems that under *Kyllo*, we need not worry about the Brandeisian concept of an “unjustifiable invasion of privacy”; anything that discloses what occurs while secluded from public view within a home or other protected area, even through the use of an investigative technique that is nonintrusive and supported by compelling law-enforcement interests, is nevertheless subject to the Fourth Amendment’s requirement of a warrant supported by probable cause. This is surely libertarianism, not pragmatism.<sup>117</sup> Unsurprisingly, commentators critical of *Katz* and its progeny have celebrated *Kyllo*, regarding it as rejecting an approach that provides only uncertain constitutional protection for a plainer boundary that treats the acquisition of any information that is concealed from public view within a residence or similarly private domain as a search subject to the commands of the Fourth Amendment.<sup>118</sup>

Subsequently, in *United States v. Jones*,<sup>119</sup> in another opinion by Justice Scalia, the Court held that attaching a GPS device to a vehicle and its subsequent use to

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<sup>114</sup> *Id.* (citation omitted) (internal quotation marks omitted).

<sup>115</sup> *Id.* at 40.

<sup>116</sup> *Id.* at 37.

<sup>117</sup> *Cf.* Susan W. Brenner, *The Fourth Amendment in an Era of Ubiquitous Technology*, 75 *MISS. L.J.* 1, 28–32 (2005) (contending that cases evaluating the application of the Fourth Amendment to new technologies through *Kyllo* continue to afford Fourth Amendment protection to particular kinds of spaces rather than by assessing personal privacy); Nowlin, *supra* note 24, at 1041–46 (arguing that *Kyllo* focuses on places that are protected by the Fourth Amendment rather than reasonable expectations of privacy).

<sup>118</sup> *See, e.g.*, Morgan Cloud, *Rube Goldberg Meets the Constitution: The Supreme Court, Technology and the Fourth Amendment*, 72 *MISS. L.J.* 5, 41–48 (2002); Colb, *supra* note 105, at 166–70; Raymond Shih Ray Ku, *The Founders’ Privacy: The Fourth Amendment and the Power of Technological Surveillance*, 86 *MINN. L. REV.* 1325, 1362–67 (2002); Tracey Maclin, *Kyllo, Katz, and Technology: Virtual Fourth Amendment Protection in the Twenty-First Century*, 72 *MISS. L.J.* 51, 61–72 (2002); Nowlin, *supra* note 24, at 1045–46; David A. Sklansky, *Back to the Future: Kyllo, Katz and Common Law*, 72 *MISS. L.J.* 143, 178–88 (2002).

<sup>119</sup> 132 S. Ct. 945 (2012).

monitor the movements of a vehicle was a “search” within the meaning of the Fourth Amendment.<sup>120</sup> Quoting *Entick*'s statement that “no man can set his foot upon his neighbor's close without his leave; if he does he is a trespasser,”<sup>121</sup> the Court reasoned that to “[assure] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted,”<sup>122</sup> the Fourth Amendment should be “understood to embody a particular concern for government trespass upon the areas (persons, houses, papers, and effects) it enumerates.”<sup>123</sup> Thus, the Court held that in addition to the approach taken in *Katz* for nontrespassory investigative techniques, a “search” within the meaning of the Fourth Amendment occurs when there is a “[t]respass . . . conjoined with that what was present here: an attempt to find something or to obtain information.”<sup>124</sup>

Thus, despite the rise of *Katz* and the seeming triumph of Justice Brandeis's *Olmstead* dissent, libertarianism is alive and well in Fourth Amendment jurisprudence. Indeed, many of the critics of *Katz* who, although not advocating a return to the property-based regime of *Boyd* and its progeny and differing in many details, nevertheless share the belief that the central objective of the Fourth Amendment jurisprudence should be to identify the limits of government power as a means of protecting individual liberty.<sup>125</sup> Perhaps Morgan Cloud has best articulated this view:

The text and history of the Fourth Amendment demonstrate that  
it exists to enhance individual liberty by constraining government

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<sup>120</sup> *Id.* at 954.

<sup>121</sup> *Id.* at 949 (quoting *Entick v. Carrington*, How. St. Tr. 1029 (C.P. 1765)).

<sup>122</sup> *Id.* at 950 (quoting *Kyllo v. United States*, 533 U.S. 29, 34 (2001)).

<sup>123</sup> *Id.* (internal quotation marks omitted).

<sup>124</sup> *Id.* at 951 n.5. To be sure, four additional Members of the Court advocated a more pragmatic conception demanding constitutional regulation when GPS surveillance is of unusually long duration because this technological advance makes intrusive investigations so much less resource-intensive, *id.* at 963–64 (Alito, J., concurring in the judgment), and a fifth Member of the Court expressed considerable sympathy with these concerns, *id.* at 956–57 (Sotomayor, J., concurring).

<sup>125</sup> *See, e.g.*, STEPHEN J. SCHULHOFER, *MORE ESSENTIAL THAN EVER: THE FOURTH AMENDMENT IN THE TWENTY-FIRST CENTURY* 12–15, 121–22 (2012); Amsterdam, *supra* note 3, at 402–09; Ricardo J. Bascuas, *Property and Probable Cause: The Fourth Amendment's Principled Protection of Privacy*, 60 RUTGERS L. REV. 575, 620–37 (2008); Timothy Casey, *Electronic Surveillance and the Right to Be Secure*, 41 U.C. DAVIS L. REV. 977, 1025–31 (2008); Castiglione, *supra* note 2, at 674–75; Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 350–66 (1998) [hereinafter Clancy, *What Does the Fourth Amendment Protect*]; Cloud, *supra* note 51, at 616–28; Thomas P. Crocker, *The Political Fourth Amendment*, 88 WASH. U. L. REV. 303, 350–54 (2010); Richard A. Epstein, *Privacy and the Third Hand: Lessons from the Common Law of Reasonable Expectations*, 24 BERKELEY TECH. L.J. 1199, 1210–26 (2009); Christian M. Halliburton, *How Privacy Killed Katz: A Tale of Cognitive Freedom and the Property of Personhood as Fourth Amendment Norm*, 42 AKRON L. REV. 803, 860–66 (2009); Luna, *supra* note 22, at 829–61.



power. The Amendment operates in a concrete dimension, regulating the power of government to intrude physically upon people and their property. But it also operates in a more abstract dimension: The limitations it imposes on government are not narrow and technical, but rest upon a sweeping vision of privacy and autonomy. The Fourth Amendment enacts a vision of the individual as an autonomous agent, empowered to act and believe and express himself free from government interference.<sup>126</sup>

Thus, both the libertarian and pragmatic conceptions of the Fourth Amendment seem to be alive and well in Fourth Amendment jurisprudence and scholarship.

#### *D. History and the Central Meaning of the Fourth Amendment*

As we have seen, Justice Frankfurter believed that inquiry into the historical origins of the Fourth Amendment was central to apprehending its central meaning.<sup>127</sup> Reliance on framing-era understandings is a longstanding staple of Fourth Amendment jurisprudence.<sup>128</sup> In recent years, it has become commonplace; the Court now tells us that “[i]n determining whether a search or seizure is unreasonable, we begin with history. We look to the statutes and common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve.”<sup>129</sup> Thus, one logical source for evidence of the Fourth Amendment’s central meaning is the original understanding of the Fourth Amendment.

Yet, there is little that helps to identify its central meaning in the historical evidence regarding the original understanding of the Fourth Amendment. Its drafting history, for example, is unenlightening. The original proposal for what became the Fourth Amendment was a single clause forbidding unreasonable search and seizure “by warrants issued without probable cause, supported by oath or affirmation, or not

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<sup>126</sup> Cloud, *supra* note 51, at 618–19 (footnotes omitted) (internal quotation marks omitted).

<sup>127</sup> See *supra* notes 10–11 and accompanying text.

<sup>128</sup> See, e.g., *United States v. Watson*, 423 U.S. 411, 418–21 (1976); *Carroll v. United States*, 267 U.S. 132, 150–51 (1925); *Boyd v. United States*, 116 U.S. 616, 624–32 (1886), *rejected by Warden v. Hayden*, 387 U.S. 294 (1967).

<sup>129</sup> *Virginia v. Moore*, 553 U.S. 164, 168 (2008); *accord, e.g., Atwater v. City of Lago Vista*, 532 U.S. 318, 326 (2001); *Florida v. White*, 526 U.S. 559, 563 (1999); *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999); *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995). For helpful discussions of the importance of framing-era practice to Fourth Amendment jurisprudence in recent decades, see Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 239, 252–66 (2002), and David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1746–61 (2000).

particularly describing the places to be searched, or the persons or things to be seized.”<sup>130</sup> The text was changed during debate in the House to create a freestanding clause prohibiting unreasonable search and seizure, but no explanation was offered for the alteration, which led Professor Davies to conclude that the alteration was intended only to phrase a prohibition on general warrants in a more imperative fashion.<sup>131</sup> That surmise may be a correct account of matter of congressional intent, but the Supreme Court has cautioned,

[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning. Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.<sup>132</sup>

Accordingly, even if no one in the House intended a substantive change from Madison's original formulation, this likely has little interpretive significance in determining how the public would have understood the proposal, at least absent evidence that the public was aware of a congressional intent to preserve the substance of the original proposal in a two-clause format. In fact, there is virtually no surviving evidence that sheds any light on the understanding of the Fourth Amendment in the ratifying states.<sup>133</sup>

Thus, we must look for evidence of the ordinary framing-era semantic meaning of “unreasonable search and seizure,” but it proves little more enlightening. David Sklansky, for example, believes that in the framing era this phrase meant “what it means today: contrary to sound judgment, inappropriate, or excessive.”<sup>134</sup> Thomas Davies, for his part, has contended that the term “unreasonable,” as a legal concept, was understood to mean illegal or unconstitutional.<sup>135</sup> Either view reduces the original meaning of the Fourth Amendment to little more than a legal conclusion without enlightening us as to the methodology to be used to reach that conclusion.

There is nevertheless a historical case to be made for the libertarian conception. One point of agreement among legal scholars and historians is that the Fourth

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<sup>130</sup> THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 223 (Neil H. Cogan ed., 1997).

<sup>131</sup> See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 716–24 (1999).

<sup>132</sup> *Dist. of Columbia v. Heller*, 554 U.S. 570, 576–77 (2008) (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)) (internal quotation marks omitted).

<sup>133</sup> See WILLIAM JOHN CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING*, 602–1791, at 712–23 (1990).

<sup>134</sup> See Sklansky, *supra* note 129, at 1777–81. He adds that the term was neither a widely used concept nor a familiar term of art in the framing era. See *id.* at 1776–807.

<sup>135</sup> See Davies, *supra* note 131, at 684–93.

Amendment was originally understood to prohibit general warrants and their like.<sup>136</sup> Even a warrant could authorize entry of a home only for purposes of searching for and seizing stolen property or contraband.<sup>137</sup> The evidence from the framing era so overwhelmingly focuses on concerns over wrongful warrants authorizing intrusion on the home that some have even argued that the historical evidence suggests that the Fourth Amendment regulates only the issuance of warrants<sup>138</sup> or the searches of the home.<sup>139</sup> Others are more impressed with historical evidence suggesting a more general hostility to any form of broad search-and-seizure authority.<sup>140</sup> In any event, as Professor Davies has demonstrated, the framing-era focus on general warrants must be understood against the background of a framing-era law regime that had nothing resembling a modern police force vested with general investigative authority; instead, in the framing era, officers had only meager authority to engage in warrantless search and seizure and a limited power of arrest.<sup>141</sup> Moreover, if a jury concluded that officers acting without a valid warrant exceeded their authority, they were personally liable in tort.<sup>142</sup>

When the framing-era limitations on warrants are coupled with the limited authority granted to officers acting without warrants, the framing-era conception seems to offer support for a libertarian conception that understands the function of the Fourth Amendment as limiting the investigative power of the government rather than engaging in pragmatic balancing. Indeed, even the rhetoric of the historical Fourth Amendment resonates with libertarianism, such as “the ancient adage that a man’s house is his castle [to the point that the] poorest man may in his cottage bid defiance to all the forces of the Crown.”<sup>143</sup> It is therefore unsurprising that those who

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<sup>136</sup> See, e.g., AMAR, *supra* note 3, at 10–17; CUDDIHY, *supra* note 133, at 770–72; SCHULHOFER, *supra* note 125, at 22–34; TAYLOR, *supra* note 33, at 29–44; Clancy, *supra* note 3, at 978–90; Davies, *supra* note 131, at 600–19; Silas J. Wasserstrom, *The Fourth Amendment’s Two Clauses*, 26 AM. CRIM. L. REV. 1389, 1392–94 (1989).

<sup>137</sup> See, e.g., CUDDIHY, *supra* note 133, at 487, 555, 633; Davies, *supra* note 131, at 645–54; Roots, *supra* note 51, at 36–37.

<sup>138</sup> See, e.g., Gerard V. Bradley, *The Constitutional Theory of the Fourth Amendment*, 38 DEPAUL L. REV. 817, 833–55 (1989).

<sup>139</sup> See, e.g., David E. Steinberg, *The Original Understanding of Unreasonable Searches and Seizures*, 56 FLA. L. REV. 1051, 1061–73 (2004).

<sup>140</sup> See, e.g., CUDDIHY, *supra* note 133, at 773–82; Thomas K. Clancy, *The Framers’ Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979, 1052–61 (2011); William Cuddihy, *Warrantless House-to-House Searches and Fourth Amendment Originalism: A Reply to Professor Davies*, 44 TEX. TECH L. REV. 997 (2012); Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 939–59 (1997).

<sup>141</sup> See Davies, *supra* note 131, at 573 n.56, 576–83, 619–68.

<sup>142</sup> See, e.g., AMAR, *supra* note 3, at 11–17, 20–21; CUDDIHY, *supra* note 133, at 593–96, 760–61; Davies, *supra* note 131, at 621–22, 665–66; Thomas, *supra* note 49, at 221–22, 225–26, 227–28.

<sup>143</sup> *Georgia v. Randolph*, 547 U.S. 103, 115 (2006) (quoting *Miller v. United States*, 357 U.S. 301, 307 (1958)) (internal quotation marks omitted).

embrace reliance on history to animate Fourth Amendment jurisprudence frequently embrace a libertarian conception that regards the Fourth Amendment as a limitation on governmental power rather than a pragmatic balance between liberty and order.<sup>144</sup> This likely explains why Justice Scalia is an exponent of the libertarian conception; he has embraced historical inquiry into the framing-era meaning of constitutional text as the basis for constitutional interpretation.<sup>145</sup>

Some scholars argue that history supports a more pragmatic conception. Akhil Amar, for example, has argued that the framing-era search-and-seizure law endorsed a more flexible and pragmatic test of reasonableness.<sup>146</sup> As framing-era support for this view, he cites statutes in which Congress authorized suspicionless searches of ships and liquor storehouses.<sup>147</sup> These statutes suggest a more pragmatic balancing of liberty and law-enforcement interests than would be suggested by an invariable requirement of a warrant issued on probable cause. But, as Professor Davies has noted, there is no framing-era source that endorses a general test of reasonableness for search and seizure.<sup>148</sup> He has also questioned the probative value of the statutes authorizing searches of vessels and storehouses without a warrant or probable cause, arguing these statutory precedents may well be attributable to the framing era's indulgent attitude toward revenue-related searches of commercial premises.<sup>149</sup> Tracey

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<sup>144</sup> See, e.g., Thomas K. Clancy, *The Fourth Amendment as a Collective Right*, 43 TEX. TECH L. REV. 255, 256–60 (2010); Crocker, *supra* note 125, at 345–50; Ku, *supra* note 118, at 1333–40; M. Blane Michael, *Reading the Fourth Amendment: Guidance from the Mischief that Gave It Birth*, 85 N.Y.U. L. REV. 905, 919–31 (2010); Regnier, *supra* note 17, at 632–43; George C. Thomas III, *Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451, 1463–78 (2005).

<sup>145</sup> See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 78–92 (2012); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862–64 (1989).

<sup>146</sup> See AMAR, *supra* note 3, at 31–40; Akhil Reed Amar, *Terry and Fourth Amendment First Principles*, 72 ST. JOHN'S L. REV. 1097, 1108–10, 1118–20 (1998) [hereinafter Amar, *Terry and Fourth Amendment First Principles*].

<sup>147</sup> See AMAR, *supra* note 3, at 18; Amar, *Terry and Fourth Amendment First Principles*, *supra* note 146, at 1104–05.

<sup>148</sup> See Davies, *supra* note 131, at 591–600. Professor Amar highlighted a reference to reasonableness in a seminal framing-era English case. See AMAR, *supra* note 3, at 13–14, 186 n.67. But, as Professor Davies observed, the statement says no more than that search and seizure must be reasonable in duration and adds that if the search was unsupported by “probable cause of suspicion,” a search’s limited duration does not establish its lawfulness. See Davies, *supra* note 131, at 593–94. Telford Taylor has argued that the framing-era evidence supports a general test of reasonableness, but his evidence consists only of the rule permitting a search of an arrestee’s person incident to arrest. See TAYLOR, *supra* note 33, at 27–30, 43.

<sup>149</sup> See Davies, *supra* note 131, at 604–08, 711–14; see also Thomas, *supra* note 144, at 1477–78. Beyond that, Professor Davies has argued that the Fourth Amendment was not thought applicable to matters falling within admiralty jurisdiction, noting that the amendment did not mention vessels, but instead regulated searches of “houses, papers, and effects.”

Maclin has explained these framing-era precedents by noting that searches of vessels had always been regarded as governed by the special standards of admiralty law, and the liquor-search statute provided only a highly limited authorization for premises likely to contain taxable alcohol.<sup>150</sup> Still, these precedents suggest that the framing-era understanding permitted at least some relaxation of search-and-seizure restrictions to meet the felt exigencies of law enforcement.

In addition to the framing-era statutes that seem to accept pragmatic justifications for broad search-and-seizure authority, there is additional evidence that framing-era limitations on search-and-seizure powers reflect pragmatic considerations. William Cuddihy and Arnold Loewy, for example, have noted that the framing-era criticism of general warrants included the charge that they authorized unjustified searches.<sup>151</sup> Indeed, the seminal case of *Entick v. Carrington*, on which *Boyd* so heavily relied,<sup>152</sup> cautioned that permitting a general search for evidence would mean that “the innocent would be confounded with the guilty.”<sup>153</sup> Justice Frankfurter understood the framing-era attacks on official discretion as reflecting a pragmatic concern that overzealous officers would exercise that discretion in a manner that would lead to unjustified search and seizure.<sup>154</sup> Accordingly, the framing-era suspicion of excessive search-and-seizure authority conferred by general warrants or otherwise can be understood not as libertarianism, but rather as based on a concern about the threat of unjustified search and seizure—the same consideration that animated Justice Brandeis’s pragmatism.

Perhaps most importantly, however, even if framing-era understandings tilt toward the libertarian conception, that conception was not codified in the text of the Fourth Amendment, and accordingly it is not clear why this understanding should

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Davies, *supra* note 131, at 607–08. Whatever its merits, however, Professor Davies’s argument about the textual inapplicability of the Fourth Amendment to vessels does not account for the framing-era willingness to permit warrantless searches of warehouses containing “effects” that presumably fell within the scope of Fourth Amendment protection. On this point, Professor Davies writes: “The most likely explanation for . . . the virtual silence regarding searches of commercial premises, is that the Framers understood that legislative authority for official inspection of commercial premises did not violate any common-law principle comparable to the castle doctrine applicable to houses.” *Id.* at 608.

<sup>150</sup> See Maclin, *supra* note 140, at 950–54; see also CUDDIHY, *supra* note 133, at 743–46; Fabio Arcila, Jr., *The Death of Suspicion*, 51 WM. & MARY L. REV. 1275, 1299–303 (2010); Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1739–43 (1996).

<sup>151</sup> See CUDDIHY, *supra* note 133, at 460; Loewy, *supra* note 79, at 1237–40. Similarly, Donald Dripps has argued that framing-era hostility to search and seizure of papers was rooted in a concern that such searches inevitably required rummaging through innocent papers in order to locate those that were incriminating. See Donald A. Dripps, “Dearest Property”: *Digital Evidence and the History of Private “Papers” as Special Objects of Search and Seizure*, 103 J. CRIM. L. & CRIMINOLOGY 49, 106–09 (2013).

<sup>152</sup> See *supra* notes 37–41 and accompanying text.

<sup>153</sup> *Entick v. Carrington*, 19 How. St. Tr. 1029, 1073 (C.P. 1765).

<sup>154</sup> See *supra* notes 10–11, 77–79 and accompanying text.

be regarded as interpretively binding. There is, moreover, reason to doubt whether the framers' assessment of reasonableness sheds much light on what is properly regarded as constitutionally reasonable today.

Consider *Kyllo*.<sup>155</sup> As we have seen, the Court rejected what it characterized as the framing-era rule requiring a physical trespass to constitute an invasion of a legally protected interest in the privacy of the home to prevent what it regarded as an erosion of constitutional protection as a consequence of technological advances.<sup>156</sup> The Court proffered a historical justification for its approach, writing that its approach “assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.”<sup>157</sup> On this view, one could argue that framing-era protections are the proper baseline to measure Fourth Amendment protections. In this vein, Orin Kerr has argued that Fourth Amendment jurisprudence reflects an effort to maintain equilibrium by adjusting doctrine to ensure that changes in technology or other circumstances do not alter the balance between liberty and investigative power.<sup>158</sup> Yet, *Kyllo* protects a privacy interest of far lesser dimension than any regarded as protected in framing-era law. In the framing era, a physical trespass for the purpose of gathering evidence necessarily enabled the trespasser—by physically entering the home—to learn a great deal more than can be revealed through a thermal image or similarly noninvasive technique. Even if one agrees with *Kyllo*, it is hard to dispute Justice Stevens's claim in his dissenting opinion that “[t]he interest in concealing the heat escaping from one's house pales in significance to ‘the chief evil against which the wording of the Fourth Amendment is directed,’ the ‘physical entry of the home.’”<sup>159</sup> Similarly, then-Professor Posner was surely correct when he observed that electronic surveillance lacks critical elements of what was regarded as an unreasonable search and seizure in the framing era because a search and seizure involving a physical intrusion into the home presents elements of force and coercion absent in electronic surveillance, of which the targets are usually unaware.<sup>160</sup> One can do little more than speculate about whether framing-era law would have protected a privacy interest as limited as the one at issue in *Kyllo*.

The same quandary emerges in *United States v. Jones* where, as we have seen, the Court invoked framing-era conceptions of trespass to support its holding.<sup>161</sup> It

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<sup>155</sup> *Kyllo v. United States*, 533 U.S. 27 (2001).

<sup>156</sup> See *supra* text accompanying notes 109–18.

<sup>157</sup> *Kyllo*, 533 U.S. at 34.

<sup>158</sup> See Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 480–81 (2011). For a similar view that focuses on maintaining an equilibrium in terms of police efficiency in ferreting out crime, see Paul Ohm, *The Fourth Amendment in a World Without Privacy*, 81 MISS. L.J. 1309, 1345–47 (2012).

<sup>159</sup> *Kyllo*, 533 U.S. at 46 (Stevens, J., dissenting) (quoting *United States v. U.S. Dist. Court for E. Dist. of Mich.*, 407 U.S. 297, 313 (1972)).

<sup>160</sup> See Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 185–88.

<sup>161</sup> See 132 S. Ct. 945 (2012); *supra* text accompanying notes 119–24.

is doubtful that we can fairly equate the attachment and monitoring of a GPS device to anything that arose in the framing era; as Justice Alito noted in his separate opinion, “it is almost impossible to think of late-18th-century situations that are analogous to what took place in this case,” such as “a case in which a constable secreted himself somewhere in a coach and remained there for a period of time in order to monitor the movements of the owner,” and, he added, even then “this would have required either a gigantic coach, a very tiny constable, or both.”<sup>162</sup> Even in this hypothetical, however, by using all of his senses, the constable almost certainly would have learned more than the limited information transmitted by a GPS device and could not have simultaneously informed his colleagues of his location in the manner that a GPS device transmits data to those monitoring it. Unsurprisingly, in *Jones* the Court ultimately retreated on this point, writing: “[I]t is quite irrelevant whether there was an 18th-century analog.”<sup>163</sup>

In truth, we have no way of knowing whether, in the framing era, the limited intrusion on the home accomplished by a thermal imager or a GPS device would have been regarded an invasion of an interest too ephemeral to merit legal protection. Even Lawrence Lessig, generally an advocate of “translating” framing-era understandings in light of contemporary circumstances,<sup>164</sup> has acknowledged the limits of historical inquiry; he concedes that the framers never “worked out what the amendment would protect in a world where perfectly noninvasive searches could be conducted. . . . When their world differs from ours in a way that reveals a choice they did not have to make, then we need to make that choice.”<sup>165</sup>

The problem of utilizing framing-era conceptions of reasonableness in contemporary circumstances is not confined to issues involving technological change. In *Terry*, for example, the Court recognized investigative authority unknown in the framing era, as Justice Douglas argued in his dissenting opinion in that case.<sup>166</sup> Yet, it is unclear that this expansion in investigative authority should be regarded as “unreasonable” in the constitutional sense if experience has demonstrated that police needed additional investigative authority to maintain social stability in complex

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<sup>162</sup> *United States v. Jones*, 132 S. Ct. 945, 958 n.3 (2012) (Alito, J., concurring in the judgment).

<sup>163</sup> *Id.* at 950 n.3.

<sup>164</sup> See, e.g., Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1174–211 (1997); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 401–14 (1995).

<sup>165</sup> LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 149–50 (1999).

<sup>166</sup> See *Terry v. Ohio*, 392 U.S. 1, 37–38 (1968) (Douglas, J., dissenting). More recently, Justice Scalia launched a similar attack on *Terry* based on his understanding of framing-era law. See *Minnesota v. Dickerson*, 508 U.S. 366, 380–81 (1993) (Scalia, J., concurring). For discussions of the tension between *Terry* and framing-era practice, see Rosenthal, *supra* note 17, at 330–37. See also Sklansky, *supra* note 129, at 1804–05; Thomas, *supra* note 144, at 1514–16.

urban settings unknown in the framing era.<sup>167</sup> Perhaps a libertarian conception of the Fourth Amendment reasonableness had more purchase in the framing era simply because framing-era law enforcement did not face the challenges to social stability prevalent in contemporary urban America.<sup>168</sup> Similarly, as Professor Stuntz observed, the framing-era “mere evidence” rule that prohibited seizure of a suspect’s business records or other papers made it much more difficult to prosecute a wide variety of white collar crime, and, accordingly, the Court’s retreat from that rule was central to the government’s ability to enforce a wide variety of regulatory measures that came to be regarded as appropriate in an increasingly complex economy.<sup>169</sup> In short, what was regarded as constitutionally “reasonable” in the framing era may not remain so in vastly changed circumstances.

Thus, as Anthony Amsterdam concluded, “history is a standoff.”<sup>170</sup> The framers placed in the Constitution not a codification of the limitations on the authority of the framing-era officers, or a command that the existing balance between liberty and governmental power be preserved, but a prohibition on “unreasonable” search and seizure, a formulation that even in the argot of the day represented little more than a legal conclusion, as we have seen.<sup>171</sup> There is little reason to believe that the Fourth Amendment’s text, written at such a high level of generality, is properly understood even as a matter of original meaning to forbid the kind of evolution that had become accepted in the often indeterminate common law of search and seizure by the time of the framing.<sup>172</sup> To construct the central meaning of the Fourth Amendment, something more than history is required.

## II. THE CENTRAL MEANING OF THE FOURTH AMENDMENT AND THE BINARY SEARCH

It may be understandable that Fourth Amendment jurisprudence has not made a decisive choice between the pragmatic and libertarian conceptions. History, as we have seen, offers uncertain guidance. As for the process of constitutional adjudication, courts decide cases as they come along, utilizing the approach that seems best

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<sup>167</sup> For a more extensive defense of *Terry* along these lines, see Rosenthal, *supra* note 17, at 337–46.

<sup>168</sup> For more elaborate arguments along these lines, see Arcila, *supra* note 150, at 1326–35, Donald A. Dripps, *Responding to the Challenges of Contextual Change and Legal Dynamism in Interpreting the Fourth Amendment*, 81 MISS. L.J. 1085, 1101–21 (2012), and Lawrence Rosenthal, *Originalism in Practice*, 87 IND. L.J. 1183, 1196–202 (2012).

<sup>169</sup> See William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 427–47 (1995).

<sup>170</sup> Amsterdam, *supra* note 3, at 401.

<sup>171</sup> See *supra* text accompanying notes 134–35.

<sup>172</sup> For more elaborate arguments in support of this conclusion premised upon the dynamic character of the common law at the time of the framing, see Dripps, *supra* note 168, at 1121–26, and Sklansky, *supra* note 129, at 1776–813.



fitted to the facts before them and therefore are rarely forced to make a choice between overarching constitutional theories.<sup>173</sup> In some cases, however, competing constitutional theories may point to opposing conclusions. It is to these cases that we must look if we are to determine which of the competing conceptions of the Fourth Amendment has the most force. As it happens, there is one type of case in which these competing theories point in decidedly different directions—cases involving binary investigative techniques disclosing no more than probable cause to believe that a location otherwise hidden to public view contains contraband or evidence of other illegal activity.

*A. The Binary Search and the Home*

Prior to *Florida v. Jardines*, the Supreme Court had addressed a binary search on four occasions. In *United States v. Place*,<sup>174</sup> after holding that the Fourth Amendment permitted the authorities to seize luggage that they reasonably suspect contains contraband,<sup>175</sup> the Court explained that such a seizure may include exposing the luggage to a trained narcotics-detection dog because the procedure “does not require opening the luggage” nor “expos[ing] noncontraband items that otherwise would remain hidden from public view,” but instead “discloses only the presence or absence of narcotics, a contraband item.”<sup>176</sup> Thus, the “exposure of respondent’s luggage, which was located in a public place, to a trained canine—did not constitute a ‘search’ within the meaning of the Fourth Amendment.”<sup>177</sup>

Arguably this discussion in *Place* was unnecessary to the decision because the Court went on to hold that the dog sniff in that case violated the Fourth Amendment because the luggage was held an unreasonably long time in the absence of probable cause before the dog arrived.<sup>178</sup>

*Place*’s discussion of binary searches, however, became the basis for the holding in *United States v. Jacobsen*.<sup>179</sup> In that case, the Court concluded that the use of a field test by federal agents to determine whether a quantity of powder that had been found in a package was cocaine did not constitute a search within the meaning of the Fourth Amendment, reasoning that “[a] chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy,” since “even if the results are negative—merely disclosing that the substance is something other than cocaine—such a result reveals nothing of special

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<sup>173</sup> Cf. Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 525–48 (2007) (exploring the reasons that the Court has not settled on a single approach for determining Fourth Amendment coverage).

<sup>174</sup> 462 U.S. 696 (1983).

<sup>175</sup> *Id.* at 706.

<sup>176</sup> *Id.* at 707.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 708–10.

<sup>179</sup> 466 U.S. 109 (1984).

interest,” and “governmental conduct that can reveal whether a substance is cocaine, and no other arguably ‘private’ fact, compromises no legitimate privacy interest.”<sup>180</sup> Thus, “[h]ere, as in *Place*, the likelihood that official conduct of the kind disclosed by the record will actually compromise any legitimate interest in privacy seems much too remote to characterize the testing as a search subject to the Fourth Amendment.”<sup>181</sup>

The Court hewed to this view in *City of Indianapolis v. Edmond*.<sup>182</sup> Even as it held that the use of drug interdiction checkpoints was an unreasonable seizure because it involved stopping vehicles in the absence of individualized suspicion for the purposes of generalized crime control,<sup>183</sup> the Court added that the use of narcotics-detection dogs at the checkpoints was governed by *Place* inasmuch as “an exterior sniff of an automobile does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics,” and “is ‘much less intrusive than a typical search.’”<sup>184</sup>

This dictum became a square holding in *Illinois v. Caballes*.<sup>185</sup> Citing *Place* and *Jacobsen*, the Court held that the use of a trained narcotics-detection dog during the course of an otherwise valid traffic stop to determine if there was probable cause to believe that a vehicle contains contraband was not a search within the meaning of the Fourth Amendment because “any interest in possessing contraband cannot be deemed ‘legitimate,’ and thus, governmental conduct that *only* reveals the possession of contraband ‘compromises no legitimate privacy interest.’”<sup>186</sup>

These earlier binary search cases are classic examples of Fourth Amendment pragmatism. *Jacobsen*, for example, stresses that in a binary search case, likelihood of an invasion of any legally protected privacy interest is too remote to justify the imposition of Fourth Amendment regulation.<sup>187</sup> An approach that rejects application of the Fourth Amendment to techniques involving low liberty costs and high law-enforcement benefits seems an emphatic repudiation of the libertarian conception.

Yet, the previous binary search cases involved investigative techniques that had taken place after the subject’s liberty interests had already been compromised—*Place*’s luggage had been validly seized in a public place,<sup>188</sup> *Jacobsen*’s package had

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<sup>180</sup> *Id.* at 123.

<sup>181</sup> *Id.* at 124. In other contexts, drug tests might not qualify as binary searches. *See, e.g., Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602, 617 (1989) (“[C]hemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic. Nor can it be disputed that the process of collecting the sample to be tested, which may in some cases involve visual or aural monitoring of the act of urination, itself implicates privacy interests.”).

<sup>182</sup> 531 U.S. 32 (2000).

<sup>183</sup> *Id.* at 40–44.

<sup>184</sup> *Id.* at 40 (quoting *United States v. Place*, 462 U.S. 696, 707 (1983)).

<sup>185</sup> 543 U.S. 405 (2005).

<sup>186</sup> *Id.* at 408 (quoting *Jacobsen*, 466 U.S. at 123).

<sup>187</sup> *See Jacobsen*, 466 U.S. at 124.

<sup>188</sup> *Place*, 462 U.S. at 703–06.

been validly seized by federal agents,<sup>189</sup> and Caballes's vehicle had been validly stopped on a public street.<sup>190</sup> When liberty interests have not already been compromised in this fashion, perhaps the binary search would be regarded as an invasion of an interest that should be regarded as protected from the government's investigative reach. Although libertarians may disagree on the bounds of the private sphere in which the government must satisfy a heightened standard for any intrusion on what is otherwise concealed from public view, certainly that which is concealed within a residence presents a particularly strong case for Fourth Amendment protection regardless of the nonintrusive character of or limited information disclosed by an investigative technique.<sup>191</sup>

Indeed, this point proved central to the holding in *Jardines*. In an opinion by Justice Scalia who, as we have seen, is an advocate of the libertarian conception, the Court wrote that the Fourth Amendment "establishes a simple baseline, one that for much of our history formed the exclusive basis for its protections: When 'the Government obtains information by physically intruding' on persons, houses, papers, or effects, 'a "search" within the original meaning of the Fourth Amendment' has 'undoubtedly occurred.'"<sup>192</sup> The Court characterized this "baseline" in libertarian terms: "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."<sup>193</sup> This protection extends to "the area 'immediately surrounding and associated with the home'—what our cases call the curtilage."<sup>194</sup> This is the area "'intimately linked to the home, both physically and psychologically,' and is where 'privacy expectations are most heightened.'"<sup>195</sup> In particular, the Court added, "[t]he front porch is the classic exemplar of an area adjacent to the home and 'to which the activity of home life extends.'"<sup>196</sup> The Court concluded that the officers' conduct amounted to "an unlicensed physical intrusion,"<sup>197</sup> and that "the background social norms that invite a visitor to the front door do not invite him there to conduct a search."<sup>198</sup> Thus, the Court wrote that it "need not decide whether

<sup>189</sup> *Jacobsen*, 466 U.S. at 118–22.

<sup>190</sup> *Caballes*, 543 U.S. at 407.

<sup>191</sup> See, e.g., D. Benjamin Barros, *Home as a Legal Concept*, 46 SANTA CLARA L. REV. 255, 259–69, 272–75 (2006); Jordan C. Budd, *A Fourth Amendment for the Poor Alone: Subconstitutional Status and the Myth of the Inviolable Home*, 85 IND. L.J. 355, 359–63 (2010); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 997–1000 (1982).

<sup>192</sup> *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) (quoting *United States v. Jones*, 132 S. Ct. 945, 950 n.3 (2012)).

<sup>193</sup> *Id.* (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)) (internal quotation marks omitted).

<sup>194</sup> *Id.* (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984)).

<sup>195</sup> *Id.* at 1415 (quoting *California v. Ciraolo*, 476 U.S. 207, 213 (1986)).

<sup>196</sup> *Id.* (quoting *Oliver*, 466 U.S. at 182 n.12).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 1416.

the officers' investigation of Jardines' home violated his expectation of privacy under *Katz*."<sup>199</sup> This case fell within the Fourth Amendment's protections because "the officers learned what they learned only by physically intruding on Jardines' property to gather evidence."<sup>200</sup>

### B. *The Uncertain Libertarianism of Jardines*

Even libertarians are likely to find little to celebrate in *Jardines* because the property-based protection recognized by the Court is so narrow and easily circumvented.

As we have seen, the holding in *Jardines* rests on the existence of a physical intrusion into a constitutionally protected area.<sup>201</sup> The narrowness of that holding means it is readily circumvented. With respect to persons, papers, and effects, a dog sniff involves no physical intrusion and accordingly is not subject to constitutional regulation under *Place* and *Caballes*—a questionable account from a libertarian perspective.<sup>202</sup> Even with respect to the home, *Jardines* offers limited protections. Consider, for example, the use of a narcotics-detection canine in a hallway outside

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<sup>199</sup> *Id.* at 1417.

<sup>200</sup> *Id.* As these passages make clear, the Court repeatedly used the concept of a physical intrusion rather than using the term trespass, which featured prominently in the prior term's decision, also written by Justice Scalia, in *Jones*. See *supra* text accompanying notes 119–24. In *Jones*, Justice Alito objected to the use of trespass because this would seemingly make the applicability of the Fourth Amendment turn on the vagaries of tort law. See *United States v. Jones*, 132 S. Ct. 945, 961–62 (2012) (Alito, J., concurring in the judgment). Indeed, reliance on a tort law concept such as trespass would have been particularly anomalous in *Jardines* because the Florida courts had never intimated that the officers had committed a trespass as a matter of state tort law. See *State v. Jardines*, 9 So. 3d 1, 4 (Fla. Dist. Ct. App. 2008) (“[T]he officer and the dog were lawfully present at the defendant’s front door.”), *quashed sub nom. Jardines v. State*, 73 So. 3d 34 (Fla. 2011), *aff’d sub nom. Florida v. Jardines*, 133 S. Ct. 1409 (2013). Moreover, to hold his majority in *Jardines*, Justice Scalia needed Justices Ginsburg and Kagan to join his opinion, yet both had joined Justice Alito’s opinion in *Jones*. This likely explains Justice Scalia’s use of the more generic concept of a physical intrusion, rather than the seemingly tort-law concept of a trespass, thereby avoiding the perhaps unintended implication in *Jones* that Fourth Amendment analysis might turn on state tort law. It is also possible that Justice Scalia had been persuaded by the view that *Jones* erred in tying Fourth Amendment law to trespass rather than property rights. See Kerr, *supra* note 49, at 90–93. Yet, given that a trespass requires an invasion to a legally protected property interest, the difference between characterizing the scope of constitutional protection in terms of a physical intrusion on property or a trespassory invasion may be more semantic than substantive.

<sup>201</sup> *Jardines*, 133 S. Ct. at 1417.

<sup>202</sup> Cf. Stephanie M. Stern, *The Inviolable Home: Housing Exceptionalism in the Fourth Amendment*, 95 CORNELL L. REV. 905, 938–52 (2010) (arguing that Fourth Amendment doctrine should focus on protection of intimate facts rather than the boundaries of the home).

an apartment.<sup>203</sup> As we have seen, the Fourth Amendment protects only persons, houses, papers, and effects; the common area in an apartment building frequently traversed by strangers may not qualify as a location “‘intimately linked to the home, both physically and psychologically’ . . . where ‘privacy expectations are most heightened.’”<sup>204</sup> Perhaps, if the dog physically touched the apartment door, the Fourth Amendment might apply; under the pre-*Katz* decision in *Silverman v. United States*,<sup>205</sup> the use of a spike microphone that made physical contact with a heating duct in the petitioners’ home, which “convert[ed] their entire heating system into a conductor of sound,”<sup>206</sup> was a search within the meaning of the Fourth Amendment because “the officers overheard the petitioners’ conversations only by usurping part of the petitioners’ house or office—a heating system which was an integral part of the premises occupied by the petitioners,” which constituted an “actual intrusion into a constitutionally protected area.”<sup>207</sup> It is far from clear that physical contact between the nose of a narcotics-detection dog and an apartment door represents a similar intrusion, but even if it were, a skilled handler could likely keep the dog far enough away from the door to avoid the writ of *Jardines*.<sup>208</sup>

The limits of *Jardines* are even more plainly illustrated by the potential development of a computer search program hypothesized by one student commentator that could be used to search the hard drive of every computer connected to the Internet and identify the presence of digital contraband, such as an illegally modified program or child pornography.<sup>209</sup> This would unquestionably permit the authorities to

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<sup>203</sup> See *Stabler v. State*, 990 So. 2d 1258, 1263 (Fla. Dist. Ct. App. 2008), *rev’d*, 90 So. 3d 267 (Fla. 2012); *Fitzgerald v. State*, 864 A.2d 1006 (Md. Ct. App. 2004); *State v. Davis*, 711 N.W.2d 841 (Minn. Ct. App. 2006).

<sup>204</sup> *Jardines*, 133 S. Ct. at 1415 (quoting *California v. Ciraolo*, 476 U.S. 207, 213 (1986)). To be sure, a “house,” for purposes of the Fourth Amendment, includes “curtilage,” but the Court has explained that

curtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.

*United States v. Dunn*, 480 U.S. 294, 301 (1987). Under these factors, the common halls of an apartment building seem poor candidates for protection, if indeed any common area could ever qualify as curtilage. See, e.g., *United States v. Hawkins*, 139 F.3d 29, 32–33 (1st Cir. 1998); *United States v. Acosta*, 965 F.2d 1248, 1252 (3d Cir. 1992); *McClintock v. State*, 405 S.W.2d 277, 283–84 (Tex. Ct. Crim. App. 2013).

<sup>205</sup> 365 U.S. 505 (1961).

<sup>206</sup> *Id.* at 507.

<sup>207</sup> *Id.* at 511, 512.

<sup>208</sup> Cf. *Goldman v. United States*, 316 U.S. 129, 134–36 (1942), *overruled by Katz v. United States*, 389 U.S. 347 (1967) (holding that the use of a listening device to overhear a conversation in an adjoining office did not violate the Fourth Amendment).

<sup>209</sup> See Michael Adler, Note, *Cyberspace, General Searches, and Digital Contraband: The Fourth Amendment and the Net-Wide Search*, 105 YALE L.J. 1093, 1097–100 (1996). For a

learn information otherwise concealed within a home, but it would involve no physical intrusion that would trigger the “baseline” protections of *Jardines*.

Beyond all this, it is entirely unclear whether *Jardines* offers any meaningful protection against binary searches. The Court’s precise holding was narrow: “The government’s use of trained police dogs to investigate the home and its immediate surroundings is a ‘search’ within the meaning of the Fourth Amendment.”<sup>210</sup> Notably, the Court did not decide whether the search was also “unreasonable” within the meaning of the Fourth Amendment.<sup>211</sup> It might well be anomalous to hold binary search techniques to the same standards as a physical search of a house, given their limited intrusiveness. Indeed, later in the same term that produced *Jardines*, the Court wrote, as it upheld the routine use of a buccal swab on the inside of an arrestee’s cheek to extract a DNA sample: “The fact [that] an intrusion is negligible is of central relevance to determining reasonableness, although it is still a search as the law defines that term.”<sup>212</sup> Accordingly, despite the holding in *Jardines*, the pragmatic arguments against restricting binary searches, at least involving a limited intrusion, could still carry the day.

The narrowness of *Jardines* accordingly undermines its libertarian virtues. It is surely a stunted brand of libertarianism that understands the Fourth Amendment to recognize a zone where individuals can be free from official scrutiny that involves only one’s home but which regards the government as free to peer within the home as long as it uses technology that requires no physical intrusion or which regards such intrusions as reasonable even when they invade property interests.

On this score, libertarians might argue that, at least with respect to the home, *Kyllo* can supplement *Jardines* by offering protection through its insistence that technology should not be permitted to erode the privacy of the home regardless of the limited significance of what is disclosed by “sense-enhancing technology.”<sup>213</sup> Yet, even assuming that the use of a narcotics-detection dog constitutes “sense-enhancing

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helpful discussion of how such a program could be used to search computers connected to the Internet for contraband, see Richard P. Salgado, *Fourth Amendment Search and the Power of the Hash*, 119 HARV. L. REV. 38 (2006).

<sup>210</sup> *Florida v. Jardines*, 133 S. Ct. 1409, 1417–18 (2013). Indeed, the Court limited its grant of certiorari “to the question of whether the officers’ behavior was a search within the meaning of the Fourth Amendment.” *Id.* at 1414.

<sup>211</sup> To be sure, the Court’s admonition that if the Fourth Amendment meant that “the State’s agents could stand in a home’s porch or side garden and trawl for evidence with impunity, the right to retreat would be significantly diminished,” might imply that the use of a narcotics-detection dog on the curtilage of a home in the absence of a warrant issued on probable cause is constitutionally unreasonable, but *Jardines* stops short of a square holding on that point. *Id.* at 1414. Similarly, in *Jones*, the Court did not reach the question whether the attachment and use of the GPS device was constitutionally unreasonable. See *United States v. Jones*, 132 S. Ct. 945, 954 (2012).

<sup>212</sup> *Maryland v. King*, 133 S. Ct. 1958, 1969 (2013).

<sup>213</sup> *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

technology”<sup>214</sup> or that the use of the Internet to examine the contents of a computer constitutes a “search,”<sup>215</sup> there remains great doubt that binary search techniques qualify for constitutional regulation under *Kyllo*. For one thing, *Kyllo* makes plain that the sending of an electronic transmission within the walls of a home cannot qualify as the kind of physical intrusion that triggers the applicability of the Fourth Amendment; the Court refused to permit that the applicability of the Fourth Amendment turn on whether technology accomplished “off-the-wall” or “through-the-wall surveillance,” explaining that it had “rejected such a mechanical interpretation of the Fourth Amendment in *Katz*,” and concluding that “there is no substance to this distinction.”<sup>216</sup> For another, the Court noted that the thermal-imaging technology was capable of disclosing innocent activity within a home, such as “at what hour each night the lady of the house takes her daily sauna and bath.”<sup>217</sup> In its subsequent decision upholding a dog sniff in *Caballes*, the Court distinguished the thermal-imaging technology used in *Kyllo* on just that basis.<sup>218</sup> Thus, *Kyllo* stops short of supporting the view that a binary search, even in the absence of a warrant issued on probable cause, violates the Fourth Amendment.<sup>219</sup>

Considered in this light, it becomes difficult to identify the libertarian virtues in *Jardines*, even as supplemented by *Kyllo*. The protection *Jardines* offers from official scrutiny of the home is uncertain at best. Plainly, the libertarian conception requires an argument that might support a more vigorous Fourth Amendment rule than can be found within the four corners of the holdings in *Jardines* and *Kyllo*.

Accordingly, even after *Jardines*, there is little reason to believe that a satisfactory libertarian account has emerged. Treating the home as a zone where one is free from official scrutiny is hardly satisfactory if the rule is easily circumvented, and, as we have seen, it seems that the protection offered by *Jardines* is subject to ready circumvention as long as the authorities can avoid physical intrusion on the home,

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<sup>214</sup> For an argument that narcotics-detection dogs in some respects qualify as advanced technology, see Irus Braverman, *Passing the Sniff Test: Police Dogs as Surveillance Technology*, 61 BUFF. L. REV. 81, 133–58 (2013).

<sup>215</sup> Although the case law regarding the application of the Fourth Amendment to the Internet is in its infancy, the principles that have been developed in the wake of *Katz* for applying the Fourth Amendment to new technologies powerfully suggest that any effort to ascertain the content of information available through the Internet which is not generally open to scrutiny of the public at large is ordinarily considered a search. See, e.g., Susan W. Brenner, *Fourth Amendment Future: Remote Computer Searches and the Use of Virtual Force*, 81 MISS. L.J. 112, 1238–44 (2012); Orin S. Kerr, *Applying the Fourth Amendment to the Internet: A General Approach*, 62 STAN. L. REV. 1005, 1017–31 (2010).

<sup>216</sup> *Kyllo*, 533 U.S. at 35, 36.

<sup>217</sup> *Id.* at 38.

<sup>218</sup> See *Illinois v. Caballes*, 543 U.S. 405, 409–10 (2005).

<sup>219</sup> *Kyllo* offers another potential qualification by treating technological surveillance as subject to Fourth Amendment regulation “where (as here) the technology in question is not in general public use.” 533 U.S. at 34.

and perhaps even by characterizing a trespassory “search” undertaken by a trained narcotics-detection dog or other binary methods as constitutionally reasonable. To be sure, *Jardines* importantly notes that property-based Fourth Amendment protections supplement, rather than replace, the protections offered by *Katz*.<sup>220</sup> As we have seen, however, the pre-*Jardines* binary search cases understood *Katz* to deny protection from binary searches.

Still, perhaps *Jardines*, when combined with a more robust version of *Kyllo*, might preclude binary searches unless authorized by a warrant issued on probable cause. Absent this, however, *Jardines* does a rather feeble job of limiting official scrutiny by means of binary search. Thus, if *Jardines* is to achieve its stated objective of affording meaningful protection against official scrutiny of the home, we must turn to the arguments for a rule that would make the home “secure” from surveillance in the form of a binary search. We will now see, however, that there are enormous problems with a libertarian conception along these lines.

### C. *The Problematic Case for Fourth Amendment Regulation of the Binary Search*

The most obvious route to a coherent account that would offer comprehensive Fourth Amendment protection against a binary search is to conclude that whenever the authorities use any sort of investigative technique to learn of the presence of an item otherwise concealed from public view, they have performed a “search” subject to regulation under the Fourth Amendment that should be subject to ordinary rules requiring reasonable suspicion or probable cause, as a number of scholars have argued.<sup>221</sup>

Coupling *Jardines* with a more robust version of *Kyllo* could, of course, achieve that objective. And, it is most likely the case that in terms of general social expectations of privacy, most of us probably do not believe that our vehicles, and especially our homes, are open to official scrutiny through binary investigative techniques. Yet, resolving Fourth Amendment issues by reference to popular sensibilities seems a problematic approach. If the protection of privacy should be measured by popular

<sup>220</sup> *Florida v. Jardines*, 133 S. Ct. 1409, 1417 (2013).

<sup>221</sup> See, e.g., Thomas K. Clancy, *What Is a “Search” Within the Meaning of the Fourth Amendment?*, 70 ALB. L. REV. 1, 37–52 (2006); John M.A. DiPippa, *Is the Fourth Amendment Obsolete?—Restating the Fourth Amendment in Functional Terms*, 22 GONZ. L. REV. 483, 502–03 (1987); Aya Gruber, *Garbage Pails and Puppy Dog Tails: Is That What Katz Is Made Of?*, 41 U.C. DAVIS L. REV. 781, 816–21 (2008); Harris, *supra* note 8, at 37–45; Cecil J. Hunt, II, *Calling in the Dogs: Suspicionless Sniff Searches and Reasonable Expectations of Privacy*, 56 CASE W. RES. L. REV. 285, 296–98 (2005); Maclin, *supra* note 140, at 101–06; Robert C. Power, *Technology and the Fourth Amendment: A Proposed Formulation for Visual Searches*, 80 J. CRIM. L. & CRIMINOLOGY 1, 59–61 (1989); Ric Simmons, *From Katz to Kyllo: A Blueprint for Adapting the Fourth Amendment to Twenty-First Century Technologies*, 53 HASTINGS L.J. 1303, 1321–29 (2002); Solove, *supra* note 95, at 1527–33; James J. Tomkovicz, *Technology and the Threshold of the Fourth Amendment: A Tale of Two Futures*, 72 MISS. L.J. 317, 385–92, 435–44 (2002).



sensibilities, it would seem better to leave regulation of searches to the politically accountable branches of government, who are more likely to be responsive to those sensibilities than a cloistered judiciary.<sup>222</sup> Deferring to popular sensibility is not the approach the Court has taken; it has left unregulated many investigative techniques that the available empirical evidence suggests infringes what the public regards as reasonable expectations of privacy.<sup>223</sup>

Moreover, there is a powerful, if pragmatic, argument against a universal requirement that investigative techniques that disclose previously concealed information surmount a threshold standard of predication, such as reasonable suspicion or probable cause. If investigations can begin only after surmounting such a threshold, then unless the authorities somehow blunder onto sufficient evidence of predication, they will be stymied. Especially for the kinds of crimes that are committed covertly and are unlikely to be uncovered absent proactive investigation, a universal requirement of predication could cripple law enforcement.<sup>224</sup> Indeed, there is increasing evidence that aggressive and proactive law-enforcement patrol tactics are particularly effective in combating crime.<sup>225</sup> Thus, wholly reactive policing, in which the police wait until someone provides them with predication to investigate, is likely to

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<sup>222</sup> Cf. SCALIA & GARNER, *supra* note 145, at 854 (“If the Constitution were . . . a novel invitation to apply current societal values, what reason would there be to believe that the invitation was addressed to the courts rather than the legislature?”).

<sup>223</sup> See SLOBOGIN, *supra* note 94, at 106–16; Jeremy A. Blumenthal et al., *The Multiple Dimensions of Privacy: Testing Lay “Expectations of Privacy,”* 11 U. PA. J. CONST. L. 331, 352–54 (2009); Henry F. Fradella et al., *Quantifying Katz: Empirically Measuring “Reasonable Expectations of Privacy” in the Fourth Amendment Context,* 38 AM. J. CRIM. L. 289, 362–67 (2011); Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at “Understandings Recognized and Permitted by Society,”* 42 DUKE L.J. 727, 738–42 (1993).

<sup>224</sup> Cf. Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech,* 86 IND. L.J. 1, 51–57 (2011) (expressing similar concerns with respect to proposals to require predication for initiating investigations based on otherwise protected speech).

<sup>225</sup> See, e.g., COMM. TO IMPROVE RESEARCH INFO. & DATA ON FIREARMS, NAT’L RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 230–35 (Charles F. Wellford et al. eds., 2005); COMM. TO REVIEW RESEARCH ON POLICE POL’Y & PRACTICES, NAT’L RESEARCH COUNCIL, FAIRNESS AND EFFECTIVENESS IN POLICING: THE EVIDENCE 235–40 (Wesley Skogan & Kathleen Frydl eds., 2004); Alfred Blumstein & Joel Wallman, *The Crime Drop and Beyond,* 2006 ANN. REV. L. SOC. SCI. 125, 136–37; Anthony A. Braga, *The Effects of Hot Spots Policing on Crime,* 578 ANNALS AM. ACAD. POL. & SOC. SCI. 104, 113–19 (2001). For discussions of the turn toward proactive policing strategies, see, for example, John E. Eck & Edward R. Maguire, *Have Changes in Policing Reduced Violent Crime? An Assessment of the Evidence,* in THE CRIME DROP IN AMERICA 207, 228–45 (Alfred Blumstein & Joel Wallman eds., rev. ed. 2006). See also Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing,* 97 COLUM. L. REV. 551, 572–84 (1997); Lawrence Rosenthal, *Policing and Equal Protection,* 21 YALE L. & POL’Y REV. 53, 81–91 (2003).

be seriously ineffective. Accordingly, it is likely reasonable, in the constitutional sense, to keep some substantial realm of effective, if relatively nonintrusive, investigative techniques largely unregulated so that the authorities can utilize them to acquire the evidentiary predication necessary to utilize more intrusive techniques. Moreover, as Professor Kerr has observed, when the Court holds that a given tactic is not a search within the meaning of the Fourth Amendment, one way of understanding such a conclusion is that the tactic is invariably reasonable and hence not in need of regulation.<sup>226</sup> And, as we have seen, on the pragmatic account, the binary search presents a particularly strong case for rejecting regulation because the binary search discloses little of interest about anyone but the guilty.

Accordingly, for a pragmatist, there is little reason to limit binary searches unless their costs in terms of liberty outweigh the benefits of leaving them unregulated. As the Court explained in the classically pragmatic *Terry v. Ohio*, “[T]here is ‘no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails.’”<sup>227</sup> If there is good reason to leave relatively nonintrusive binary search techniques unregulated in light of their limited costs to privacy, then, on the pragmatic account, they should not be subject to limitation under the Fourth Amendment. Indeed, as we have seen, Fourth Amendment law already treats many investigative techniques as compromising such limited privacy or liberty interests that they remain constitutionally unregulated.<sup>228</sup> It is therefore no more than a doctrinal detail whether a binary search should be deemed a search within the meaning of the Fourth Amendment that is nevertheless invariably reasonable even in the absence of individualized suspicion or not a search at all. If a particular practice should be among those in which the authorities are permitted to engage in order to gather sufficient evidence to satisfy the probable-cause or reasonable-suspicion standards, then there is little pragmatic justification for subjecting it to judicial oversight. And, as we have seen, this is a question that remains open after *Jardines*; even if a binary search method involves “‘physically intruding’ on persons, houses, papers, or effects,”<sup>229</sup> *Jardines* does not reach the question whether such a technique is “unreasonable” within the meaning of the Fourth Amendment.

There are, of course, a number of pragmatic arguments that could support constitutional regulation of binary searches. For example, one could argue that the unrestricted use of a narcotics-detection dog or other binary search technique undermines

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<sup>226</sup> See Kerr, *supra* note 173, at 526–31.

<sup>227</sup> *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (quoting *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 536–37 (1967)); *accord, e.g.*, *Samson v. California*, 547 U.S. 843, 848 (2006); *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985).

<sup>228</sup> See *supra* notes 97–104 and accompanying text.

<sup>229</sup> *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) (quoting *United States v. Jones*, 132 S. Ct. 945, 950 n.3 (2012)).

the sense of security one should be entitled to enjoy in an otherwise private space.<sup>230</sup> In her separate opinion in *Jardines*, Justice Kagan advanced an argument along these lines, claiming that “in every way that matters,” *Jardines* was like a case in which “a stranger comes to the front door of your home carrying super-high-powered binoculars,” and then “uses the binoculars to peer through your windows, into your home’s furthest corners.”<sup>231</sup> The visitor, Justice Kagan concluded, has not only “trespassed on your property,” but “he also invaded your ‘reasonable expectation of privacy’ by nosing into intimacies.”<sup>232</sup>

Yet, this pragmatic argument for protecting the security of the home against official scrutiny loses its force precisely because binary searches disclose no more than the presence or absence of contraband—a point that somehow escaped Justice Kagan as she analogized the dog sniff to peering inside of a home.<sup>233</sup> Unlike *Kyllo*, where, as we have seen, the thermal imaging device could disclose details about the innocent use of a sauna or high-power binoculars that could disclose any number of innocent details about one’s home life, the binary search compromises no liberty or privacy interest in possessing lawful items and otherwise results in no intrusion, physical or otherwise, on privacy. With respect to the innocent, a binary search tells investigators nothing about what is in a home or other location otherwise concealed from public view; instead, they learn only what is not present. Accordingly, as the pre-*Jardines* binary search cases explain, it is hard to understand how such an investigative technique compromises the privacy interests of persons, houses, papers, or effects to any meaningful extent—except for the interest in possessing contraband. The argument for regulating the binary search must identify some coherent social good served by regulating official scrutiny that discloses no more than the presence or absence of contraband.

There is, to be sure, a pragmatic argument for protecting the guilty to deter unjustified intrusions on the security of the innocent as well.<sup>234</sup> That consideration, however, has little force for binary search techniques that disclose nothing of significance about the innocent. Indeed, precisely because the binary search disaggregates the interests of the innocent and the guilty, it places to one side the most

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<sup>230</sup> See, e.g., *Illinois v. Caballes*, 543 U.S. 405, 422 (2005) (Ginsburg, J., dissenting); Gruber, *supra* note 221, at 823–27; Hunt, *supra* note 221, at 305–14.

<sup>231</sup> *Jardines*, 133 S. Ct. at 1418 (Kagan, J., concurring).

<sup>232</sup> *Id.*

<sup>233</sup> For an endorsement of Justice Kagan’s view that similarly ignores this point, see Andrew D. Selbst, *Contextual Expectations of Privacy*, 35 CARDOZO L. REV. 634, 682–86 (2013).

<sup>234</sup> See, e.g., *Minnesota v. Carter*, 525 U.S. 83, 110 (1998) (Ginsburg, J., dissenting); *United States v. Sharpe*, 470 U.S. 675, 719 (1985) (Brennan, J., dissenting); *Rawlings v. Kentucky*, 448 U.S. 98, 120–21 (1980) (Marshall, J., dissenting); *United States v. Rabinowitz*, 339 U.S. 56, 82 (1950) (Frankfurter, J., dissenting); *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting).

powerful pragmatic argument that is ordinarily advanced in favor of Fourth Amendment restraint on investigatory power—the claim that we must inhibit the ability of the government to gather evidence against the guilty in order to protect the innocent. Justice Kagan's argument for regulating the binary search, in short, wrongly conflates binary and non-binary searches. For that reason, it simply will not do.

A pragmatist might still argue for regulation of binary search techniques, observing that there will inevitably be some error rate associated with binary search techniques that might result in the issuance of warrants even though no contraband is to be found within the area to be searched, but it is difficult to understand how protecting individuals against this type of error is the function of the Fourth Amendment. The Fourth Amendment authorizes the issuance of warrants authorizing search and seizure on probable cause, even though probable cause requires only a “fair probability,”<sup>235</sup> which is “a standard well short of absolute certainty.”<sup>236</sup> If we assume that an alert by a properly trained narcotics-detection dog possesses sufficient reliability to invoke the binary search cases, then a positive dog sniff, like the positive field test at issue in *Jacobsen* or the hypothesized contraband-search program, is tantamount to a finding of probable cause.<sup>237</sup> Thus, whatever error rate may inhere

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<sup>235</sup> *E.g.*, *Safford Unified Sch. Dist. No. One v. Redding*, 557 U.S. 364, 371 (2009); *United States v. Grubbs*, 547 U.S. 90, 95–97 (2006); *United States v. Sokolow*, 490 U.S. 1, 7 (1989); *New York v. P.J. Video, Inc.*, 475 U.S. 868, 876–77 (1986); *Illinois v. Gates*, 462 U.S. 213, 238–39 (1983).

<sup>236</sup> *Cnty. of Los Angeles v. Rettele*, 550 U.S. 609, 615 (2007) (per curiam).

<sup>237</sup> Justice Souter, dissenting in *Caballes*, questioned whether narcotics-detection dogs are sufficiently reliable that a dog's alert can be considered an invariable indication of the presence of contraband and for that reason thought the case should be governed by *Kyllo*. See *Illinois v. Caballes*, 543 U.S. 405, 411–13 (2005) (Souter, J., dissenting). Others have taken a similar view. See, e.g., George M. Dery III, *Who Let the Dogs Out? The Supreme Court Did in Illinois v. Caballes by Placing Absolute Faith in Canine Sniffs*, 58 RUTGERS L. REV. 377, 403–06 (2006); Lewis R. Katz & Aaron P. Golembiewski, *Curbing the Dog: Extending the Protection of the Fourth Amendment to Police Drug Dogs*, 85 NEB. L. REV. 735, 754–65 (2007). Yet, Justice Souter and the commentators cited above have argued no more than that dog sniffs are fallible; this stops short of an argument that they are insufficiently reliable to generate probable cause. Indeed, in *Caballes*, the Court noted that Justice Souter did not “deny that a dog's reaction may provide reasonable suspicion, or probable cause, to search the container or enclosure; the Fourth Amendment does not demand certainty of success to justify a search for evidence or contraband.” 543 U.S. at 413. Most commentators agree that an alert by a trained dog, even if not infallible, amounts to probable cause. See, e.g., Mark E. Smith, Comment, *Going to the Dogs: Evaluating the Proper Standard for Narcotic Detector Dog Searches of Private Residences*, 46 HOUS. L. REV. 103, 116–38 (2009); see also Jane Bambauer, *Defending the Dog*, 91 OR. L. REV. 1203, 1207 (2013) (evidence of error rates in canine narcotics-detection overlooks that “[a]ll probable cause is probabilistic”). Others, however, have doubted this conclusion. See, e.g., Richard E. Myers II, *Detector Dogs and Probable Cause*, 14 GEO. MASON L. REV. 1, 14–18 (2006). Although there may be room to debate what type of proof should be regarded as sufficient to establish that a dog is

in a binary search technique sufficiently reliable to generate probable cause is one that the Fourth Amendment regards as acceptable.<sup>238</sup> Accordingly, in constitutional terms, a search is “binary” if it discloses no more than the presence or absence of probable cause—a standard which, if satisfied, supports issuance of a warrant that would properly authorize a conventional, if non-binary, search of locations hidden from public view.

A pragmatist might also believe, however, that the costs of a binary search are not limited to the risk of false positives. The use of a narcotics-detection dog during a police confrontation with a suspect could be embarrassing, if not frightening, even for the innocent.<sup>239</sup> Indeed, in *Jardines*, as it rejected the State’s argument that the public has a customary invitation to utilize the front walkway and porch of a residence, the Court wrote:

To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the

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adequately trained and reliable, *see generally* Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 KY. L.J. 405 (1997) (exploring this question), just a few weeks before it decided *Jardines*, the Court unanimously held that if a bona fide organization has certified a dog as reliable, or the dog has recently completed a training program that assessed its proficiency, “a court can presume (subject to any conflicting evidence offered) that the dog’s alert provides probable cause to search,” *Florida v. Harris*, 133 S. Ct. 1050, 1057 (2013).

<sup>238</sup> One could also argue pragmatically that binary search techniques are problematic because of the potential for their arbitrary or discriminatory use. *See, e.g.*, Amanda M. Basch, Note, *Sniffing Out the Problems: A Casenote Study of the Analysis and Effects of the Supreme Court’s Decision in Illinois v. Caballes*, 25 ST. LOUIS U. PUB. INT. L. REV. 417, 441–42 (2006); Brett Geiger, Comment, *People v. Caballes: An Analysis of Caballes, The History of Sniff Search Jurisprudence, and its Future Impact*, 26 N. ILL. U. L. REV. 595, 615–16 (2006). *But cf.* Rosenthal, *supra* note 17, at 347–56 (expressing skepticism about claims of arbitrary and discriminatory enforcement in urban policing). If this is a problem, however, it is one for all of Fourth Amendment jurisprudence. The Court has held that the alleged discriminatory motive of an investigator is irrelevant to the reasonableness inquiry under the Fourth Amendment. *See Whren v. United States*, 517 U.S. 806, 813 (1996). Although allegedly discriminatory enforcement decisions are subject to challenge under the Equal Protection Clause, the demanding standard governing such claims requires proof that a similarly situated individual was treated differently. *See United States v. Armstrong*, 517 U.S. 456, 465–68 (1996). If the risk of arbitrary and discriminatory enforcement is thought to be sufficiently great to require doctrinal innovation, surely the last place to begin is the binary search, which constitutes the investigative technique that is less likely to compromise the interests of the innocent than techniques that currently receive fairly little constitutional scrutiny.

<sup>239</sup> *See, e.g.*, Gruber, *supra* note 221, at 822–23; Hunt, *supra* note 221, at 285–86; Leslie A. Lunney, *Has the Fourth Amendment Gone to the Dogs?: Unreasonable Expansion of Canine Sniff Doctrine to Include Sniffs of the Home*, 88 OR. L. REV. 829, 880–87 (2009).

garden before saying hello and asking permission, would inspire most of us to—well, call the police.<sup>240</sup>

Yet, in *Jardines*, this observation was not offered to explain why the use of a narcotics-detection dog on a front porch is inconsistent with “the background social norms that invite a visitor to the front door.”<sup>241</sup> For that purpose, it may persuade, but it is far from clear that it supplies a basis to brand binary search techniques as constitutionally unreasonable searches.

The fact that an investigative technique might be regarded as alarming or embarrassing is generally not regarded as sufficient to brand it a constitutionally unreasonable search or seizure. To the contrary, as we have seen, the use of narcotics-detection dogs in *Place* and *Caballes* were not regarded as sufficient to brand the seizures in those cases constitutionally unreasonable, even though they no doubt added to the stress and potential embarrassment in those encounters. As long as the police are permitted to initiate investigations without probable cause in order to generate the evidence necessary to utilize more intrusive techniques, mistakes are inevitable, even though they may doubtless generate embarrassment or worse. Yet, absent the use of coercion, such tactics are generally considered to be consistent with the Fourth Amendment. For example, even when a uniformed officer approaches a suspect in the absence of individualized suspicion to undertake official questioning, that is not regarded as sufficiently coercive to trigger Fourth Amendment protection.<sup>242</sup> Similarly, a surprise raid on a workplace by immigration officials who then engaged in systematic questioning of employees while other agents stationed themselves at the exits was not regarded as sufficiently coercive to fall within the ambit of the Fourth Amendment.<sup>243</sup> The Court has also held that even absent probable cause or a warrant, when police approached the door to a residence, “banged on the door as loud as [they] could and announced either ‘Police, police, police’ or ‘This is the police,’” their “conduct was entirely consistent with the Fourth Amendment.”<sup>244</sup> These contexts are not precisely analogous to approaching the front door of a house with a narcotics-detection dog, but they do suggest that even a likelihood of causing embarrassment or alarm to a potentially innocent suspect may be insufficient to brand an investigative tactic constitutionally unreasonable.

Even so, perhaps the potential embarrassment, alarm, or humiliation experienced that could be produced by the presence of a narcotics-detection dog and its handler on one’s curtilage may be sufficient to brand this technique constitutionally unreasonable

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<sup>240</sup> Florida v. *Jardines*, 133 S. Ct. 1409, 1416 (2013).

<sup>241</sup> *Id.*

<sup>242</sup> See, e.g., United States v. *Drayton*, 536 U.S. 194, 200–01, 204–05 (2002).

<sup>243</sup> See *INS v. Delgado*, 466 U.S. 210, 216–21 (1984).

<sup>244</sup> Kentucky v. *King*, 131 S. Ct. 1849, 1863 (2011).

absent sufficient predication.<sup>245</sup> It is more difficult to understand, however, why this would be the case if the search is conducted in a discreet fashion and when the target is unaware that it is taking place, as was apparently the case in *Jardines*.<sup>246</sup> In any event, the conclusion that the use of a narcotics-detection dog outside a residence is unreasonable because it threatens alarm and embarrassment is eminently pragmatic—it ultimately brands such binary searches as “unjustified intrusions” as Justice Brandeis used that term because of the unwarranted injury that it might inflict on even innocent individuals. Moreover, this argument supplies no basis to restrict binary search techniques that do not involve a physical trespass and that are utilized without the target or other members of the public ever knowing, such as a computer search for digital contraband.

Accordingly, with the possible exception of physical intrusions that might produce unwarranted alarm in the innocent no less than the guilty, the pragmatic argument for regulating binary searches necessarily rests on their impact on the guilty alone; binary searches unaccompanied by a physical intrusion simply do not have a sufficient impact on the innocent to warrant regulation, as the pre-*Jardines* binary search cases uniformly concluded. Moreover, in pragmatic terms, the benefits of a technique that reliably identifies locations at which there is probable cause to search, while disclosing little else of interest, seem to dwarf its costs. If a binary search technique is a reliable indicator of probable cause, then when the technique generates a negative result, it produces few, if any, costs in terms of liberty, and when the technique produces a positive result, the Constitution itself tells us that the benefits of the ensuing non-binary search outweigh its costs precisely because it is supported by probable cause.<sup>247</sup> In this fashion, binary search techniques facilitate the detection of crime while disclosing nothing else of particular interest, much less compromising important interests of the innocent. Thus, the pragmatic case for constraining nonintrusive binary search techniques seems wanting, as the pre-*Jardines*

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<sup>245</sup> See also Gruber, *supra* note 221, at 822–23; Hunt, *supra* note 221, at 285–86; Katz & Golembiewski, *supra* note 237, at 752–53; Lunney, *supra* note 239, at 880–87. The Florida Supreme Court advanced an argument along these lines in *Jardines*. See *Jardines v. State*, 73 So. 2d 34, 48–49 (Fla. 2011), *aff’d sub nom.* *Florida v. Jardines*, 133 S. Ct. 1409 (2013). For a more general argument that the Fourth Amendment should regard as unreasonable investigative techniques that target potentially innocent individuals in a manner that could produce a stigmatic injury, see Colb, *supra* note 79, at 1491–94.

<sup>246</sup> Cf. Timothy C. MacDonnell, *Florida v. Jardines: The Wolf at the Castle Door*, 7 N.Y.U. J.L. & LIB. 1, 50 (2013) (“The [Florida Supreme C]ourt concluded this particular dog sniff created a public spectacle, and yet *Jardines* himself was apparently unaware of the spectacle occurring right outside his front door.”).

<sup>247</sup> Cf. Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585, 660–70 (2011) (arguing that nonintrusive binary search techniques satisfy traditional Fourth Amendment standards for reasonableness); Simmons, *supra* note 95, at 579–85 (arguing that binary investigative techniques likely have benefits exceeding their costs when false-positive rates are low).

binary search cases powerfully suggest. It remains, however, to consider the libertarian case against the binary search.

In *Jardines*, all the Court offered to support its libertarian conception was history—the claim that property-based protection had been historically at the core of the Fourth Amendment.<sup>248</sup> When it comes to binary searches, however, the historical case for constitutional regulation is on unsteady ground. As we have seen in Part I.D above, history provides uncertain guidance when choosing between libertarian and pragmatic conceptions of Fourth Amendment reasonableness. History is equally unclear about the propriety of binary search methods that disclose no more than the presence of contraband. After all, constraining binary search techniques would provide little, if any, protection except to the guilty, and the framing-era support for such an approach is highly debatable.<sup>249</sup> In the framing era, the remedy for a wrongful search and seizure was not exclusion of incriminating evidence, but an award of damages in tort.<sup>250</sup> Moreover, if a search produced incriminating evidence, that was considered a defense to tort liability.<sup>251</sup> There is scholarly debate about whether this defense was recognized for a trespass to a house, with only a handful of cases available as evidence to support the conflicting positions of legal historians on this point.<sup>252</sup> Moreover, as we have seen, it is far from clear how framing-era law would have treated an investigative technique that disclosed no more than the presence of contraband.<sup>253</sup> Something more than history is required to offer adequate support for a libertarian resolution of binary search debate.

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<sup>248</sup> *Jardines*, 133 S. Ct. at 1414.

<sup>249</sup> See *supra* Part I.D.

<sup>250</sup> See AMAR, *supra* note 3, at 20–22; William Gangi, *The Exclusionary Rule: A Case Study in Judicial Usurpation*, 34 DRAKE L. REV. 33, 39–46, 125–29 (1984). Although one scholar has argued that something resembling the exclusionary rule existed in the framing era, see Roots, *supra* note 51, at 14–20, most of the framing-era precedents he cites involve the very different remedy of release from custody as a remedy for wrongful arrest, see *id.* at 20–30. He also cites the framing-era rule prohibiting the seizure of “mere evidence,” yet, as we have seen, this rule did not protect contraband, which is precisely the type of evidence disclosed through a binary search. See *id.* at 37–45. As Professor Amar observed, no less an authority on framing-era law than Justice Story wrote that “evidence is admissible on charges for the highest crimes, even though it may have been obtained by a trespass upon the person, or by any other forcible and illegal means.” AMAR, *supra* note 3, at 21 (internal quotation marks omitted). Thus, there is ample reason to doubt the claim that there was framing-era support for the exclusion of incriminating evidence based on the manner in which it was obtained. For my own explication of the difficulties with efforts to support or defend the exclusionary rule on the basis of historical evidence, see Lawrence Rosenthal, *Seven Theses in Grudging Support of the Exclusionary Rule*, 10 OHIO ST. J. CRIM. L. 525, 532–37 (2013).

<sup>251</sup> See AMAR, *supra* note 3, at 7.

<sup>252</sup> Compare Davies, *supra* note 131, at 647–49 (denying the existence of immunity), with Arcila, *supra* note 150, at 1316–24 (arguing that immunity was recognized).

<sup>253</sup> See *supra* notes 155–69 and accompanying text.



In his dissenting opinion in *Jacobsen*, Justice Brennan endeavored to make a libertarian case against the binary search. Deregulation of binary search techniques, he contended, would mean

if a device were developed that could detect, from the outside of a building, the presence of cocaine inside, there would be no constitutional obstacle to the police cruising through a residential neighborhood and using the device to identify all homes in which the drug is present. . . . [U]nder the interpretation of the Fourth Amendment first suggested in *Place* and first applied in this case, these surveillance techniques would not constitute searches and therefore could be freely pursued whenever and wherever law enforcement officers desire. Hence, at some point in the future, if the Court stands by the theory it has adopted today, search warrants, probable cause, and even “reasonable suspicion” may very well become notions of the past.<sup>254</sup>

Some of Justice Brennan’s argument is surely overstated. Treating a binary search as constitutionally unregulated does not render the standard of probable cause or warrant requirement obsolete as long as a judicial official must determine whether the binary search has produced probable cause and issued a warrant prior to a physical entry. Moreover, if a warrant is obtained on the basis of the dog’s alert, then judicial review of the sufficiency of the evidence of probable cause will occur prior to any physical search and seizure, eliminating the pragmatic concern that those engaged in law enforcement will be too quick to conclude that probable cause is present.

Still, aside from the insupportable claim that an unregulated binary search renders the probable-cause and warrant requirements superfluous, it is worth considering whether the Fourth Amendment ought to prevent the government from learning where contraband is concealed—and where it is not—at least absent a warrant issued on probable cause.

In the libertarian conception, even if binary search techniques involve little intrusion on the interest of the innocent in secluding the home from official scrutiny, the Fourth Amendment nevertheless offers something to the guilty because it operates as a limitation on the government’s investigative powers. Thus, under the Fourth Amendment, the power to declare an item contraband does not imply a concomitantly broad power to search without limitation for such contraband. Within one’s home or similarly “private” zone, on the libertarian account, the individual is sovereign, and accordingly beyond the government’s reach, at least absent a warrant issued on probable cause. The point has Fourth Amendment resonance; the Fourth Amendment grants a right to be “secure” against unreasonable search and seizure;

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<sup>254</sup> United States v. *Jacobsen*, 466 U.S. 109, 138 (1984).

presumably the right to be secure against official scrutiny is of Fourth Amendment concern.<sup>255</sup> This objection gains force, it is added, when a binary search discloses information about the home, where privacy and autonomy interests are generally thought to be at their greatest.<sup>256</sup> Indeed, precisely such an argument was advanced against a binary search of computers in the note that first hypothesized the potential for this investigative technique.<sup>257</sup>

On this point, as it explained why the use of a field test for the presence of cocaine was not a “search” within the meaning of the Fourth Amendment, in *Jacobsen*, the Court response to Justice Brennan was instructive: “Congress has decided—and there is no question about its power to do so—to treat the interest in ‘privately’ possessing cocaine as illegitimate; thus governmental conduct that can reveal whether a substance is cocaine, and no other arguably ‘private’ fact, compromises no legitimate privacy interest.”<sup>258</sup> This observation presents a serious challenge to the libertarian conception of the Fourth Amendment. If, as a matter of substantive constitutional law, there is no right to possess cocaine in one’s home, it should follow that it is “reasonable” in the constitutional sense to enforce this limitation on the individual’s right of “retreat” into the home—as long as the government uses binary search methods that do not compromise any legitimate security interest in the privacy of the home.

Consider *Gonzales v. Raich*,<sup>259</sup> in which the Court, echoing its earlier observation in *Jacobsen*, held that Congress can prohibit even the wholly intrastate manufacture and possession of marijuana as an incident of its authority to regulate interstate commerce because these intrastate activities necessarily affect interstate markets:

One need not have a degree in economics to understand why a nationwide exemption for the vast quantity of marijuana (or other drugs) locally cultivated for personal use (which presumably would include use by friends, neighbors, and family members) may have a substantial impact on the interstate market for this extraordinarily popular substance.<sup>260</sup>

It follows that Congress may legitimately concern itself with the possession and use of controlled substances even when they are secreted within an individual’s home—to

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<sup>255</sup> For helpful discussions of the manner in which the Fourth Amendment’s guarantee of security against unreasonable search and seizure illuminates its meaning, see Clancy, *What Does the Fourth Amendment Protect*, *supra* note 125, at 350–66, and Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 119–31, 138–51 (2008).

<sup>256</sup> See, e.g., Katz & Golembiewski, *supra* note 237, at 775–78; Lunney, *supra* note 239, at 887–89; Smith, *supra* note 237, at 132–36; Renee Swanson, Comment, *Are We Safe at Home from the Prying Dog Sniff?*, 11 LOY. J. PUB. INT. L. 131, 150–53 (2009).

<sup>257</sup> See Adler, *supra* note 209, at 1110–19.

<sup>258</sup> *Jacobsen*, 466 U.S. at 123.

<sup>259</sup> 545 U.S. 1 (2005).

<sup>260</sup> *Id.* at 28; see also *id.* at 39–41 (Scalia, J., concurring in the judgment).

the extent that individuals can utilize the Fourth Amendment to limit the government's ability to locate contraband stored within their homes, this will inevitably facilitate the distribution of such contraband, and the attendant social harms. In this respect, the individual is not "sovereign" over the contents of his own residence—not when it comes to contraband. Accordingly, a libertarian conception premised on identifying the limits of governmental authority has difficulty treating contraband within the home as beyond the legitimate ambit of official scrutiny, at least as long as substantive constitutional law permits the government to proscribe even the purely "private" possession of such contraband.

The point is also illustrated by the hypothesized computer worm that could search for images of unlawful child pornography on any computer connected to the Internet. In *Osborne v. Ohio*,<sup>261</sup> the Supreme Court rejected an argument that the criminalization of the private possession of child pornography in one's home infringed a constitutional "right to receive information in the privacy of [one's] home,"<sup>262</sup> concluding instead that the prohibition was an appropriate measure to reduce the economic incentive to exploit children sexually in order to supply the market for child pornography.<sup>263</sup> Thus, in terms of child pornography, as a matter of substantive constitutional law, the Court has rejected libertarianism on the ground that the mere existence of child pornography creates a tangible harm to children that justifies treating it as contraband.<sup>264</sup>

If *Osborne* is a sound statement of the legitimate sweep of governmental authority under substantive constitutional law, then it becomes difficult to understand why an investigative technique that does no more than enforce the government's substantive entitlement to prohibit even the "private" possession of child pornography can be branded "unreasonable" within the meaning of the Fourth Amendment. After *Osborne*, the possession of child pornography is not properly regarded as "private" as a matter of substantive constitutional law; the government is entitled to make even the entirely "private" possession of such material its affair because of what is regarded as the harmful effect that such material has on third parties outside the privacy of the home.<sup>265</sup> Thus, the impact of recognizing a Fourth Amendment right to secret child pornography in one's home absent a warrant issued on probable cause would be to reduce the ability of the government to enforce the child pornography laws, thereby undermining the government's ability to stem the demand for child pornography. To be sure, a libertarian might argue that there is some cognizable

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<sup>261</sup> 495 U.S. 103 (1990).

<sup>262</sup> *Id.* at 108.

<sup>263</sup> *Id.* at 108–11.

<sup>264</sup> *Id.*

<sup>265</sup> Cf. Kenneth J. Melilli, *Dog Sniffs, Technology, and the Mythical Constitutional Right to Criminal Privacy*, 41 HASTINGS CONST. L.Q. 357, 371–72 (2014) ("How can one be said to enjoy a right to anything if, as soon as the state has good reason to believe that the citizen might be exercising that right, the state can immediately put a stop to it?").

liberty interest in permitting people to indulge in their taste for child pornography as long as they do so in their privacy of their homes, but that was precisely the libertarian argument of the dissenters that failed to carry the day in *Osborne* as a matter of substantive constitutional law.<sup>266</sup> Once libertarians lose their argument for protection of the purely “private” possession of child pornography as a matter of substantive constitutional law, in turn, there is little reason to believe that it is somehow “reasonable” within the meaning of the Fourth Amendment to recognize a cognizable liberty interest in secreting child pornography in one’s home (or elsewhere), at least as long as all other aspects of the privacy of the home remain secure absent the issuance of a warrant properly issued on probable cause.

As we have seen in Part I.A above, even the relatively robust libertarian conception of the *Boyd* era could not find a basis to protect the home from official scrutiny when it contained contraband or other items in which the owner had no legitimate property interest.<sup>267</sup> The libertarian conception, in short, cannot identify any type of constitutionally cognizable liberty interest compromised by a binary investigative technique that discloses only the existence of contraband—at least once one agrees that liberty, in the constitutional sense, does not embrace the right to secret contraband in one’s home. In short, precisely the reasons that the government may prohibit even the purely “private” possession of contraband make it reasonable, in the constitutional sense, for the government to utilize techniques that disclose the presence of contraband (or other illegal activity), as long as no constitutionally cognizable liberty interest is compromised by those techniques.

So it goes with any binary search; there is no tenable way to stretch the people’s right to be secure from “unreasonable” search and seizure into a right to violate valid laws without fear of official scrutiny. It is one thing to say that the Fourth Amendment necessarily benefits the guilty when it limits official scrutiny of the innocent; it is quite another to say that the Fourth Amendment offers the guilty “security” from investigative techniques that compromise no interests of law-abiders. After all, when the Constitution permits the government to treat a given activity as unlawful even when conducted within the privacy of the home, it becomes impossible to think of a right of the people to be “secure” when committing such crimes within the home, at least when investigative techniques are used that pose no threat to the security or liberty of law-abiders. Once it is agreed that the government has legitimate reason to punish the possession of contraband wherever it may be found, it becomes difficult to explain why an investigative technique that discloses the presence of contraband and nothing else of interest should be regarded as constitutionally “unreasonable” even though the government has good reason to concern itself with contraband wherever it may be found.

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<sup>266</sup> *Jacobsen*, 466 U.S. at 139–45 (Brennan, J., dissenting).

<sup>267</sup> See *supra* notes 33–56 and accompanying text.

Although, at first blush, binary search techniques utilized in the absence of individualized suspicion may resemble the use of a general warrant to engage in indiscriminate search and seizure, as we have seen, the intrusion accomplished by a binary search involving no physical intrusion is far more limited than anything regarded as unreasonable in the framing era.<sup>268</sup> Although physical entry of the home or other area otherwise concealed from public view compromises a variety of important privacy interests, if physical entry occurs only after a warrant has issued based on probable cause generated by a binary search technique, then these remaining interests are compromised only in a fashion authorized by the Fourth Amendment. The binary search does no more than enable the authorities to overcome the difficulties that usually attend assembling probable cause to search—and in that fashion it advances the government’s legitimate interest in identifying all locations at which contraband is present without compromising any liberty interest that the government is constitutionally obligated to respect.<sup>269</sup>

Indeed, about the only libertarian virtue in constitutional limitations on binary search techniques is restricting the use of these techniques to cases in which law enforcement already has acquired probable cause to search will make enforcement less efficient. One can fairly doubt, however, whether a coherent libertarianism can be built on such a foundation. Although, for those who believe that the government’s regulatory reach extends too far, there may be virtues in inefficiency; libertarianism can take, at most, small comfort in knowing that not all lawbreakers are apprehended. Indeed, it is passing strange to conceive of liberty as an incremental reduction in the likelihood that one will get caught when breaking the law. Equally important, if the government is entitled to define particular items as contraband that may never be possessed, even within one’s home or similarly “private” area, then it is surely reasonable to insist that the prohibition be enforced as effectively as possible through techniques that do not compromise the interests of those who are exercising constitutionally protected liberty within those private locations. It is more than a little anomalous to take the position that it is constitutionally reasonable for the government to restrict “liberty” by banning altogether the possession of an item thought to produce cognizable evils, but only if the ban cannot be fully enforced.

To be sure, there may be something alarming to many sensibilities about an investigative technique with a seemingly limitless ability to detect wrongdoing.<sup>270</sup> This

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<sup>268</sup> See *supra* notes 130–50 and accompanying text.

<sup>269</sup> Cf. Rubinfeld, *supra* note 255, at 129 (“The freedom to defy public norms that a democratic citizenry requires is not a license to ignore democratically enacted laws. The Fourth Amendment is not violated by searches and seizures that make *criminals* insecure. It is violated by searches and seizures that rob the *law-abiding* of their security.”).

<sup>270</sup> See, e.g., Timothy C. MacDonnell, *Orwellian Ramifications: The Contraband Exception to the Fourth Amendment*, 41 U. MEM. L. REV. 299, 353 (2010). For a valuable discussion about the concerns arising from highly accurate and reliable methods of law

could explain, for example, at least part of the backlash against “red-light camera” systems capable of detecting any vehicle that fails to come to a stop when required at an intersection, which often encounter political opposition.<sup>271</sup> Yet, whatever one’s unease with perfect technological enforcement of the prohibition on running red lights, it is impossible to speak coherently of a legal right to run a red light unless a human being observes the offense. Unease with technological enforcement of a substantively valid prohibition can properly fuel political debate, but it cannot supply a coherent legal libertarianism. After all, libertarians do not advocate inefficient enforcement of all laws; presumably few, if any, libertarians argue that laws forbidding the possession of nuclear weapons or deadly biological weapons should be only imperfectly enforced. Instead, libertarians may seek imperfect enforcement of laws which they regard as unwarranted restraints on liberty, but surely the proper ground of debate is over the substance of those laws. On that score, technology that improves the efficiency of enforcement may even aid the libertarian agenda by producing “either a reduction in punishments across the board or a much better, and narrower, definition of ‘wrongful conduct.’”<sup>272</sup> But, if substantive law permits the government to prohibit running a red light even if unobserved by human eyes—or possessing contraband within one’s own home—it becomes impossible to conceive of liberty, at least in a legal sense, as embracing a right to break the law as long as no one is watching.

#### *D. The Libertarian Conception and the Swath of the Contemporary Regulatory State*

The difficulties in articulating a libertarian argument for regulating the binary search when substantive constitutional law recognizes no protected liberty interest in the possession of contraband is no accident. As Professor Stuntz once observed of the demise of the *Boyd* regime, a libertarian conception of the Fourth Amendment could not be squared with emergence of a vigorous regulatory state in which the zone of what was thought to be private activity beyond the reach of the regulatory government radically shrank.<sup>273</sup> One need not share Professor Stuntz’s skepticism

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enforcement, see Christina M. Mulligan, *Perfect Enforcement of Law: When to Limit and When to Use Technology*, 14 RICH. J.L. & TECH. 13 (2008).

<sup>271</sup> See, e.g., Randal C. Archibold, *First State to Adopt Photo Enforcement of Speed Laws, Arizona Halts the Program*, N.Y. TIMES, July 16, 2010, at A12. For an explication of red-light camera technology, see Aleecia M. McDonald & Lorrie Faith Cranor, *How Technology Drives Vehicular Privacy*, 2 I/S: J.L. & POL’Y FOR INFO. SOC’Y 981, 992–93 (2006). For a useful discussion of the objections to red-light cameras, see Elizabeth E. Joh, *Discretionless Policing: Technology and the Fourth Amendment*, 95 CALIF. L. REV. 199, 230–33 (2007).

<sup>272</sup> Paul Rosenzweig, *Privacy and Counter-Terrorism: The Pervasiveness of Data*, 42 CASE W. RES. J. INT’L L. 625, 645 (2010).

<sup>273</sup> See William J. Stuntz, *Privacy’s Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1031–34 (1995).

about the coherence of contemporary conceptions of privacy to agree that privacy's domain necessarily contracts when the regulatory reach of government expands. When governmental power comes to be understood in relatively expansive terms, a libertarian conception of the Fourth Amendment becomes untenable. If the government has a lawful basis for prohibiting the private possession of a particular item, for example, it has a concomitant justification for treating the supposedly "private" possession of that item as properly its business.

Indeed, as we have seen, even the libertarian regime of *Boyd* could not justify libertarianism when it comes to the possession of contraband.<sup>274</sup> There is, of course, no coherent libertarianism that embraces a right to harm others, and when the government's regulatory power expands based on policy judgments that previously unregulated conduct produces cognizable harms to third parties—as in the case of child pornography—then offering constitutional protection to activities thought to harm others lacks a coherent libertarian justification.<sup>275</sup> One can disagree with the policy arguments that are deployed to support the view that any number of regulated activities harm third parties, but if that view is rejected as a matter of substantive constitutional law, a powerful argument follows that investigative techniques that disclose these harm-producing activities, and nothing else, are reasonable in the constitutional sense.

Given the breadth of contemporary regulatory power, substantive constitutional law rarely takes a libertarian cast, and for that reason the government's power to define items as contraband is largely uncircumscribed. The leading example where libertarianism has made inroads on substantive constitutional law is the First Amendment's protection for freedom of speech and freedom of the press.<sup>276</sup> In *Stanley v. Georgia*,<sup>277</sup> for example, the Court held that the First Amendment protects the private possession of obscene materials that may not lawfully be distributed in public.<sup>278</sup> It follows that even a search technique that discloses only the existence of proscribable obscenity impinges on a constitutionally protected liberty interest. In such cases, the binary search doctrine becomes irrelevant—there is no such thing as a binary search of the home for obscenity given the substantive constitutional right to possess obscene material within the home.<sup>279</sup> Thus, in *Jacobsen*, citing *Stanley*, the Court explained that its holding that a field test disclosing the presence of cocaine was not

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<sup>274</sup> *Boyd v. United States*, 116 U.S. 616 (1886), *rejected by* *Warden v. Hayden*, 387 U.S. 294 (1967).

<sup>275</sup> For a useful discussion of the arguments that can be deployed to justify a wide variety of government regulation consistent with a libertarian principle protecting conduct that produces no harm to others, see Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 139–81 (1999).

<sup>276</sup> U.S. CONST. amend. I.

<sup>277</sup> 394 U.S. 557 (1969).

<sup>278</sup> *Id.* at 564–68.

<sup>279</sup> *See id.*

subject to regulation under the Fourth Amendment was “confined to possession of contraband. It is not necessarily the case that the purely ‘private’ possession of an article that cannot be distributed in commerce is itself illegitimate.”<sup>280</sup>

Precisely because the First Amendment imposes limitations on the government’s ability to treat some items as contraband, Fourth Amendment law is necessarily structured to respect these limitations on regulatory powers, as *Jacobsen* acknowledged. Beyond the example of the interaction between *Stanley* and the binary search doctrine, the Court has held that warrants authorizing the seizure of materials that are believed to be obscene must adequately circumscribe the discretion of officers who execute the warrant in order to minimize the risk that a search or seizure will burden First Amendment rights.<sup>281</sup> The Court has also held that the seizure of alleged obscene materials violates the Fourth Amendment prior to an adjudication of obscenity because of the risk that such a seizure will prevent the dissemination of materials that turn out to be protected by the First Amendment.<sup>282</sup> In such cases, the Fourth Amendment imposes regulation on the authorities because of the risk that search and seizure will exceed the power of the government to treat expressive materials as contraband—a power that is limited by the First Amendment.<sup>283</sup> Even when it comes to the search or seizure of expressive materials, however, when there is no risk that search-and-seizure powers are being used to exceed the power of government to treat expressive materials as contraband, the Court applies ordinary Fourth Amendment standards.<sup>284</sup> Thus, these cases illustrate the interaction between substantive constitutional law and the scope of Fourth Amendment protection.

The libertarian character of the First Amendment, however, imposes only modest limitations on the power of government to define various items as contraband. In *Stanley*, for example, the Court stressed that its holding “in no way infringes upon the power of the State or Federal Government to make possession of other items, such as narcotics, firearms, or stolen goods, a crime. . . . No First Amendment rights are

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<sup>280</sup> *United States v. Jacobsen*, 466 U.S. 109, 123 n.23 (1984).

<sup>281</sup> *See* *Stanford v. Texas*, 379 U.S. 476, 485–86 (1965) (regarding a warrant authorizing seizure of records relating to Communist Party); *Marcus v. Search Warrants of Property at 104 E. Tenth St.*, 367 U.S. 717, 731–33 (1961) (regarding a warrant authorizing seizure of obscene materials).

<sup>282</sup> *See* *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 62–67 (1989).

<sup>283</sup> *See* U.S. CONST. amend. I.

<sup>284</sup> *See, e.g., New York v. P.J. Video, Inc.*, 475 U.S. 868, 873–75 (1986) (holding that a warrant to seize obscene materials is governed by ordinary Fourth Amendment standards, because a valid warrant adequately protects First Amendment interests of a distributor); *Maryland v. Macon*, 472 U.S. 463, 469–70 (1985) (stating that an undercover officer may purchase potentially obscene materials, because such activities pose no threat to First Amendment rights); *Zurcher v. Stanford Daily*, 436 U.S. 547, 565 (1978) (holding that a warrant to search a newspaper for photos documenting illegal conduct supported by probable cause sufficiently protected First Amendment interests of newspaper).



involved in most statutes making mere possession criminal.”<sup>285</sup> And, when substantive constitutional law permits the government to treat even seemingly “private” activity as subject to regulatory authority, a libertarian conception of the Fourth Amendment as creating a zone of privacy in which contraband may be securely secreted becomes impossible to reconcile with substantive constitutional law.

In this connection, it bears noting that the Fourth Amendment has never been understood to impose any independent limitation on the power of government to define items as contraband and therefore not a legitimate source of privacy or other cognizable liberty interests. The closest the Court has ever come to articulating a libertarian understanding of the Fourth Amendment was when it held that a state may not prohibit the possession of contraceptives by married couples in *Griswold v. Connecticut*.<sup>286</sup> In *Griswold*, the Court famously invoked a number of constitutional provisions, including the Fourth Amendment and the possibility of police “search[ing] the sacred precincts of marital bedrooms,” to construct a “zone of privacy created by several fundamental constitutional guarantees.”<sup>287</sup> Yet, *Griswold* did not bear much in the way of fruit for a libertarian conception of the Fourth Amendment. As it expanded *Griswold* to recognize a right of unmarried persons to possess contraceptives, the Court abandoned reliance on the Fourth Amendment, characterizing the right at issue as one protected by the Fourteenth Amendment’s Due Process Clause.<sup>288</sup> Nor did *Griswold* produce a “zone of privacy” in the “marital bedroom” or elsewhere in Fourth Amendment jurisprudence; even “the sacred precincts of the marital bedroom” are subject to search on what is regarded as sufficient justification, even when its occupants lie naked and asleep therein.<sup>289</sup> Indeed, the perils in branding any “private” location as free from search and seizure are obvious. Fourth Amendment reasonableness cannot tenably be translated into immunity from official scrutiny.

#### *E. The Incoherence of the Libertarian Conception*

All this should illustrate an even more fundamental problem with the libertarian conception—the incoherence of any libertarian boundary on governmental search-and-seizure authority.

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<sup>285</sup> *Stanley v. Georgia*, 394 U.S. 567, 568 n.11 (1969).

<sup>286</sup> 381 U.S. 479 (1965).

<sup>287</sup> *Id.* at 485.

<sup>288</sup> *See, e.g., Carey v. Population Servs. Int’l*, 431 U.S. 678, 684–85 (1977).

<sup>289</sup> *See Cnty. of Los Angeles v. Rettele*, 550 U.S. 609 (2007) (per curiam). The Fourth Amendment does ordinarily require, however, that the authorities knock and announce their authority prior to making a forcible entry of a residence, although that requirement too can be dispensed with on what is regarded as “sufficient justification.” *See, e.g., United States v. Banks*, 540 U.S. 31, 36–40 (2003); *Wilson v. Arkansas*, 514 U.S. 927, 934–36 (1995).

The *Boyd* regime, whatever its defects, used an intelligible line—the boundaries of property rights—to define the boundaries of Fourth Amendment protection.<sup>290</sup> But, as we have seen, tying the Fourth Amendment to property law proved untenable.<sup>291</sup> Contemporary Fourth Amendment libertarianism, however, has yet to articulate any other boundary on governmental authority to replace property rights. Morgan Cloud can stirringly write, for example, that “[t]he Fourth Amendment enacts a vision of the individual as an autonomous agent, empowered to act and believe and express himself free from government interference,”<sup>292</sup> but if we do not use property law to demarcate the boundaries of individual autonomy, what is to take its place? Asserting a right to possess cocaine in order to intoxicate oneself is one tenable notion of individual autonomy, but if not tied to property rights, this conception seems little more than license for the judiciary to enact its preferred version of moral philosophy as constitutional law. And, as we have seen, a libertarianism that aspires to do no more than reduce the efficiency with which the government can enforce concededly valid laws, while offering no meaningful protection to innocent persons who are actually exercising constitutionally protected liberty, is neither coherent nor terribly attractive.

At best, a principled Fourth Amendment libertarianism might claim that the constitutional requirement of reasonableness should be understood to embrace a libertarian harm principle that forbids search and seizure except when some harm is threatened to third parties. Yet, as we have seen, the government will often be able to demonstrate that seemingly private activities qualify for regulation under some version of the harm principle. One might try to identify discrete privacy interests that should mark out the limits of governmental investigative authority; for example, Anthony Amsterdam framed what he viewed as “the ultimate question” regarding the reach of the Fourth Amendment as “whether, if the particular form of surveillance practiced by the police is permitted to go unregulated . . . the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society.”<sup>293</sup> Yet, if under substantive constitutional law, the existence of a “free and open society” is thought consistent with a prohibition on even seemingly private activity because of the harmful effects it is believed to generate, it is unclear why an investigative technique that does no more than identify such a violation of law should be regarded as constitutionally unreasonable.

Beyond that, it is far from clear that Professor Amsterdam’s approach can produce a workable Fourth Amendment jurisprudence. In *Kyllo*, for example, the Court rejected a test for a “search” within the meaning of the Fourth Amendment that would require disclosure of “intimate details,” cautioning that a jurisprudence that

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<sup>290</sup> See *supra* Part I.A.

<sup>291</sup> See *supra* Part I.B.

<sup>292</sup> Cloud, *supra* note 51, at 619 (internal quotation marks omitted).

<sup>293</sup> Amsterdam, *supra* note 3, at 403.

protected only interests regarded as meaningful or important would be an invitation to unbounded judicial subjectivity.<sup>294</sup> That concern argues against Professor Amsterdam's view as well; it would be no easy task to determine what constraints on search and seizure are necessary to produce a "free and open society." Thus, if *Kyllo* embraces a relatively low threshold for Fourth Amendment regulation, that view is not without pragmatic justification. In this fashion, even in the seeming libertarianism of *Kyllo*, lurks Fourth Amendment pragmatism.

As we have seen, Fourth Amendment jurisprudence faces challenges unimaginable to the framers.<sup>295</sup> To assess a host of novel investigative techniques, from gathering telephone records from phone companies to Internet-based searches of computers that detect only illegal activity, the libertarian conception offers little more than slogans.

For example, the government's collection of vast quantities of noncontent data from telephone companies, such as records reflecting originating and terminating numbers and the length of all telephone calls, which are then placed into a database available to be queried, but solely for purposes of counterterrorism investigations on the basis of reasonable suspicion, has provoked considerable and quite understandable public controversy.<sup>296</sup> Yet, because the data is collected from telephone companies, a libertarian conception rooted in property rights supplies no basis for telephone users to object to data collection even on a scale this vast. Other formulations of the libertarian conception, however, can identify no coherent boundary on the limits on investigative authority. Even more important, surely any fair assessment of the constitutional "reasonableness" of such a program should consider the national security interests underlying the collection of the data, as well as the limitations on its use, just as it should consider as well the special threat to liberty posed when data is collected on a wholesale rather than a case-by-case basis.

The pragmatic conception, by demanding an assessment of all of the relevant costs and benefits of an investigative technique, at least provides a vehicle for assessing the constitutionality of a search program, as difficult as the process of balancing may sometimes be.

To this, one might object that if the Fourth Amendment is concerned with no more than pragmatic balancing, there is little reason to require constitutional regulation of search and seizure; legislatures could be thought fully competent, if not superior, to the judiciary to engage in this type of cost-benefit analysis, at least when search and seizure is not targeted at discrete groups not likely to be fairly represented in the

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<sup>294</sup> *Kyllo v. United States*, 533 U.S. 27, 38–39 (2001).

<sup>295</sup> See *supra* notes 130–50 and accompanying text.

<sup>296</sup> See, e.g., Charlie Savage, *Nation Will Gain by Discussing Surveillance, Expert Tells Privacy Board*, N.Y. TIMES, July 10, 2013, at A16. For a description of the program and the legal rationale supporting it, see *In re Application of the FBI for an Order Requiring Production of Tangible Things from [Redacted]*, No. BR 13-109, 2013 WL 5741573 (FISA Ct. Aug. 29, 2013).

political process.<sup>297</sup> Yet, it is far from clear that nothing is gained when the process of cost-benefit analysis is moved from the legislature to an independent judiciary.

The classic justification for a warrant requirement is eminently pragmatic—a neutral and detached judicial officer is thought more likely to assess with integrity the balance between liberty and order than an “officer engaged in the often competitive enterprise of ferreting out crime.”<sup>298</sup> Legislative balancing involves a similar problem—leaving the balance between liberty and order to politically accountable legislators means that Fourth Amendment rights are held hostage to the whims of transient political majorities that may overreact to passing fears of crime. Perhaps even more important, legislatures may be less than fully sensitive to the long-term costs of enhancing search-and-seizure authority for immediate political advantage. In his scholarship, for example, Professor Stuntz stressed the desire of politicians to be tough on crime as a response to fear of crime resulting in increasingly harsh substantive criminal laws.<sup>299</sup> He bemoaned the failure of constitutional law to regulate substantive criminal law and urged more vigorous judicial regulation of substantive criminal law to address the problem, while recognizing that the Constitution’s text does not support much in the way of regulation of substantive criminal law.<sup>300</sup> The Fourth Amendment, however, insulates the process of balancing liberty and order from political overreaching when it comes to search and seizure by leaving the balancing to an independent judiciary. The fact that the Constitution’s text imposes special limitations on search and seizure surely is a powerful indication that we are not free to regard questions of search and seizure identically to others that are left to the ordinary push-and-pull of the political process.

One might nevertheless regard a system that gives legislatures largely unconstrained ability to indulge their punitive instincts by enacting harsh substantive criminal laws while maintaining judicial regulation of search-and-seizure powers as of little value to the protection of liberty, but there may be particular virtue in

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<sup>297</sup> For an elaborate defense of this approach to Fourth Amendment jurisprudence, see Richard C. Worf, *The Case for Rational Basis Review of General Suspicionless Searches and Seizures*, 23 *TOURO L. REV.* 93 (2007). For some illustrations of how such an approach might work, see, for example, Bernard E. Harcourt & Tracey L. Meares, *Randomization and the Fourth Amendment*, 78 *U. CHI. L. REV.* 809, 851–61 (2011), and Christopher Slobogin, *Government Dragnets*, *LAW & CONTEMP. PROBS.* 107, 136–41 (2010).

<sup>298</sup> *Johnson v. United States*, 333 U.S. 10, 14 (1948) (footnotes omitted); *accord, e.g.*, *Steagald v. United States*, 451 U.S. 204, 212 (1981); *Payton v. New York*, 445 U.S. 573, 585–86 (1980); *United States v. U.S. Dist. Court*, 407 U.S. 297, 316–17 (1972); *McDonald v. United States*, 335 U.S. 451, 455–56 (1948).

<sup>299</sup> *See, e.g.*, WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 236–41 (2011). For a similar argument that legislatures are likely to be unduly sensitive to the interests of law enforcement, see Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 *SYRACUSE L. REV.* 1079, 1088–94 (1993).

<sup>300</sup> *See, e.g.*, STUNTZ, *supra* note 299, at 208–12, 227–35.

ensuring that the government's powers of search and seizure are limited, even if its ability to enact substantive criminal laws is largely unfettered. One reason is found in the Constitution's text—the Fourth Amendment identifies a constitutional principle not to be left to ordinary majoritarian politics. Beyond that, if one believes that majoritarian institutions are likely to overvalue the interests of law enforcement, then there is good reason to insist on judicial review of search and seizure.<sup>301</sup>

It may be that permitting majoritarian institutions to indulge what may be transitory political support for overly aggressive search and seizure has the potential to change political culture in ways fundamentally hostile to republican government. Justice Jackson famously made the point not long after his return from Nuremberg:

[O]ne need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.<sup>302</sup>

On this view, the political process may undervalue the long-term costs of enlarging search-and-seizure power, and the electorate, once accustomed to vigorous law-enforcement power, may fail to appreciate those costs when the reality of such power becomes ingrained in political culture.<sup>303</sup>

Justice Jackson was one of our greatest legal pragmatists, and yet it was he who wrote that Fourth Amendment rights “are not mere second-class rights but belong in the catalog of indispensable freedoms.”<sup>304</sup> Indeed, many pragmatists argue that high value should be placed on any number of liberty interests that are compromised

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<sup>301</sup> See Dripps, *supra* note 299, at 1094–97.

<sup>302</sup> *Brinegar v. United States*, 338 U.S. 160, 180–81 (1949) (Jackson, J., dissenting). For a discussion of the impact of Justice Jackson's experiences at the Nuremberg war-crimes trial on his subsequent jurisprudence, see NORBERT EHRENFREUND, *THE NUREMBERG LEGACY: HOW THE NAZI WAR CRIMES TRIALS CHANGED THE COURSE OF HISTORY* 134–36 (2007).

<sup>303</sup> For a more elaborate argument justifying the Fourth Amendment's assignment of the task of assessing the reasonableness of search and seizure to the judiciary, see Wasserstrom & Seidman, *supra* note 3, at 106–07.

<sup>304</sup> *Brinegar*, 338 U.S. at 180 (Jackson, J., dissenting). On Justice Jackson's legal pragmatism, see NOAH FELDMAN, *SCORPIONS: BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES* 363–65 (2010). See also JEFFREY D. HOCKETT, *NEW DEAL JUSTICE: THE CONSTITUTIONAL JURISPRUDENCE OF HUGO L. BLACK, FELIX FRANKFURTER AND ROBERT H. JACKSON* 241–47 (1996); G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* 246–50 (1988); Gregory S. Chernack, *The Clash of Two Worlds: Justice Robert H. Jackson, Institutional Pragmatism, and Brown*, 72 *TEMP. L. REV.* 51, 51–53 (1999).

by search and seizure.<sup>305</sup> Thus, although some may criticize Fourth Amendment pragmatism as undervaluing liberty interests,<sup>306</sup> nothing inherent to legal pragmatism requires that liberty interests receive less than their due. One can embrace pragmatism without denigrating the importance of the liberty interests protected by the Fourth Amendment when striking a balance between liberty and order.

#### CONCLUSION

*Jardines* has not brought an end to the tension between Fourth Amendment libertarianism and pragmatism. While *Jardines* represents the libertarian conception, as we have seen, its libertarianism is stunted and uncertain. For that reason, it is unlikely to produce conceptual clarity as to the central meaning of the Fourth Amendment.

The author has, of course, done little to conceal his impulse toward Fourth Amendment pragmatism. A binary search of a home illuminates the inquiry into the central meaning of the Fourth Amendment because it presents a paradigm case for Fourth Amendment libertarianism. A binary search, if left unregulated, involves official scrutiny of the contents of the home without constitutional constraint; but, as we have seen, there is ultimately no coherent libertarian case for restricting binary searches. To the contrary, the best argument in defense of *Jardines* is pragmatic—a binary search involving a physical intrusion might create sufficient alarm or embarrassment to innocent homeowners to justify regulation on pragmatic grounds, although the matter is hardly free from doubt. For nonintrusive binary searches, however, there is no coherent libertarian objection, and the pragmatic arguments seem to weigh against restraining such techniques. If the libertarian account cannot offer a convincing account for restricting the binary search, it cannot offer any discrete space in which an individual is free from official scrutiny. Thus, while libertarian Fourth Amendment rhetoric permeates the decision in *Jardines*, and indeed a fair swath of Fourth Amendment doctrine, it is rather a dead end. Whatever the difficulties in reaching a pragmatic accommodation between liberty and order, the Fourth Amendment leaves us no other choice.

The impulse to understand the Fourth Amendment in libertarian terms among a people whose Constitution was written amid fear of governmental overreaching is doubtless powerful. Indeed, there are some who argue that substantive constitutional law has granted too much leeway to the regulatory state and ought to return

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<sup>305</sup> See, e.g., Castiglione, *supra* note 2, at 699–709 (arguing that dignity should receive greater weight in Fourth Amendment balancing); Colb, *supra* note 17, at 1644–47 (arguing for enhanced Fourth Amendment protection when search or seizure implicates particularly sensitive and constitutionally recognized interests); Reinert, *supra* note 79, at 1485–91 (arguing that balancing must consider the impact of search and seizure on individuals' relation with government); Sundby, *supra* note 105, at 1796–802 (arguing that Fourth Amendment jurisprudence should give greater weight to trust of the citizenry as a constitutional value).

<sup>306</sup> See *supra* text accompanying note 96.

to a regime in which regulatory power is far more circumscribed.<sup>307</sup> The account offered here is not so much unsympathetic to libertarianism as it is to the contention that when libertarian claims are rejected as a matter of substantive constitutional law, they can nevertheless be somehow smuggled into the inquiry into Fourth Amendment reasonableness. Fourth Amendment pragmatism offers a coherent way to think about the challenges facing Fourth Amendment jurisprudence; Fourth Amendment libertarianism, adrift in a sea of substantive law that largely rejects libertarian claims, does not. If libertarianism one day makes greater inroads in substantive constitutional law, then it is likely that what is regarded as “unreasonable search and seizure” will change as well. We should not expect a malleable and contingent concept such as reasonableness, however, to do the work of substantive constitutional law. Substantive constitutional law, by and large, rejects libertarianism. It is only natural that the Fourth Amendment’s carefully calibrated prohibition on “unreasonable” search and seizure should follow suit.

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<sup>307</sup> See, e.g., RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 257–71 (2004); RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 19–20, 24–25 (1985).