THE WARREN COURT'S HOUSE BUILT ON SAND: FROM SECURITY IN PERSONS, HOUSES, PAPERS, AND EFFECTS TO MERE REASONABLENESS IN FOURTH AMENDMENT DOCTRINE

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INTRODUCTION

In the 1960s, the Warren Court revolutionized the foundations of Fourth Amendment doctrine—shifting constitutional analysis away from a traditional concern with the security of persons, houses, papers, and effects towards an innovative analysis centered on the prohibition of unreasonable searches and seizures. The Warren Court's aim was to expand the protections of the Fourth Amendment well beyond its traditional contours, but the Court's doctrinal innovations have failed to fulfill that original promise and have actually contributed to a narrowing of the scope of the Fourth Amendment in important respects. This Article will advance a partial account of this failure emphasizing the framing and anchoring effects of the Warren Court's new doctrines. This account is offered as "one view of the cathedral" in full awareness that there are other plausible

perspectives on the Warren Court's revolution and its impact on the law today.[1]

First, this Article will contend that the Warren Court's doctrinal innovations in favor of open-ended "reasonableness" analyses reframed key Fourth Amendment doctrines in ways which are not inherently suggestive of expansive protection and which are particularly vulnerable to narrow interpretations in the hands of judicial actors predisposed to embrace crime-control policies or defer to local authorities. This reframing of Fourth Amendment doctrine empowered Justices in the Nixon era and beyond to craft plausible doctrinal readings of the Fourth Amendment offering minimal protections to individual rights. Second, this Article will contend that the ultimate effect of the Warren Court's doctrinal innovations has been to facilitate an "anchoring" of the Fourth Amendment in a social vision that routinely favors the collective goal of crime prevention over individual rights. This anchoring effect is a function of (i) the Warren Court's sweeping rejection of the traditional mere evidence rule as a substantive protection prohibiting police searches for evidence of crime and (ii) the practical result of the Court's embrace of free-floating "reasonableness" doctrines easily subject to narrow crime-control interpretations. The Warren Court's re-anchoring of the Fourth Amendment has produced a substantial bias against the rights of the individual in the now predominant analysis of Fourth Amendment "reasonableness."

Part I of this Article will discuss doctrinal implementation of the Fourth Amendment and the operation of doctrinal framing and anchoring effects more generally. Part II will discuss the implications of the Warren Court's doctrinal shift from "persons, houses, papers, and effects" as "protected interests" to "reasonable expectations of privacy." Part III will discuss the significance of the doctrinal shift in analysis from Fourth Amendment "security" in enumerated interests to the "(un)reasonableness" of police conduct. Part IV will discuss the importance of the Warren Court's

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[1] I borrow the phrase "one view of the cathedral," in reference to Claude Monet's series of paintings of Rouen Cathedral, from the well known article on property and liability rules. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

wholesale rejection of the "security-driven" mere evidence rule for the ultimate establishment of a revisionist crime-control understanding of Fourth Amendment "reasonableness." Part V will outline some thoughts on the future of Fourth Amendment doctrine, and it will sketch a possible pathway for doctrinal reform which respects stare decisis and the basic contours of the "reasonableness" doctrines of the Warren Court's revolution while partially reorienting those doctrines back toward an emphasis on "security" in "protected interests."

I. CONSTITUTIONAL DOCTRINE: IMPLEMENTATION, FRAMING, AND ANCHORING

A. Implementing the Fourth Amendment Through the Creation of Doctrine

In recent years, scholars who study the Constitution and the Court have increasingly emphasized the relationship between the Constitution and court-created constitutional law—between the judicial interpretation of the meaning of the Constitution and the judicial construction of constitutional doctrines.[2] When the Court resolves a Fourth Amendment case, it inquires into the meaning of the Fourth Amendment, but it must also act to translate that meaning into constitutional doctrine—the rules, tests, and standards expressed in the Court's evolving precedents.[3] The purpose of these doctrines is to "implement" the Constitution in the judicial process by establishing a reasonably determinant body of constitutional law designed for practical application by courts.[4] Constitutional doctrines—such as the tiers of scrutiny in the law of equal protection—both specify abstract constitutional values

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[2] For a careful discussion of the interpretation-construction distinction emphasizing the institutional differences between the judicial branch and the institutional branches, see KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING (2001).

[3] *See* Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 56 (1997).

[4] *Id.* at 61-67.

and provide an important measure of legal certainty, predictability, and stability.[5]

The Court crafts doctrine to reflect constitutional meaning, but the doctrine is also shaped by other concerns—such as respect for the authority of political actors, the comparative institutional competence of judicial and non-judicial actors, and the potential costs of legal uncertainty.[6] Given these latter concerns, constitutional doctrines sometimes over-enforce and sometimes under-enforce the meaning of the Constitution.[7] The conceptual space between constitutional meaning and constitutional doctrine is a function of the Court's obligation of "fidelity" to the Constitution.[8] As Richard Fallon argues, the Court must display fidelity to the meaning of individual constitutional provisions such as the Fourth Amendment, but the Court must also be faithful to Article III of the Constitution which establishes the Court's institutional mission to operationalize the Fourth Amendment within the judicial branch, a mission that requires the creation of constitutional doctrines.[9] The focus of this Article is on the Court's obligation to create implementing doctrines for Fourth Amendment rights and on the crucial framing and anchoring effects of those doctrines.

B. Constitutional Doctrine and Framing Effects

Constitutional doctrines implement constitutional meaning and in doing so they frame issues, structure analysis, and shape conclusions. One can see this process in more detail if one considers the question of the Fourth Amendment and the

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[5] *Id.*

[6] *Id.* at 66-67. On some recurrent patterns of policy argument in law, see ALLAN C. HUTCHISON, IT'S ALL IN THE GAME: A NONFOUNDATIONALIST ACCOUNT OF LAW AND ADJUDICATION (2000); Ellie Margolis, *Closing the Floodgates: Making Persuasive Policy Arguments in Appellate Briefs*, 62 MONT. L. REV. 59 (2001).

[7] Fallon, *supra* note 3, at 64-65. On judicial under-enforcement of the Constitution, see Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

[8] Fallon, *supra* note 3, at 59-60.

[9] *Id.* The Court's institutional mission derives from its self-conception under Article III as the "ultimate expositor of the constitutional text." United States v. Morrison, 529 U.S. 598, 616 n.7 (2000).

constitutionality of consent searches. The Fourth Amendment guarantees the "right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures."[10] Does the meaning of the Fourth Amendment encompass a prohibition of searches in cases where an individual consents to the search? The consensus view is that it does not—at least if consent is understood in the appropriate way.[11] The Court recognizes the legitimacy of consent searches,[12] and it has found no obstacle to this view in conventional methods of constitutional interpretation grounded in text, original understanding, evolving legal traditions, social ethos, and public policy.[13] Even so, the judicial implementation of the Fourth Amendment requires that one move beyond the mere interpretation of constitutional meaning to the construction of constitutional doctrines designed to specify that meaning in a more determinant form to provide guidance for judges, attorneys, police officers, and citizens. One needs a doctrine to frame the issue and outline the precise analysis to be pursued.

The importance of doctrine is apparent when thinking about the question of what rules to craft to operationalize the Fourth Amendment in the area of consent searches. Consider three obvious doctrinal explanations for the basic conclusion that consent searches are compatible with the Fourth Amendment.[14] First, one could contend that a consent search is constitutionally permissible because it is a "reasonable" search under the Fourth

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[10] U.S. CONST. amend. IV.

[11] Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973) (holding that consent searches are permissible if consent is "voluntary" on the "totality of all the circumstances").

[12] *See id.*

[13] *See, e.g.*, Georgia v. Randolph, 547 U.S. 103, 143-45 (2006) (Scalia, J., dissenting) (discussing some of the interactions between the authority to consent to a search, changes over time in the law of property, and the original understanding of the Fourth Amendment). On the conventional modes of constitutional interpretation, see PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982).

[14] I will discuss a fourth approach, a "security-driven" view of "reasonableness" emphasizing the need for a compelling police justification analogous to a valid warrant for an entry into the home, later in this Article. *See infra* Part III; *cf.* Marcy Strauss, *Reconstructing Consent*, 92 J. CRIM. L. & CRIMINOLOGY 211, 216 n.11 (2001) (contrasting three theories of consent—a warrant exception theory, a "reasonableness" theory, and a "reasonable expectation of privacy" theory).

Amendment.[15] The text of the Fourth Amendment does not prohibit "reasonable" searches, and one could easily conclude that a search is "reasonable" when a police officer has received valid consent to search. This view has been adopted by the Court in its more recent consent search decisions.[16] Second, one could contend that a consent search is constitutionally permissible because valid consent to a search constitutes a waiver of the Fourth Amendment right.[17] An individual is entitled to waive his or her Fourth Amendment rights if he or she chooses, and a search made after a valid waiver of those rights would not violate the Fourth Amendment. Notably, Justice Marshall advanced this view of consent searches in his dissent in *Schneckloth v. Bustamonte*.[18]

Third, one could contend that a consent search is constitutionally permissible because such a search is not in fact a technical "search" within the meaning of the Fourth Amendment.[19] The first clause of the Fourth Amendment restricts "unreasonable searches and seizures," and its protections apply only when governmental action constitutes a Fourth Amendment search or seizure.[20] The Court has held in recent decades that only a governmental invasion of a "reasonable expectation of privacy" constitutes a "search" within the meaning of the Fourth Amendment.[21] Governmental observation of something sufficiently "expose[d] to the public" is not a "search."[22] One could easily conclude that consent to a search is a kind of public "exposure" eliminating any "reasonable expectation of privacy" and therefore the consent search is not a technical "search" under the Fourth Amendment. On this view, valid consent to a search of a container such as a suitcase eliminates the privacy in the container and its contents—just as does opening the container and

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[15] Illinois v. Rodriguez, 497 U.S. 177, 186 (1990).

[16] *Id.* (holding that a search is reasonable within the meaning of the Fourth Amendment if it is based upon a reasonable appearance of authority to consent).

[17] Schneckloth v. Bustamonte, 412 U.S. 218, 278-79 (1973) (Marshall, J., dissenting).

[18] *Id.*

[19] *Rodriguez*, 497 U.S. at 189-90 (Marshall, J., dissenting).

[20] U.S. CONST. amend. IV.

[21] Katz v. United States, 389 U.S. 347, 350 (1967).

[22] *Id.* at 351.

dumping out its contents in plain view of the officers. Justice Marshall also advanced a similar view in dissent in *Illinois v. Rodriguez*.[23]

Each of these doctrinal explanations has what can be called a "framing effect." A framing effect can be defined here in simple terms as the effect that framing or posing a given question in one way rather than another can have on our attitudes in response to the question.[24] For instance, studies have shown that responses to questions are often shaped by how the questions are put, and the framing effect can be as simple as, say, stating the anticipated consequences of a medical procedure positively (e.g., an 80% chance of survival) or negatively (e.g., a 20% chance of death).[25] A positive framing of the question in this example might increase support for the procedure while a negative framing of the question could decrease support.[26] The three doctrinal approaches to consent searches outlined above each frame the basic legal issue in a slightly different way: a consent search is permissible because it is reasonable for an officer to search with consent; a consent search is permissible because consent is a waiver of the Fourth Amendment; and a consent search is permissible because a consent search is not a Fourth Amendment search. Each explanation therefore has an at least somewhat different possible framing effect which shapes the legal analysis and conclusions that follow from the doctrine's frame.

Consider here the framing effect the approaches above have on the question of what legal test one should use to determine what counts as valid consent for a consent search—the next logical step in establishing a set of consent search doctrines to operationalize the Fourth Amendment in this area. Clearly the analysis at this step will be influenced by the initial doctrinal explanation concerning why one thinks consent searches conform to the Fourth Amendment. Each approach frames the consent

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[23] *Rodriguez*, 497 U.S. at 189-90 (Marshall, J., dissenting).

[24] For a nice discussion of framing effects generally, see WARD FARNSWORTH, THE LEGAL ANALYST: A TOOLKIT FOR THINKING ABOUT THE LAW 224-29 (2007).

[25] *Id.* at 228.

[26] *Id.*

search issue in a different way that has likely consequences for the next step in analysis.

For instance, if a consent search is framed as a "reasonable" search, doctrinal emphasis is placed on the "reasonableness" of police action. That in turn suggests that the doctrine governing "valid" consent would likely gravitate toward a "reasonableness" standard centered on the objective actions of the police. On this view, one might ask the question whether the police behaved "reasonably" in obtaining consent to search—by refraining from coercion or other "overreaching" behaviors such as exploiting a known weakness of the suspect.[27] Similarly, if consent is framed as a Fourth Amendment waiver, doctrinal emphasis is placed not on the "reasonableness" of the police conduct but on whether the suspect actually waived his or her rights. That suggests in turn that the doctrine governing the "validity" of consent is a subjective standard centered on the suspect and his or her mental state—whether the suspect in fact intended to waive his or her Fourth Amendment rights and whether any waiver was sufficiently informed by an understanding of its legal consequences. On this view, one might then ask a standard waiver question common in many areas of criminal procedures: Was the suspect's consent-as-a-waiver in fact knowing, intelligent, and voluntary?[28]

Clearly, these two rival approaches to the "validity" of consent could generate quite different conclusions in, say, a case in which police do not engage in any objectively "unreasonable" coercion but in which a defendant's subjective consent is less than knowing and intelligent. Of course, recognition of these different outcomes often drives an initial preference for one doctrinal frame ("a consent search is permissible if the search is reasonable") over another ("a consent search is permissible if the consent is a valid waiver"). Since the doctrinal framing of the issue affects later

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[27] *Cf.* Colorado v. Connelly, 479 U.S. 157, 167 (1986) (holding that under the Due Process Clause "coercive" behavior by police is a necessary predicate to finding that a confession is not 'voluntary'); Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973) (holding that a search is permissible under the Fourth Amendment if consent is given "voluntarily" under the "totality of all the circumstances").

[28] *See Schneckloth*, 412 U.S. at 277 (Marshall, J., dissenting); Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (stating that a waiver of a constitutional right is "ordinarily an intentional relinquishment . . . of a known right").

analysis and conclusions, an upfront recognition of those effects may drive the decision on how to frame an issue doctrinally. Not surprisingly, these concerns appear to have motivated, in part, the choice of doctrinal frame by the majority and dissenting opinions in *Schneckloth*.[29]

C. Constitutional Doctrine and Anchoring Effects

The crafting of constitutional doctrines also has important anchoring effects on later decision making. An "anchoring effect" can be defined simply as the influence that an initial "anchor" (e.g., a piece of information, a value judgment, a monetary demand, a decision, etc.) can have on later judgments.[30] Anchoring, a function of human psychology, is a cognitive bias in which the anchor, as an initial reference point for decision, exercises an influence analogous to "gravitational pull" on the ultimate judgment of decision makers.[31] The effect of an anchor can be strong even when decision makers are aware of the effect and are consciously resisting the anchor.[32] For example, studies have shown that initial monetary demands in negotiations, whether low or high, tend to have a substantial effect on the final outcome of the negotiations—even when experienced negotiators are involved.[33] Advisory standards, such as the Federal Sentencing Guidelines, can have significant anchoring effects, and the Sentencing Guidelines have likely influenced sentencing upwards or downwards "even when the sentence falls outside the

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[29] The main point of contention in *Schneckloth* was whether the state must prove that consent is "knowing and intelligent" in order for a search on the basis of consent to comply with the Fourth Amendment. *Schneckloth*, 412 U.S. at 235-58. The waiver theory of consent offered by the dissent tends to support a "knowing and intelligent" consent requirement, and the majority appears to have been unwilling to endorse the waiver view in part because it wished to avoid the burdens on law enforcement which that view would appear to entail. *Id.*

[30] For a nice discussion of anchoring effects generally, see FARNSWORTH, *supra* note 24, at 230-36.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[Guidelines] range"[34] because they "provide a crucial "starting point or 'anchor' for judges" in determining a sentence.[35]

A decision establishing a given legal doctrine can also have an anchoring effect on later decision makers, who will take the status quo as their point of departure (even when they ultimately decide to change it) and who may also have internalized or at least acclimated to that status quo. There is good reason to think that judicial actors in common-law systems are especially susceptible to the anchoring effect of prior judicial decisions given the value common-law systems place on adherence to precedent, a value which is reflected in the formal doctrine of stare decisis.[36] A judicial decision establishing a particular doctrinal frame ("a consent search is permissible if the search is reasonable") as a precedent exercises not only a framing effect but may also have a substantial anchoring effect on the judgments of later judicial actors—whose views will be shaped in some respects by the presence of the doctrinal frame.

Georgia v. Randolph, a recent consent search case, illustrates the likely anchoring effects of precedent.[37] The issue in *Randolph* was the reasonableness of the police search of a residence when one co-tenant consented to the search but another co-tenant was present and objected to the search.[38] The Court held by a 5-3 vote that police searches in such circumstances are unreasonable because "widely shared social expectations" suggest that a private visitor would not enter a home under the same circumstances.[39]

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[34] Recent Case, *Criminal Law—Sentencing Guidelines—Second Circuit Holds That Imposing Below-Guidelines Sentence Using Retroactive Guidelines Range Increase Does Not Violate Ex Post Facto Clause*, 124 HARV. L. REV. 2091, 2094-95 (2011).

[35] *Id.* at 2095 (quoting United States v. Turner, 548 F.3d 1094, 1099 (D.C. Cir. 2008)). This anchoring effect can present an ex post facto issue arising when an upward alteration in the Sentencing Guidelines range—occurring after a defendant's criminal conduct—has an anchoring effect which operates retroactively to increase the defendant's sentence, an effect which could be obscured by the fact that the ultimate sentence still falls below the formal range increase even though it is higher than it would have been without the anchoring effect of the range increase. *See id.*

[36] On the doctrine of stare decisis, see Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405-06 (1932) (Brandeis, J., dissenting).

[37] 547 U.S. 103 (2006).

[38] *Id.* at 106.

[39] *Id.* at 111.

Since "no sensible [private] person would go inside" when a co-tenant is present and objects to their entry, a search by police in those circumstances is unreasonable under the Fourth Amendment.[40] The dissent, by contrast, asserted that an approach centered on "shared social expectations" is too amorphous and uncertain in application to serve as a constitutional standard given the almost infinite variety of differing social circumstances, and advocated instead adoption of a bright-line rule turning on the shared authority co-tenants have over their common home.[41]

For the purposes of this Article, what is notable about *Randolph* is simply that all the Justices viewed the issue as one centering on the interpretation of the contours of the consent search doctrines established by cases such as *Schneckloth v. Bustamonte*[42] and *United States v. Matlock*,[43] the first co-tenant consent search case. Both of those decisions included firm dissenting opinions advocating an analysis centered on the question of knowing and intelligent waiver,[44] which were ignored by the Justices in *Randolph*. The consent search question in the Georgia case was both framed by these precedents ("a consent search is permissible if the search is reasonable") and anchored by them as a practical matter—the Justices made no effort to revisit and reformulate the foundations of Fourth Amendment consent search doctrine but rather took the established doctrines as a starting point for their analysis.

Of course, it is conceivable that all the Justices simply agreed with this approach in some fashion wholly independent of the earlier cases, but no actual defense of the "reasonableness" approach over other approaches was advanced by any Justice. Given the substantial number of dissenting Justices in these early cases,[45] and the range of plausible doctrinal explanations for

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[40] *Id.* at 113.

[41] *Id.* at 127-42 (Roberts, C.J., dissenting).

[42] 412 U.S. 218 (1973).

[43] 415 U.S. 164 (1974).

[44] *Matlock*, 415 U.S. at 188 (Brennan, J., dissenting); *Schneckloth*, 412 U.S. at 277 (Marshall, J., dissenting).

[45] The same three Justices—Douglas, Brennan, and Marshall—dissented in both cases. *Matlock*, 415 U.S. at 178, 188; *Schneckloth*, 412 U.S. at 275-77.

consent searches,[46] it seems likely that the views of the *Randolph* Justices were simply canalized by the early decisions both as a formal matter of stare decisis and perhaps in nonformalized ways as well. In sum, the anchoring effect of the earlier decisions on consent likely played a significant role in determining the frame that structured all the Justices' analyses in *Randolph*.

Also important are the broader effects of doctrinal anchoring—especially the influence that implementing doctrines can have over time on the way the general legal community comes to think about the original constitutional provision at issue. "We are under a Constitution, but the Constitution is what the judges say it is," Chief Justice Hughes once famously observed.[47] That statement is best understood not as an expression of constitutional cynicism but of constitutional realism: In a legal system where the Court has the final say on the meaning of the Constitution,[48] the practical effect of most constitutional provisions will turn on the doctrines created by the Court. Those who are most concerned with the real-world effect of the Constitution will therefore study court-created constitutional doctrine more than constitutional theory or history.[49] The end result is that the distinction between the Constitution and court-created constitutional law, obscure to begin with, becomes blurred even further in practice.

Lower court judges, lawyers, and police officers are by necessity concerned with the practical application of the Fourth

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[46] *See supra* Part I.B.

[47] CHARLES EVANS HUGHES, ADDRESSES OF CHARLES EVANS HUGHES, 1906-1916 at 185 (2d ed. 1916).

[48] United States v. Nixon, 418 U.S. 683, 703 (1974); Cooper v. Aaron, 358 U.S. 1, 18 (1958).

[49] This is often true even for arguments addressed to the Supreme Court. For instance, Charles Fried, who served as Solicitor General in the Reagan Administration, states that a good legal brief addressed to the Court is "largely analogy and precedent" and that he "tease[d] the lawyers in [his] office that the ideal SG's brief would have not one word that is not in quotations marks and attributed to some prior Supreme Court opinion." CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT 66 (1991); *cf.* Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930) (advocating the study of the practical "working" rules that capture the actual conduct of government officials over the study of the abstract "paper" rules found in judicial opinions and statutes).

Amendment and thus with the doctrinal construction of the Fourth Amendment established by the Court. For these actors, the Fourth Amendment as a provision of the Constitution is first and foremost embodied in a set of judicially-crafted constitutional doctrines. Some of these actors will in fact internalize Fourth Amendment doctrines and view the doctrines as the "meaning" of the amendment. Others who do not internalize the doctrines will tend at least to acclimate to them—accepting the established doctrines as the binding law and becoming accustomed to them as the operational rules that govern cases. By processes of internalization and acclimation, a decision that might have been viewed as outrageous on the day it was decided can seem a few years later like a mere mistake which should be respected as a matter of precedent and—after a few years more—like a perfectly reasonable and perhaps even correct view of the Fourth Amendment.

The Court's doctrines shape how later Justices and the broader legal community view the Fourth Amendment even as the Court's view of the Fourth Amendment influences the crafting of Fourth Amendment doctrines. Thus, the perceived meaning of the Fourth Amendment shapes attitudes towards the doctrine, but doctrinal anchoring effects—both informal effects and the formal effects associated with stare decisis—also shape perceptions of the Fourth Amendment. This process can act as a form of feedback loop so that a "new normal" of Fourth Amendment doctrinal innovation in one era can so shape the view of the Fourth Amendment that to a later generation the innovative doctrines seem quite natural and in some cases appear almost axiomatically correct. The fact that so many Americans have a healthy faith in progress over time simply reinforces the view that newer doctrines are likely to be improvements over older ones, even as the newer doctrines themselves become the "dead hand" of the past for the next generation.

This Article will contend in the next three parts that the Warren Court's reframing and anchoring of the Fourth Amendment in innovative doctrines has undermined the amendment's basic protections in important respects. Of course, the framing and anchoring effects of these doctrines can also predispose one to view them with more complacency than one

otherwise might, and may well obscure the full import of their contraction of Fourth Amendment rights. With these thoughts in mind, this Article now turns to an examination of the Warren Court's Fourth Amendment revolution.

II. FROM "PERSONS, HOUSES, PAPERS, AND EFFECTS" TO "REASONABLE EXPECTATIONS OF PRIVACY"

A. Katz *and Rival Frames: "Protected Interests" Versus "Reasonable Expectations of Privacy"*

What governmental actions trigger the basic protections of the Fourth Amendment—such as the requirement of a warrant based upon probable cause? This is a foundational question, and it places a constitutional decision maker at a doctrinal crossroads. The Supreme Court in confronting this question has had to choose implementing doctrines which carry inevitable framing and anchoring effects. The Court has had to decide how to frame the inquiry and which text, which concepts, which values will be emphasized in the doctrinal construction—and which will not.

Consider a set of facts based upon those of the Court's landmark decision in *Katz v. United States*, a case which addressed these doctrinal questions and which represents a profound shift in the Court's analysis.[50] Police place a tap on the telephone wires on the outside of a telephone booth and listen in on the telephone conservation which occurs within the booth.[51] Does this investigative act trigger the protections of the Fourth Amendment which would presumptively require police to obtain a warrant to conduct the surveillance? What doctrinal approach should one take here?

One can contrast here two rival ways to frame the doctrinal view—both embraced more-or-less by the Court at different points in time. The older view can be called the "protected interest" view.[52] This traditional approach emphasized the interests

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[50] Katz v. United States, 389 U.S. 347 (1967).

[51] *Id.* at 348.

[52] For a comprehensive account of the concept of "protected interests" in Supreme Court doctrine over the course of Fourth Amendment history, see Thomas K. Clancy,

specifically enumerated as protected in the text of the Fourth Amendment, "persons, houses, papers, and effects," and the common-law principles rooted in property law that formed the important broader legal context of the text.[53] The newer view, which the Court adopted in the 1960s, can be called the "reasonable expectation of privacy" view.[54] This newer approach emphasizes the textual reference to "searches" in the Fourth Amendment, and it defines a "search" doctrinally as a governmental invasion of a "reasonable expectation of privacy."[55] The two rival frames thus emphasize (i) different parts of the Fourth Amendment text ("persons, houses, papers, and effects" versus "searches and seizures") and (ii) different forms of legal analysis (common-law legal traditions versus an open-ended "reasonableness" test).

Consider two well-known applications of the Court's traditional "protected interest" approach. In 1924, the Court, in *Hester v. United States*, held that a police search of an "open field" does not implicate the Fourth Amendment because an "open field" is not a "person, house, paper, or effect" protected by the amendment.[56] Justice Holmes observed—in a brief opinion for a unanimous Court—that the legal distinction between a "house" and an "open field" is "as old as the common law" itself and thus that the protection afforded "houses" in the Fourth Amendment is not extended to "open fields."[57] In 1928, the Court, in *Olmstead v. United States*, held that a wiretap of a defendant's telephone involving the wires outside of his home did not implicate the Fourth Amendment.[58] The Court reasoned that the "construction" of the Fourth Amendment favored by the Court could not "justify enlargement of the [its] language . . . beyond the possible practical

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What Does the Fourth Amendment Protect: Property, Privacy, or Security?, 33 WAKE FOREST L. REV. 307 (1998).

[53] *See id.* at 309-27.

[54] *See id.* at 327-39.

[55] *Katz*, 389 U.S. at 350.

[56] 265 U.S. 57, 59 (1924).

[57] *Id.*

[58] 277 U.S. 438, 464 (1928).

meaning of houses, persons, papers, and effects" to extend to wires "stretched" along "highways" outside of the home.[59]

The traditional "protected interest" view had both a "strict" and a "liberal" expression, the latter tracing its roots back to the Court's landmark decision in *Boyd v. United States* in 1886.[60] The Court in both *Hester* and *Olmstead* adhered to a "strict" construction of "protected interests" which limited those interests to the dimensions established by their original basis in common-law property rights.[61] The "liberal" construction, by contrast, invoked property rights as the foundation for a broader view of the Fourth Amendment, one which built on a property rights base but which was willing to extend Fourth Amendment protections beyond that base.[62] Justice Butler, dissenting in *Olmstead*, endorsed the latter position.[63] In his dissent, Justice Butler advocated extending the traditional protections of the Fourth Amendment to wiretaps outside of homes on the "liberal" theory that the "Fourth Amendment safeguards against all evils that are like and equivalent to those embraced within the ordinary meaning of its words."[64] A phone tap, on this view, is an "evil" equivalent to, say, an actual incursion into the home by government agents to eavesdrop or rifle through private papers, and thus it is equally violative of the Fourth Amendment.

Significantly, a majority of the Court embraced a "liberal" construction of the Fourth Amendment in *Silverman v. United States*.[65] The Court in *Silverman* recognized that homes and offices are constitutionally protected areas within the ambit of the meaning of the word "house" in the Fourth Amendment, and the Court held that Fourth Amendment "houses" are protected

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[59] *Id.* at 465.

[60] 116 U.S. 616, 635 (1886) (stating that "constitutional provisions for the security of person and property should be *liberally* construed" because "[a] close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance" (emphasis added)).

[61] Notably, the Court in *Olmstead* characterized its own approach as a "liberal" construction. *Olmstead*, 277 U.S. at 465. Its approach, however, is certainly "strict" in comparison to the *Olmstead* dissents.

[62] *See id.* at 485 (Butler, J., dissenting).

[63] *Id.*

[64] *Id.* at 488.

[65] 365 U.S. 505 (1961).

against actual physical intrusions by the government even when the intrusions do not constitute a technical trespass under property law—thus broadening the protections of the traditional common-law approach beyond strict trespass analysis.[66] On this view, the government's actual physical invasion into a house—even though not technically a trespass—sufficiently compromised the security of the house to warrant the protections of the Fourth Amendment. On these grounds, the Court recognized a distinction between police use of a "spike mike" listening device which involved an actual physical intrusion into a house and the use of a "detectaphone" which did not.[67]

As for our initial hypothetical case concerning the tap of a telephone booth based on the facts of *Katz*, if a court were to analyze the issues under the "protected interest" approach, it might focus on the Fourth Amendment text concerning "houses" as a "protected interest."[68] Given that focus, a court would ask two basic questions: (i) whether a telephone booth falls within the category of "houses" enumerated in the Fourth Amendment as constitutionally protected areas; and, if so, (ii) whether a police wiretap compromises the security of the telephone booth so as to trigger the protections of the Fourth Amendment—by either a common law trespass, a physical intrusion, or an "equivalent evil" such as the use of a technological device as a substitute for a trespass or intrusion.

On the first issue, a court might conclude that a telephone booth is a kind of "house" as enumerated in the Fourth Amendment and thus that a telephone booth is a constitutionally protected area. Why? Because a telephone booth is a building with a roof atop four walls; it is designed to protect privacy in telephone conservations; and it is in effect "rented" for privacy purposes for a few minutes at a time by paying to make a telephone call.[69]

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[66] *Id.* at 511.

[67] *Id.* at 512.

[68] Under a "liberal" construction of the "protected interest" view, other possible points of focus would be on the telephone conversation as an electronic equivalent of "papers" or as an extension of the "person."

[69] *Cf.* Katz v. United States, 389 U.S. 347, 352 (1967) (stating "[o]ne who occupies [a telephone booth], shuts the door behind him, and pays the toll that permits him to

Conversely, a court might conclude that a telephone booth is not a "house" within the meaning of the Fourth Amendment perhaps because the booth has transparent walls, is not designed for an overnight stay, and overall has minimal privacy protections.[70]

Second, if a court concluded that a telephone booth is a constitutionally protected area, it might next conclude that the wiretap compromises the security of the telephone booth under a "liberal" construction of the Fourth Amendment. A court might reach this conclusion by viewing the wiretap as simply the technological equivalent of a trespass or physical invasion—given that wiretap technology allows the government to obtain information it could have obtained under the technological limits of the founding era only by more intrusive means.[71] Or a court might conclude the reverse under a stricter construction of the Fourth Amendment: The security in the telephone booth is compromised only by a technical trespass or actual physical intrusion,[72] and Fourth Amendment security is simply subject to some erosion with the advent of new technologies.[73] In short, the case could have come out either way under a "protected interest" analysis.

In *Katz*, the parties expected the Court to follow the traditional "protected interest" view and, not surprisingly, the

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place a call is surely entitled to assume that the words he utters . . . will not be broadcast to the world").

[70] *See id.* (noting the government's argument that there is no "reasonable expectation of privacy" in a telephone booth because of its transparent walls).

[71] *Cf.* Kyllo v. United States, 533 U.S. 27, 34 (2001) (holding that government use of a sense-enhancement device not in general public to explore details of a home that could not have been discovered at the time of the framing without an actual physical intrusion is a search within the meaning of the Fourth Amendment); Olmstead v. United States, 277 U.S. 438, 485 (1928) (Butler, J., dissenting). On the similarities between Justice Butler's dissent in *Olmstead* and the opinion of the Court in *Kyllo*, see Morgan Cloud, *Rube Goldberg Meets the Constitution: The Supreme Court, Technology and the Fourth Amendment*, 72 MISS. L.J. 5, 46 (2002).

[72] *Cf. Silverman*, 365 U.S. at 512 (holding that an actual physical invasion of a constitutionally protected area is required to trigger the protections of the Fourth Amendment).

[73] *Cf. Kyllo*, 533 U.S. at 34 (stating the Fourth Amendment must be interpreted to limit governmental use of new technologies to preserve the degree of privacy in the home against the government that existed when the amendment was adopted). The Court does note in *Kyllo* that once the technologies are in "general public use" their use by police does not constitute a Fourth Amendment "search." *Id.* at 40.

petitioner formulated the dispute in light of the Court's traditional approach in cases such as *Silverman*. This formulation centered on the textual statement of protected interests and the principles of the common law: (i) "[w]hether a public telephone booth is a constitutionally protected area" under the Fourth Amendment and (ii) "[w]hether physical penetration of a constitutionally protected area" is required to trigger the protections of the Fourth Amendment.[74] The Court, however, did not adhere to the traditional approach. Instead, the Court called the traditional formulation of the issues "misleading."[75]

The Court in *Katz* rejected the traditional approach and framed a new approach to the threshold question of whether the protections of the Fourth Amendment apply. This new approach emphasized the Fourth Amendment's textual reference to "searches" and centered on an open-ended "reasonableness" test used by the Court to define when a "search" occurs under the Fourth Amendment.[76] On this new view, police engage in a Fourth Amendment "search" triggering the protections of the amendment when they invade a "reasonable expectation of privacy."[77] As a result, the Court asserted in *Katz* that the operative question was whether Katz had a "reasonable expectation" with respect to the privacy of his conversation within the telephone booth.[78] If Katz had a "reasonable expectation of privacy" within the telephone booth, then an invasion of that expectation with a listening device was a "search" triggering the protections of the Fourth Amendment—even without an actual physical invasion of the interior of the booth or a determination that a phone booth was a protected area.[79] On the other hand, if Katz did not have a "reasonable expectation of privacy" within the telephone booth,

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[74] *Katz*, 389 U.S. at 349-50.

[75] *Id.* at 351.

[76] *Id.* at 353.

[77] *Id.*

[78] Justice Stewart in *Katz* principally uses the word "justifiable" to refer to Katz's expectation of privacy. *Id.* The phrase "reasonable expectation of privacy" derives from Justice Harlan's concurrence. *Id.* at 360 (Harlan, J., concurring). This "reasonableness" formulation of the *Katz* test is now more common. *See Kyllo*, 533 U.S. at 32-33; Clancy, *supra* note 52, at 328.

[79] *Katz*, 389 U.S. at 348-54.

then no search occurred and no Fourth Amendment protections applied.

On this question, the Court decided that Katz's expectation of privacy was "reasonable" because "[o]ne who occupies a [telephone booth], shuts the door behind him, and pays the toll," is "entitled to assume that the words he utters . . . will not be broadcast to the world" and that for the Court "[t]o read the Constitution more narrowly [would be] to ignore the vital role that the public telephone has come to play in private communication."[80] The Court concluded that "[t]he Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth."[81] Since the police wiretap invaded a "reasonable expectation of privacy," it constituted a "search" within the meaning of the Fourth Amendment, and it presumptively required a warrant.[82]

Notably, the application of the "reasonable expectation of privacy" approach to the facts of *Katz* is far from obvious. The Court concluded that Katz had a "reasonable expectation of privacy" because the purpose of a telephone booth is to provide privacy for telephone conversations[83] and because of the important role that telephone booths played in contemporary life in the 1960s.[84] The Court, however, could have concluded that Katz did not have a "reasonable expectation of privacy" in the booth if it had emphasized other potential factors—such as the glass walls of the telephone booth exposing Katz to visual observation,[85] the fact that a telephone operator could have

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[80] *Id.* at 352.

[81] *Id.* at 353.

[82] *Id.* at 354-59.

[83] *Id.* at 352.

[84] *Id.*

[85] The government raised this point in *Katz*. *Id.* If the government could have obtained the substance of Katz's conversation through the glass walls of the phone booth by visual observation, say, through reading Katz's lips, then there is a plausible argument that no Katzian "reasonable expectation of privacy" existed in the conversation. *Cf.* United States v. Knotts, 460 U.S. 276, 282 (1983) (holding that use of an electronic device to track the location of a vehicle on public roadways is not a search within the meaning of the Fourth Amendment because police could have obtained the information by direct visual observation).

listened in on the call,[86] or that the party on the other end of the conversation could have shared the conversation with others by transmitting the conversation, or recording it, or simply repeating its content.[87] The new *Katz* analysis, given its open-ended "reasonableness" analysis, cannot assure the protection of privacy in a telephone booth.

For purposes of this Article, what is important about *Katz* is the profound doctrinal reframing it embraced—from a focus on "persons, houses, papers, and effects" informed by long-standing common-law traditions to a focus on the word "search" defined by a flexible analysis of "reasonable expectations of privacy."[88] The obvious reason behind the reframing in *Katz* was to expand the reach of the Fourth Amendment beyond its enumerated interests: persons, houses, papers, and effects.[89] However, the Katzian "reasonable expectation of privacy" approach has not delivered on that promise and it in fact has threatened to undermine the Fourth Amendment's traditional protections.

The Court, more than four decades after *Katz*, has not used the "reasonable expectation of privacy" doctrine to expand the reach of the Fourth Amendment beyond a point where the "protected interest" doctrine could also have gone.[90] Consider *Oliver*,[91] the Katzian follow up to *Hester*,[92] the original case which held that an "open field" is not protected by the Fourth Amendment because it is not a person, house, paper, or effect.[93] In *Oliver*, the Court held that the search of an "open field" is not a "search" within the meaning of the Fourth Amendment in part

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[86] *Cf.* Smith v. Maryland, 442 U.S. 735, 744 (1979) (holding that one has no "reasonable expectation of privacy" in the telephone numbers one dials because this information is knowingly "exposed" to the telephone company and one "assume[s] the risk" that the telephone company will turn the information over to police). On the tension between *Smith* and *Katz*, see *id.* at 746-48 (Stewart, J., dissenting).

[87] *Cf.* United States v. White, 401 U.S. 745, 752 (1971) (holding that police use of a "false-friend" to record or transmit a conversation does not constitute a "search" within the meaning of the Fourth Amendment).

[88] *See* Clancy, *supra* note 52, at 320-29.

[89] *Id.*

[90] *Id.* at 329-40; Cloud, *supra* note 71, at 7.

[91] Oliver v. United States, 466 U.S. 170 (1984).

[92] Hester v. United States, 265 U.S. 57 (1924).

[93] *Id.* at 59.

because there is no "reasonable expectation of privacy" in an open field, given the typical uses of "open fields" for agricultural or other utilitarian purposes rather than for privacy-intensive purposes.[94]

Consider also *California v. Ciraolo*,[95] a case involving police use of an aircraft to observe the curtilage of a home.[96] Under the "protected interest" view, the common law establishes that curtilage is an extension of the home entitled to Fourth Amendment protection,[97] and the pivotal issue would be whether an actual physical intrusion is necessary to consider the security of the curtilage compromised. This question could easily go either way depending on whether one held strictly to a physical invasion approach to security or "liberally" adjusted the standard to include functional equivalents of physical invasions enabled by technological advances.[98] Under the "reasonable expectation of privacy" view, the Court in *Ciraolo* held that there is no "reasonable expectation of privacy" in curtilage from aerial observation given that the curtilage is "knowingly exposed" to airplanes flying within a "lawful vantage point."[99]

The *Katz* Court's reframing of the Fourth Amendment in favor of a flexible test that would allow the judiciary to expand the reach of the amendment has also threatened to narrow it, especially with respect to the traditional protections for houses and papers. This is so for several related reasons. First, the *Katz* doctrine's flexible "reasonableness" test encourages policy-oriented decision making, which can just as easily restrict the reach of the Fourth Amendment as expand it—depending upon the inclination of the judges who must interpret it.[100] Thus, the original Katzian promise of a more expansive Fourth Amendment carries with it

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[94] *Oliver*, 466 U.S. at 177-81. The Court in *Oliver* also stated that "*Katz*' 'reasonable expectation of privacy' standard did not sever Fourth Amendment doctrine from the Amendment's language." *Id.* at 176 n.6.

[95] 476 U.S. 207 (1986).

[96] *Id.* at 209.

[97] *Hester*, 265 U.S. at 57.

[98] *See supra* notes 65-73 and accompanying text.

[99] *Ciraolo*, 476 U.S. at 213-16.

[100] Morgan Cloud, *A Liberal House Divided: How the Warren Court Dismantled the Fourth Amendment*, 3 OHIO ST. J. CRIM. L. 33, 34 (2005); Clancy, *supra* note 52, at 339-40.

the concomitant hazard of a narrower amendment interpreted by judges who favor a crime-control view of the Fourth Amendment.[101]

Second, the *Katz* doctrine takes the emphasis off the specific language of "persons, houses, papers, and effects" and thereby reduces the significance of this concrete enumeration of interests worthy of special protection under the amendment. The shift in emphasis away from this text has an inevitable tendency to undermine the significance of the protections afforded by the textual specification of protected interests. Third, the Katzian approach also reduces the importance of the common-law background principles which inform the understanding of the security of protected interests—such as homes and papers. This shift also undermines a source which can provide a crucial "floor" of traditional legal protection in many cases.[102]

Fourth, the new doctrinal frame also pushes the protection of houses to the margins of doctrinal analysis. As *Katz* makes clear, whether a structure such as a telephone booth is protected by the Fourth Amendment has no direct analytical connection to whether the structure is analogous to a house. The older doctrine would have reaffirmed the centrality of privacy in homes by building its doctrinal analysis of structures such as telephone booths on the ways in which they are (or are not) like houses. Whether or not a court applying this analysis decided that the structure was a kind of "house" for Fourth Amendment purposes, the substance of its analysis would have reaffirmed the importance of houses as concrete protected interests and elaborated on the ultimate policy foundation of the special protections for houses in a way that could deepen judicial appreciation of their importance. This same basic point will likely hold true for physical papers and digital documents.[103]

Finally, the Court in *Katz* stated baldly that the Fourth Amendment protects "people, not places."[104] This proposition is either meaningless (since, of course, no one claims that places

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[101] Cloud, *supra* note 100, at 72.

[102] *Id.*

[103] *See* discussion *infra* notes 142, 144 and accompanying text.

[104] Katz v. United States, 389 U.S. 347, 351 (1967).

have Fourth Amendment rights) or it inevitably undercuts the protection the Fourth Amendment specifically enumerates for "houses" as a constitutionally protected "place" in which "people" have a right to be "secure." Denigrating the Fourth Amendment's clear application to places *as places* will inevitably tend to erode respect for the constitutional protections afforded to those places.

B. Kyllo*, "Houses," and Rival Frames: A Return to "Protected Interests" Within the "Reasonable Expectation of Privacy" Framework*

Some of the conceptual fallout from *Katz*'s reframing of the Fourth Amendment—eroding security in houses—is on display in the opinions in *Kyllo v. United States*.[105] This case involved police use—without a warrant—of a thermal-imaging device to measure the heat generated inside a home to determine whether heat lamps were being used to grow marijuana.[106] The Court held 5-4 that police use of a thermal imager to monitor the heat levels in a home is a "search" that triggers the protections of the Fourth Amendment and presumptively requires a warrant.[107] The dissent concluded that the use of the thermal imager is not a search and thus would have allowed the use of a thermal imager without a warrant.[108] Both the majority opinion and the dissent demonstrate the threat the Katzian approach poses to a broad view of the Fourth Amendment.

The most thoroughly Katzian opinion in *Kyllo* is the dissent. Written by Justice Stevens and joined by three other Justices—Rehnquist, O'Connor, and Kennedy—the dissent applied the *Katz* "reasonable expectation of privacy" test in a straightforward manner consistent with the flexibility of its "reasonableness" standard. Justice Stevens summarily dismissed the claim that Kyllo had a reasonable expectation of privacy in the heat levels in his home by characterizing the privacy claim as one concerning external heat emissions.[109] "[T]he notion," Justice Stevens

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[105] Kyllo v. United States, 533 U.S. 27 (2001).

[106] *Id.*

[107] *Id.*

[108] *Id.* at 41 (Stevens, J., dissenting).

[109] *Id.* at 42.

pronounced, "that heat emissions from the outside of a dwelling are a private matter implicating the protections of the Fourth Amendment . . . is not only unprecedented but also quite difficult to take seriously."[110] Why? Because "[h]eat waves," Justice Stevens argued, "like aromas that are generated in a kitchen . . . enter the public domain if and when they leave a building" and thus any "expectation" they will "remain private" is "implausible" and unreasonable.[111]

Significantly, Justice Stevens also invoked the "strong public interest" in clearly recognizing governmental authority to monitor "emission from homes" in cases involving "smoke, suspicious odors, odorless gases, airborne particulates, or radioactive emissions, any of which could identify hazards to the community."[112] This last point suggests that concern for facilitating effective law enforcement is relevant to the Fourth Amendment's "reasonable expectation" inquiry. Justice Stevens thus concluded that the use of the thermal imager is not a search within the meaning of the Fourth Amendment and police were not required to obtain a warrant to use an imager to monitor heat levels in Kyllo's home.[113]

Justice Scalia's opinion for the Court concluded that Kyllo's home was protected from police use of a thermal imager without a warrant.[114] The majority opinion was decidedly less Katzian in substance than the dissent, and its quiet but dramatic retreat from *Katz* also illustrates the problems with the *Katz* approach. Justice Scalia first criticized the *Katz* "reasonable expectation of privacy" approach and then purported to apply it while actually embracing the core of the substance of the traditional "protected interest" approach discarded by the Court decades earlier.[115]

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[110] *Id.* at 43.

[111] *Id.* at 43-44.

[112] *Id.* at 45.

[113] *Id.* at 51.

[114] *Id.* at 40.

[115] On the pre-Katzian themes present in *Kyllo*, see Thomas K. Clancy, *Coping with Technological Change:* Kyllo *and the Proper Analytical Structure to Measure the Scope of Fourth Amendment Rights*, 72 MISS. L.J. 525, 555 (2002) (stating that the "Court's language is remarkable for its reliance on themes developed by the Court when property analysis was the applicable test: the common law; constitutionally protected areas; analogy to physical intrusions; and reliance on what was protected at the time of

Justice Scalia began by noting that the *Katz* approach "has often been criticized as circular" and hence as "subjective and unpredictable,"[116] a criticism that Justice Scalia himself had endorsed in earlier cases.[117] Justice Scalia thus recognized that the purported virtue of the Katzian inquiry, its flexibility, is also its central vice.

Justice Scalia acknowledged that *Katz* may be difficult to refine in some contexts but, importantly, not in that of the home—the context at issue in *Kyllo*—precisely because of the home's common-law historical context of established protections.[118] Justice Scalia here concludes that *Katz* may be applied to the issues raised in *Kyllo* without the approach's characteristic difficulties only because the privacy-in-the-home context of the case allows the Court to return to the common law for guidance. The Court thus rested its application of *Katz* on an analysis of the historical materials which are the foundation of the "protected interest" view rejected by *Katz*. In light of this historical context, Justice Scalia advanced an analysis centering on two basic substantive questions: (i) the nature of the home as a constitutionally protected area under the historically-established principles of the common law and (ii) whether an actual physical intrusion is required to compromise the security of the home triggering the protections of the Fourth Amendment.[119] These questions, which the Court asked in substance, are the same as those presented by the traditional "protected interest" view and expressly condemned by the Court in *Katz*.[120]

On this first point, Justice Scalia recognized that the home is a constitutionally protected area of the highest order. The Fourth Amendment, Justice Scalia acknowledged, recognizes the

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the framing"); Cloud, *supra* note 71, at 46 (stating that the "core [of the Court's analysis in *Kyllo*] appears to be the functional equivalent of the long forgotten property-based analysis" of Justices in the pre-*Katz* era such as Justice Butler in his *Olmstead* dissent).

116 *Kyllo*, 533 U.S. at 34.

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

118 *Kyllo*, 533 U.S. at 34-35 (stating that with the home "there is a ready criterion, with deep roots in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*" (emphasis in original)).

119 *Id.* at 34-35.

120 *See* discussion *supra* Part II.A.

traditional "sanctity of the home"[121] and "draws 'a firm line at the entrance to the house,'"[122] so that the "entire [home] area is held safe from prying government eyes" because "all details" in the home are "intimate details" worthy of protection.[123] On the second point, Justice Scalia reasoned that to "assure[ ] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted," a warrant is presumptively required when police "obtain[ ] by sense-enhancing technology any information . . . that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area.'"[124] The Court thus concluded that police must have a warrant to use a thermal imager.

Of special interest here is Justice Scalia's quotation of language from the Court's decision in *Silverman*—a "physical intrusion into a constitutionally protected area."[125] This is the principal case and almost the very language on which the petitioner in *Katz* relied in crafting the questions presented to the Court, questions which the Court in turn rejected as a "misleading" formulation of the legal issues.[126] Justice Scalia's substantive analysis is also in line with dissenting Justices in the pre-*Katz Olmstead* decision, who applied a "protected interest" analysis grounded in the common law in a "liberal" fashion to protect against actual trespasses and other "evils" that are "like and equivalent" to trespasses.[127] In sum, the Court's opinion in *Kyllo* turns on a substantive analysis of the same questions—and in virtually the same language drawn from the pre-*Katz Silverman* decision—rejected by the Court as "misleading" inquiries in *Katz*.

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[121] *Kyllo*, 533 U.S. at 28. "'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Id.* at 31 (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)).

[122] *Id.* at 40 (quoting Payton v. New York, 445 U.S. 573, 590 (1980)).

[123] *Id.* at 37.

[124] *Id.* at 34 (quoting *Silverman*, 365 U.S. at 512).

[125] *Id.*

[126] Katz v. United States, 389 U.S. 347, 351 (1967).

[127] Olmstead v. United States, 277 U.S. 438, 487-88 (1928) (Butler, J., dissenting); Cloud, *supra* note 71, at 46.

What the opinions in *Kyllo* demonstrate are the problematic framing effects of the Katzian "reasonable expectation of privacy" test. The *Katz* approach frames the question of the applicability of the Fourth Amendment in terms of a governmental invasion of something as open-ended as a "reasonable expectation of privacy" unmoored from any clear legal foundation in the text of the Fourth Amendment or the traditional principles of the common law. Indeed, the lack of mooring is precisely the point of the Katzian approach, and it thus presents the Justices with an inkblot analysis into which they can read their preferences for privacy—or for crime-control polices and deference to government. This approach makes its very easy to characterize *Kyllo* as a case about governmental observation of "external heat emissions" implicating an "at best trivial" privacy concern[128] rather than a case about police use of a technological substitute for an actual physical invasion of the security of Kyllo's home to determine whether Kyllo was committing a crime within its walls.[129] One should not be surprised when four Justices conclude that Kyllo's expectation of privacy is not only "unreasonable" but even "difficult to take seriously."[130]

Compare this with the traditional "protected interest" approach which the majority in *Kyllo* uses in substance while purporting to apply a Katzian analysis. The "protected interest" frame places its emphasis on the textual recitation of protected interests in the Fourth Amendment—persons, houses, papers, and effects—and that emphasizes the centrality and paramount importance of the protection of homes to the meaning of the Fourth Amendment. The Fourth Amendment was in fact designed to protect only four basic interests expressed in its text—and houses are one of those interests. The common-law background principles reinforce that view substantially because those principles affirm the special importance of homes among the four interests.

The "protected interest" doctrinal formulation therefore positions one to read the Fourth Amendment broadly to protect

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[128] *Kyllo*, 533 U.S. at 45 (Stevens, J., dissenting).

[129] *Id.* at 34-35 (majority opinion).

[130] *Id.* at 43 (Stevens, J., dissenting).

the home. The remaining question, then, is whether to protect the traditional security in the home against both actual physical invasions and the use of cutting-edge technology as a police substitute for such invasions. A court recognizing the importance of security in the home when it answers the first question should be better primed to answer the second question in a home-protective fashion than it otherwise would be.[131] The "protected interest" view, in short, frames the constitutional issues in a way that promotes protection of the home. One should not be surprised when a Court doctrinally committed to *Katz* must struggle to the substance of the "protective interest" view to arrive at and defend a properly home-protective conclusion.

C. "Papers," Digital Documents, and Rival Frames: A Return to "Protected Interests" Within the "Reasonable Expectation of Privacy" Framework?

The "protected interest" frame underpinning the substantive analysis in *Kyllo* not only promises surer protection for the home, it could also offer more certain protections in other important areas than the Court's present *Katz*-based doctrines. Consider the crucial questions presented by Fourth Amendment protections for "papers"—and their modern digital equivalents such as computer files and e-mail. Suppose that one allows a third party broad access to one's personal papers—such as a diary, letters, or business records—and police in turn obtain the papers from the third party. What implications does this chain of events have for one's Fourth Amendment rights? Do the protections of the Fourth Amendment remain firm or do they falter?

On the "protected interest" view, one would retain one's right to security in the papers against governmental intrusion. The essence of the traditional security in protected interests, grounded in the law of property, is the right to exclude—which, of course, includes the right to selectively include some individuals while

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[131] For a notable split on the question of extending protection for the home to functional equivalents of traditional searches, see the majority and dissenting opinions in *Olmstead*, 277 U.S. at 438.

excluding others.[132] On this view, one has a right to allow some actors access to one's home or papers while still excluding others—such as the police.[133] It would thus invade the core of the protected interest for the government to obtain papers through a third party and search through them—without the owner's permission.

This basic analysis is further reinforced by landmark precedents. The Court held in *Boyd* under the "protected interest" view that simple government compulsion of the production of one's papers implicates the Fourth Amendment because of the invasion of the property interest in the papers.[134] Obviously, the government's use of a third party to achieve the very same end constituting the very same invasion of the property interest in the papers would implicate the amendment equally.[135] As a result, a Court following the "protected interest" view would not approve of a governmental seizure and search of papers simply because the government had employed the stratagem of obtaining the papers through a third party who did not in fact have the owner's authorization to transfer them to police. At a minimum, some additional justification for the search would be required.[136]

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[132] *See* Clancy, *supra* note 52, at 344-66.

[133] *See id.*

[134] Boyd v. United States 116 U.S. 616, 635 (1886) (stating that the government's strategy of compelling an individual to produce his private papers for government inspection "divested" the government's actions of "many of the aggravating incidents of actual search [for] and seizure" of the papers from the person's home but that the strategy still contained the "substance and essence" and still "effects [the] substantial purpose" of that search and seizure and that "illegitimate and unconstitutional practices get their first footing . . . by [such] silent approaches and slight deviations from legal modes of procedure").

[135] As the *Boyd* Court might put it, asking a third party to turn documents over to the government would limit the "aggravating incidents of an actual search [for] and seizure" of the papers from the person's home, but the strategy still contains the "substance and essence" and still "effects [the] substantial purpose" of that search and seizure. *Id.*

[136] The paper-protective stance of the "protected interest" approach is further reinforced by the traditional mere evidence rule, another facet of the "protected interest" view. The mere evidence rule restricted evidence-gathering searches under the Fourth Amendment and even in its most narrow form protected "papers" from such searches. Thus a traditional "security in protected interest" analysis would actually bar a seizure and search of "papers" for evidence of crime even with a valid warrant. On the mere evidence rule, see *infra* Part IV.

By contrast, under the established Katzian privacy doctrines, granting broad access to one's papers to third parties undermines one's "reasonable expectation of privacy" because one has "knowingly expose[d]"[137] the papers to other persons and could be thought to have "assumed the risk"[138] that those persons will convey the papers and their contents to others—including police.[139] These Katzian points are the basis of the present "third-party doctrine," which holds that there is generally no "reasonable expectation of privacy" in information shared with a third party—even in confidence.[140] The upshot is that today police who obtain papers from a third party may not be viewed as having engaged in a technical "search" under *Katz*. If there is no "search" under *Katz*, no Fourth Amendment protections apply. The "protected interest" approach could thus easily provide more certain protection for papers shared with a third party than the "reasonable expectation of privacy" approach.

Consider the implications of the analysis above for digital documents, which are often shared with others on servers or networks. Even a modestly "liberal" reading of the "protected interest" approach could expand its protections to guard the contemporary equivalents to traditional papers—digital documents such as e-mails and computer files. A "liberal" reading would thus recognize that government access to digital documents through a third party (such as an Internet Service Provider) who is not authorized to grant such access is an invasion of the protected interest in "papers" triggering the protections of the Fourth Amendment. Thus, a government request or demand for digital documents from a third party such as an ISP could not circumvent an individual's protections under the Fourth

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[137] Katz v. United States, 389 U.S. 347, 351, 360 (1967).

[138] Smith v. Maryland, 442 U.S. 735, 744 (1979) (holding on "assumption of the risk" grounds that there is no "reasonable expectation of privacy" in a conversation with a "false friend" who is cooperating with police to transit the conversation); *cf.* United States v. White, 401 U.S. 745 (1971).

[139] United States v. Miller, 425 U.S. 435, 443 (1976) (stating that "the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed").

[140] *Id.* at 442.

Amendment. A warrant, consent, or similar justification would still be required to examine the documents.

By contrast, under the Katzian third-party doctrine, the emphasis placed on "knowing exposure" to others and "assumption of the risk" renders digital documents shared with third parties potentially vulnerable to a governmental invasion.[141] Protection under the Katzian framework is uncertain—consistent with the open-ended nature of the Court's "reasonable expectation of privacy" doctrine. While courts applying a broad Katzian framework could ultimately take a protective stance on digital communications under the Fourth Amendment,[142] they will do so by retreating from the full implications of the Court's Katzian third-party doctrine[143] and by returning to the substance of an analysis which emphasizes the importance of the traditional protected interest in "papers"[144]—just as the Court in *Kyllo* found

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[141] *See, e.g.*, Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It*, 72 GEO. WASH. L. REV. 1208, 1211 (2004) (stating that in light of the Court's third-party doctrine "it remains unclear today whether files held by ISPs on behalf of their users can retain a Fourth Amendment 'reasonable expectation of privacy'").

[142] *See* United States v. Warshak, 631 F.3d 266, 284-89 (6th Cir. 2010) (recognizing a "reasonable expectation of privacy" in e-mail on the facts of the case but holding that the "reasonableness" of the expectation depends in part on the nature of the "subscriber agreement" and the degree to which a commercial ISP intends to monitor e-mail accounts).

[143] *Id.* at 288 (noting the obvious tension between its "reasonable expectation analysis" finding Fourth Amendment protections for e-mail with third-party access and the Supreme Court's third-party doctrine and "assumption of the risk" analysis in *Miller*).

[144] *Cf. id.* at 284 (observing that the "explosion of Internet-based communication" means that "[p]eople are now able to send sensitive and intimate information, instantaneously, to friends, family, and colleagues half a world away" so that the "conglomeration of stored messages that comprises an email account . . . provides an account of its owner's life" into which "government agents" can "peer deeply" into an individual's "activities"). Compare the view in *Warshak* concerning the importance of the individual protected interest in e-mail with Justice Douglas's defense of the protected-interest based mere evidence rule in *Warden v. Hayden*, which emphasizes the importance of both the right to exclude and selectively include others with respect to one's "secrets":

> Those who wrote the Bill of Rights believed that every individual needs both to communicate with others and to keep his affairs to himself. That dual aspect of privacy means that the individual should have the freedom to select for himself the time and circumstances when he will share his secrets with

itself emphasizing the importance of the traditional protected interest in "houses." In sum, the protection of digital documents shared with others is substantially less certain today under the Warren Court's nebulous "reasonable expectation of privacy" approach than it would have been under a "liberal" construction of the traditional "protected interest" approach.

Significantly, the emphasis of each frame tends to shape the outcome here—paralleling the effect of the frames in *Kyllo* for privacy in the home. The "protected interest" analysis places greater emphasis on what interests the Fourth Amendment specifically protects in the constitutional text—here, "papers" in both their original physical and contemporary electronic forms. That emphasis tends to encourage protection by reaffirming the importance of the basic interest at stake—security in papers—and by encouraging a careful evaluation of the underlying reasons for that specific Fourth Amendment protection.[145] That tendency toward protection is further reinforced by the common-law foundation of those interests, which can be extremely protective when "liberally" construed.[146]

The "reasonable expectations of privacy" approach places its central emphasis on the free-floating concept of privacy—with results that are both less predictable and potentially less protective. The result in this context has been a doctrinal focus on the degree to which one has diluted one's "privacy" in papers or digital documents by sharing the documents with other persons who in turn may share them with still other persons—including police. A shift in focus toward "protected interests" and away from "reasonable expectations of privacy" could reduce the potentially negative doctrinal implications of common third-party access to

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> others and decide the extent of that sharing. This is his prerogative not the States'. The Framers, who were as knowledgeable as we, knew what police surveillance meant and how the practice of rummaging through one's personal effects could destroy freedom.

Warden v. Hayden 387 U.S. 294, 323-24 (1967) (Douglas, J., dissenting). On the demise of the mere evidence rule, see *infra* Part IV.

[145] *See supra* note 144.

[146] The traditional "protected interest" view grounded in property rights both rejects an "assumption of the risk" approach and would have absolutely protected papers from evidence-gathering searches. *See* discussion *supra* Part II.C.

digital documents and offer potentially greater protections for the electronic "papers" which play an increasingly important role in contemporary life.

No radical break with existing doctrine would be required to begin moving down the "protected interest" path to greater protection in this area or in other areas under the Fourth Amendment. *Kyllo* points to a practical way to promote the "protected interest" view to reinvigorate Fourth Amendment rights without overturning established precedents.[147] As it did in *Kyllo*, the Court could slowly reorient the Warren Court's broad "reasonable expectation of privacy" frame back towards a traditional concern for the protection of Fourth Amendment interests specifically enumerated in the text—as "liberally" construed in light of their common-law origins. A cautious doctrinal reorientation rather than a sharp break with precedent is the most prudent path to reform. This Article will discuss Fourth Amendment reform in more detail in Part III.

III. FROM "SECURITY" IN PROTECTED INTERESTS TO THE "REASONABLENESS" OF POLICE CONDUCT

A. Rival Frames: "Security" Versus "Reasonableness"

Doctrinal constructions determining the applicability of the Fourth Amendment must be followed by another set of doctrines that determine when the protections of the amendment are satisfied. If the protections of the Fourth Amendment apply, which governmental actions comply with the amendment and which do not comply? The text of the Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures."[148] Another fundamental division in doctrinal construction is whether to emphasize the text of "security" (in

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147 *See* Cloud, *supra* note 100, at 73 n.144.

148 U.S. CONST. amend. IV.

persons, houses, papers, or effects)[149] or the textual prohibition of "unreasonable" searches and seizures.[150]

Should one privilege the concept of "security" and subordinate the concept of Fourth Amendment "unreasonableness" by defining the latter largely or wholly in terms of "security" in protected interests? On this view, searches that unjustifiably compromise "security" in "persons, houses, papers, and effects," properly understood, are "unreasonable" for that reason. Or should one privilege the concept of "unreasonableness" and subordinate the concept of Fourth Amendment "security" by defining "security" largely or wholly in terms of freedom from "unreasonable" searches? On this view, it is only from "unreasonable" searches that one has any right to be secure. Does one want a doctrinal analysis formulated principally as a positive statement of the interests of the people worthy of special protection (i.e., security in protected interests) or principally as a negative statement of the police conduct one wishes specially to prohibit (unreasonable searches)? What word and concept—"security" or "unreasonableness"—should drive the doctrinal formulation? This is a basic question of doctrinal framing.

One should also note here the immediate framing effect of our last doctrinal crossroads—whether, when thinking about the initial applicability of the Fourth Amendment, to emphasize the text of "persons, houses, papers, and effects" or the textual reference to "searches" doctrinally defined in terms of "reasonable expectations of privacy." That choice of frame has implications for the next choice of frame given the text of the Fourth Amendment. The word "secure" in the text is closely associated with the phrase "persons, houses, papers, and effects." The guarantee of "security" is extended to four enumerated interests: "the right of the people to be secure in their persons, houses, papers, and effects." Therefore, the "protected interest" view emphasizing "persons, houses, papers, and effects" will tend to gravitate toward the word

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[149] On the general concept of Fourth Amendment "security" in "protected interests," see Clancy, *supra* note 52.

[150] On the general concept of Fourth Amendment "reasonableness," see Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 UTAH L. REV. 977.

"secure" and the concept of "security" in formulating a doctrine on the question of Fourth Amendment standards. On the other hand, the word "unreasonable" in the Fourth Amendment modifies the word "searches," and thus the Katzian view emphasizing the invasion of a "reasonable expectation of privacy" as a Fourth Amendment "search" will tend to gravitate toward the word and concept of "(un)reasonableness" in formulating a doctrine. In sum, *Katz*'s doctrinal reformulation of the focus of the application of Fourth Amendment law has a major framing effect on the doctrinal question of when the Fourth Amendment is satisfied, one that promotes a frame focused on "(un)reasonableness."

Consider another hypothetical drawn from the area of consent searches—one based on the facts of *Illinois v. Rodriguez*.[151] Police search a home with the consent of someone who claims to live in the home and to have authority to consent to a search but who in fact is a former resident of the home without authority to consent. The police form a reasonable belief in the person's authority to consent based upon evidence that the person lives in the house. The police search clearly triggers the protections of the Fourth Amendment because there is a "search" under *Katz* (and would also trigger the protections of the Fourth Amendment under the "protected interest" view because there is a physical invasion of a "house"), but the question remains: Have those protections been complied with? Should our doctrinal analysis emphasize "security" in the person's house or the "reasonableness" of the police conduct? When one frames the question, will one ask principally whether the individual's house was properly "secure" or whether the police engaged in an "unreasonable" search?

The "security" perspective encourages one to approach the doctrinal question from the perspective of what the Fourth Amendment was meant to protect—here the individual's security in the home—and to adopt what amounts to a resident-oriented perspective asking whether the individual's home was properly secure or unjustifiably compromised. The "reasonableness" perspective encourages one to approach the doctrinal question

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[151] Illinois v. Rodriguez, 497 U.S. 177 (1990).

from the perspective of what the Fourth Amendment was meant to prohibit—unreasonable searches—and might tend to promote a police-oriented perspective (asking whether the officers acted reasonably in light of what they knew or should have known).

These two different ways of framing the issue have the potential to shape intuitions and push answers in different directions—just as the framing of consent search analysis does in other ways (as a Fourth Amendment waiver or a Katzian non-search). The first approach centered on "security" is likely to generate deference toward the interests of residents because the word "security" is paired with the word "house" and thus places analytical emphasis squarely on the individual's security in the home and the importance of its protections under the Fourth Amendment. The second approach centered on "reasonableness" is more likely to generate deference toward police because it places its analytical emphasis on the objective behavior of police and because the stated standard requires that police be merely "reasonable." Indeed, one should not underestimate here the power of the word "reasonable" in this context to facilitate the argument that the Fourth Amendment requires from police "mere" reasonableness in a simple criminal justice policy sense rather than in a traditional Fourth Amendment justificatory sense (e.g., a warrant or actual consent).[152]

While intuitions will no doubt vary, the first approach above seems to offer a more straightforward promise of broad protection. If one asks in this hypothetical situation whether the citizen's home as a constitutionally protected area was properly secure, one will be inclined to focus on the police entry into the home and the absence of a warrant or actual consent as traditional justifications for that entry. One will then tend to ask whether the police had another justification for their search analogous to a warrant or actual consent.[153] The officer's reason for searching in this example—a reasonable mistake about consent—has more of the character of an excuse than a justification for the search and is a

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[152] *See* discussion *infra* Part III.B. on the "security-driven" view of "reasonableness."

[153] *Cf.* Gouled v. United States, 255 U.S. 298 (1921) (holding that an entry into a home without a warrant and without consent by force, coercion, or stealth are all equally without justification and therefore equally violative of the Fourth Amendment).

far cry from a warrant or actual consent. However, if one asks whether the police officer's search was a reasonable one, one can easily answer in the affirmative—because the police reasonably believed that they had consent.[154]

These divergent framing effects may be most important when judicial actors who must answer the question have strong crime-control policy inclinations. The "security" frame tends to center the issue on the individual interest invaded by police and the need for a compelling justification for such action and may act to constrain crime-fighting policy inclinations to some substantial degree, while the "reasonableness" frame tends to center the issue on an appraisal of police under a standard which invites an open-ended consideration of policy such as the suppression of crime. Significantly, the Court's actual conclusion in *Illinois v. Rodriguez* is the most straightforward product of the "reasonableness" frame used by the Court today: if police "reasonably" believe someone has authority to consent and has in fact consented, the search is "reasonable."[155] The dissent in *Rodriguez*, written by Justice Marshall, had to fight the uphill battle of explaining why a search based upon a "reasonable" mistake about consent would still be "unreasonable" as a matter of Fourth Amendment law.[156] It would have been much easier for Justice Marshall's view to prevail if the doctrinal frame had more effectively emphasized the invasion of security in the home and the need for a strong justification for such action.

B. The "Security" Era and the Warren Court's Transition to the "Reasonableness" Era

As *Rodriguez* illustrates, the Court's analysis today is centered on "reasonableness," and "security" is seldom seriously considered as an independent concept. While the distinction between the "security" and "reasonableness" doctrinal frames is not quite as sharp as a matter of constitutional history as the distinction between "protected interests" and "reasonable

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[154] *Rodriguez*, 497 U.S. at 185-87.

[155] *Id.*

[156] *Id.* at 189. (Marshall, J., dissenting).

expectations of privacy," the distinction still captures an essential difference between the Court's conception of the Fourth Amendment in the pre- and post-Warren Court eras. The Fourth Amendment jurisprudence of earlier days did not always emphasize the precise terminology of "security" over that of "reasonableness,"[157] but it did regularly define "reasonableness" in the Fourth Amendment in light of the common-law background of property rights which form the foundation of the traditional view of "security" in protected interests.[158] This "security" focus routinely led the Court to emphasize both the Fourth Amendment's substantive protections derived from common-law property rights[159] and its procedural protections for "security" in protected interests associated with doctrines such as the warrant preference.[160] The result was a protective set of substantive and procedural requirements.

It was *Boyd v. United States*, the landmark case of the 1880s, which first expressly adopted this common-law approach to the Fourth Amendment equating "reasonableness" in part with respect for the property rights implicated by the security of the enumerated interests in the Fourth Amendment.[161] This security-driven view of "reasonableness" is on display in the evolution of the primary substantive protection for security in protected interests, the mere evidence rule prohibiting evidence-gathering

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[157] *Boyd v. United States* may have been first case to treat "(un)reasonableness" as an independent standard apart from the standards for warrants in the second clause of the Fourth Amendment. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 728 n.514 (1999).

[158] *See* Hoffa v. United States, 385 U.S. 293, 301 (1966) ("What the Fourth Amendment protects is the security a man relies upon when he places himself or his property within a constitutionally protected area, be it his home or his office, his hotel room or his automobile."); Clancy, *supra* note 150, at 991-92; *cf.* Illinois v. Andreas, 463 U.S. 765, 776 n.4 (1983) (Brennan, J., dissenting) (stating that "[b]efore *Katz*, this Court may have focused too much on the 'security' aspect of the right of privacy, while giving short shrift to its 'secrecy' aspect").

[159] *See* Gouled v. United States, 255 U.S. 298 (1921); Clancy, *supra* note 150, at 991-92.

[160] *See* Weeks v. United States, 232 U.S. 383, 393 (1914) (stating that police "could only have invaded the house of the accused when armed with a warrant issued as required by the Constitution").

[161] Boyd v. United States, 116 U.S. 616 (1886).

searches, as will be discussed in detail in Part IV of this Article.[162] The security-oriented view of "reasonableness" is also embodied in early cases endorsing the primary procedural protection for security, the warrant preference.[163] The Court viewed this mechanism as the vehicle "the framers of the Fourth Amendment" embraced to "provide the necessary security against unreasonable intrusions upon the private lives of individuals."[164] Notably, the traditional security-driven view of the Fourth Amendment was substantially eroded by the Warren Court in the 1960s as part of its criminal procedure revolution.[165] That Court—in pivotal cases such as *Schmerber v. California*,[166] *Warden v. Hayden*,[167] and *Terry v. Ohio*[168]—adopted something closer to a contemporary view of "reasonableness" that generally equates that standard with a flexible and policy-oriented evaluation of police conduct not tied to the formal enumeration of protected interests in the Fourth Amendment or their traditional common-law context.[169]

Not surprisingly, a broad range of cases from the earlier era give a decided emphasis to "security" as a word and concept driving the definition of "reasonableness."[170] For instance, in *Gouled v. United States* in 1921, the Court held that entry into a home without a warrant by stealth was no better than entry without a warrant by force or coercion.[171] Why? Because, the Court said "[t]he *security* . . . of the home . . . would be as much invaded and . . . as much against [the] will [of the owner] in the one case as in the other, and it must therefore be regarded as equally in violation of his constitutional rights."[172] The Court in *Gouled* placed a special emphasis on the "security" of the "protected interest" and then defined "unreasonableness" largely in light of that emphasis. One can easily apply *Gouled*'s

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162 *See infra* Part IV.
163 Trupiano v. United States, 334 U.S. 699, 705 (1948).
164 *Id.*
165 *See* Clancy, *supra* note 150, at 992; *infra* Part III.
166 384 U.S. 757 (1966).
167 387 U.S. 294 (1967).
168 392 U.S. 1 (1968).
169 *See* Clancy, *supra* note 150, at 1005-11.
170 *See, e.g.*, Trupiano v. United States, 334 U.S. 699, 705 (1948).
171 Gouled v. United States, 255 U.S. 298 (1921).
172 *Id.* at 305-06 (emphasis added).

traditional "security" in "protected interests" thought to our consent search hypothetical above based upon *Illinois v. Rodriguez*: When police enter a home without a warrant—whether by force, coercion, stealth, or *simple mistake*—the security of the home is equally invaded against the will of the owner, so each must be regarded equally as a violation of constitutional rights. Notably, the pre-Warren era *Gouled* Court would likely have extended more protection to the resident in "apparent authority" circumstances than the post-Warren era *Rodriguez* Court did almost seventy years after *Gouled*.

Another illustrative case from this era of "security-driven" conceptions of "reasonableness" is *Johnson v. United States*.[173] In *Johnson*, police searched a hotel room without a warrant after detecting the scent of burning opium in a hallway.[174] The Court stated that the "right of officers to thrust themselves into a home is . . . a grave concern, not only to the individual but to a society which chooses to dwell in *reasonable security* and freedom from surveillance."[175] The Court therefore endorsed a strong "warrant preference" so that probable cause determinations will be made by a "neutral and detached magistrate" rather than by potentially overzealous officers "engaged in the often competitive enterprise of ferreting out crime."[176]

The Court in *Johnson* acknowledged that "[t]here are exceptional circumstances in which . . . it may be contended that a magistrate's warrant for search may be dispensed with" but stated that "[n]o reason is offered for not obtaining a search warrant" in this case except for "inconvenience" and "some slight delay."[177] *Johnson* thus stands for the view that the people's "reasonable security" in their "persons, houses, papers, and effects" requires that police act under the authority of a warrant except in "exceptional circumstances." It is unlikely that the *Johnson* Court would have concluded that a "reasonable mistake" about consent is such an "exceptional circumstance."

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[173] 333 U.S. 10 (1948).

[174] *Id.* at 12.

[175] *Id.* at 14 (emphasis added).

[176] *Id.*

[177] *Id.* at 14-15.

The abandonment of the "protected interest" view—a view grounded in the specific enumeration of interests in the Fourth Amendment, in the common law, and in pre-Warren Court precedents—fatally undercut the traditional security approach on display in *Gouled* and *Johnson*. The Warren Court's move to newer approaches to the Fourth Amendment emphasizing interpretive flexibility, the ephemeral promise of greater protections for privacy, and the textual reference to "searches" all ensured that an analysis of "reasonableness" as an open-ended policy-oriented standard would predominate and be subject eventually to security-restrictive crime-control interpretations as the political orientation of the Court as a whole moved to the right. The full fruit of the new approach to Fourth Amendment "reasonableness" is on display in *Rodriguez*, as discussed above, and can also be seen in cases such as *Michigan v. Summers*[178] and *Michigan Department of State Police v. Sitz*.[179]

Consider the last two cases. *Michigan v. Summers* involved a detention without probable cause of an occupant of premises subject to search under a search warrant.[180] The Court upheld the detention as a "reasonable" seizure despite the absence of probable cause to arrest by "balancing" the intrusion on the interests of the individual against law enforcement interests.[181] The Court found the intrusion on individual interests to be minimal since few persons would wish to leave during a police search of their homes while the law enforcement interests were pressing given the suspicion that attaches to someone whose home is subject to search and the concerns about the flight of suspects and risk of harm to the officers.[182] *Sitz* involved the question of seizures at a sobriety checkpoint.[183] The Court concluded that the seizure at the sobriety checkpoint was "reasonable" under the Fourth Amendment despite the absence of any individualized suspicion for the seizure by simply balancing the effectiveness of the

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[178] 452 U.S. 692 (1981).
[179] 496 U.S. 444 (1990).
[180] 452 U.S. 692 (1981).
[181] *Id.* at 699-704.
[182] *Id.*
[183] 496 U.S. at 444.

checkpoint in serving the state interest in safe roadways against the intrusion on the individuals seized.[184] The Court also observed in *Sitz* that "the choice among . . . reasonable alternatives remains with the governmental officials" given their "unique understanding of" and unique "responsibility" for "limited public resources."[185]

By *Rodriguez*, *Summers*, and *Sitz*, Fourth Amendment "reasonableness" is a flexible standard, and its flexibility is employed by a Court with a strong interest in facilitating the control of crime and deferring to local authorities. In these decisions, police behavior which is viewed as "reasonable" in a crime-control policy sense is also viewed as "reasonable" under the Fourth Amendment. Dissenting Justices in these cases invoked the importance of traditional justifications for government searches and seizures—the warrant preference in *Rodriguez*,[186] the probable cause standard in *Summers*,[187] and individualized suspicion in *Sitz*[188]—but the invocation of such traditional justifications as a constraint on judicial policy evaluation under the "reasonableness" standard had already been seriously undermined by the Warren Court's own policy-oriented rejection of similar protective doctrines grounded in Fourth Amendment tradition.[189] One traditional protection discarded by the Warren Court under a flexible "reasonableness" approach to the Fourth Amendment was the mere evidence rule.[190] In Part IV, this Article will discuss that issue and its broader consequences for Fourth Amendment "reasonableness."

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184 *Id.* at 450.

185 *Id.* at 453-54.

186 Illinois v. Rodriguez, 497 U.S. 177, 189 (1990) (Marshall, J., dissenting).

187 452 U.S. at 706 (Stewart, J., dissenting).

188 496 U.S. at 456 (Brennan, J., dissenting). Justice Thomas has also expressed interest in reconsidering *Sitz*, stating that it is "rather doubt[ful] that the Framers of the Fourth Amendment would have considered 'reasonable' a program of indiscriminate stops of individuals not suspected of wrongdoing." City of Indianapolis v. Edmond, 531 U.S. 32, 56 (2000) (Thomas, J., dissenting).

189 *See* Terry v. Ohio, 392 U.S. 1 (1968); Warden v. Hayden, 387 U.S. 294 (1967); Schmerber v. California, 384 U.S. 757 (1966).

190 *Warden*, 387 U.S. at 294.

C. The Continuing Relevance of the "Security" Frame in the Court's Decisions Today

Significantly, the "security" frame is still relevant to the Court's Fourth Amendment analysis, and its undervalued potential to promote a reinvigorated protection of Fourth Amendment rights can be seen in the opinions in the recent case of *Kentucky v. King*.[191] That case concerned the issue of police-created exigencies and warrantless entries into the home.[192] Justice Alito, writing for the Court in *King*, concluded that warrantless searches of homes are generally justified by police-created exigent circumstances except when the police create the exigency "unreasonably" by "engaging or threatening to engage in conduct that violates the Fourth Amendment."[193]

Justice Alito's opinion is a straightforward application of the dominant "reasonableness" frame with its current crime-control orientation: police act "reasonably" as a general matter when their warrantless search is the product of an exigency unless they have created the exigency "unreasonably" by violating or threatening to violate the Fourth Amendment. No special concern for security in the home is evident in the opinion beyond a pro forma recognition of the original policy basis for the warrant preference.[194] The free-floating "reasonableness" of the police conduct with a focus on efficient control of crime is almost the sole focus.[195]

Justice Ginsburg, the lone dissenter in *King*, countered the majority's "reasonableness" analysis by building much of her analysis of the issue around the rival concept of "security" as supported by text, tradition, and precedent from the "security" era.[196] She contended that police who pass on the opportunity to obtain a search warrant and act instead to create an exigency cannot invoke the exigency as a basis for a warrantless entry into

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[191] 131 S. Ct. 1849 (2011).

[192] *Id.*

[193] *Id.* at 1858.

[194] *Id.* at 1856.

[195] *Id.* at 1860-61 (recounting "legitimate law enforcement strategies" that would be "unjustifiably" restricted by additional limits on the use of police-created exigencies to justify warrantless entries into and searches of the home).

[196] *Id.* at 1864-66 (Ginsburg, J., dissenting).

the home.[197] In framing her argument, Justice Ginsburg reoriented the "reasonableness" frame toward "security" by specially emphasizing the security language in the Fourth Amendment: "The Fourth Amendment guarantees to the people '[t]he right . . . to be secure in their . . . houses . . . against unreasonable searches and seizures.'"[198]

Justice Ginsburg further grounded her analysis in the security-driven common-law traditions dating back "centuries" that extend special protections to the home, a point of argument which functions as a "security" bulwark against the majority's "reasonableness" crime-control impulse.[199] Further, she drew on *Johnson v. United States* from the "security" era to define "reasonableness" in terms of a strict warrant preference providing "reasonable security and freedom from surveillance" in the home.[200] Finally, Justice Ginsburg pointed to the serious consequences of the Court's free-floating "reasonableness" analysis in *King* for Fourth Amendment "security" in the home—asking rhetorically: "How 'secure' do our homes remain if police, armed with no warrant, can pound on doors at will and, on hearing sounds indicative of things moving, forcibly enter and search for evidence of unlawful activity?"[201]

Kentucky v. King, in sum, shows the importance of the rival frames for Fourth Amendment rights and the relevance today of their conflicting approaches. The Justices deploying the dominant free-floating "reasonableness" approach predictably reached a conclusion favoring law enforcement over protecting the security of the home. Justice Ginsburg, defending a home-protective conclusion, found herself reorienting the "reasonableness" doctrine toward the traditional "security" frame in order to craft the most

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[197] *Id.* at 1864.

[198] *Id.* (ellipses in original).

[199] *Id.* at 1865.

[200] *Id.* at 1866 (quoting Johnson v. United States, 333 U.S. 10, 14 (1948)). Justice Ginsburg also points to powerful home "security" language from *Silverman*, language also quoted by the Court in *Kyllo* as part of its return to a more traditional emphasis: "At [the Fourth Amendment's] very core stands the right of a man to retreat to his own home and there be free from unreasonable governmental intrusion." *Id.* at 1865 (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)).

[201] *Id.* at 1865.

persuasive legal argument for her position. The opinions in *King* demonstrate both the need for a doctrinal reform of Fourth Amendment "reasonableness" and point to a particular path paralleling that in *Kyllo*: gradually rebuilding traditional "security" concerns back into the substance of the Warren Court's open-ended "reasonableness" frame. This Article will discuss the future of Fourth Amendment reform in more detail in Part V.

IV. RE-ANCHORING THE FOURTH AMENDMENT: FROM A SUBSTANTIVE BAN ON EVIDENCE-GATHERING SEARCHES TO FACILITATING THE CONTROL OF CRIME

A. The Mere Evidence Rule

In *Warden v. Hayden*, the Warren Court discarded the traditional mere evidence rule barring evidence-gathering searches,[202] and the Court's pivotal decision in that case was an essential part of its revolution in criminal procedure. In *Hayden*, the Court confronted a basic doctrinal question: Does the Fourth Amendment allow police to search a home for "mere evidence" of crime—as opposed to searching for contraband, fruits of crime, or criminal instrumentalities—if the officers have a procedural justification for the search such as a valid search warrant or an exigency?[203] Under the broad view of the mere evidence rule then in force, evidence searches were impermissible under the Fourth Amendment. The Court in *Hayden* repudiated the mere evidence rule in toto and approved evidence searches generally. The Court's resolution of this question in *Hayden* stands in stark contrast to the traditional "security in protected interest" view of the matter.

The traditional view reflected in the Court's longstanding precedents held that police may not search for "mere evidence" of crime, that such a search is substantively barred by the Fourth Amendment even with a valid warrant or similar justification.[204] This traditional bar, known as the mere evidence rule, had a lengthy legal pedigree dating back in one form or another to the

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[202] 387 U.S. 294 (1967).

[203] *Id.*

[204] Gouled v. United States, 255 U.S. 298 (1921).

prohibition of "paper searches" for evidence in the English common law.[205] The new view, expressed in *Hayden* as part of the Warren Court's shift to an innovative free-floating "reasonableness" analysis of the Fourth Amendment's requirements, [206] holds that police may search for mere evidence of crime if they possess a valid warrant or similar justification.[207] The Warren Court's view in *Hayden* is that Fourth Amendment "reasonableness" requires no more than adherence to such procedural protections.[208]

The traditional mere evidence rule will strike many readers today as an unsound doctrine—an "irrational" obstacle to effective law enforcement—which the Court was right to abandon.[209] Serious arguments can certainly be made for that position,[210] and it is ultimately impossible to determine to what extent that view today has been influenced by the anchoring effects of the Court's present Fourth Amendment doctrines. On the other hand, distinguished jurists have defended the mere evidence rule as an essential component of Fourth Amendment liberty[211]—a view which itself is no doubt partly the product of an earlier set of anchors.[212] Moreover, if the mere evidence rule seems problematic in a broader form which bars all evidence-gathering searches, it is certainly much less problematic in its narrower original form which bars evidence-gathering searches only of an individual's "papers," a limited "mere evidence" restriction which would allow other forms of evidence-gathering searches.[213] Additionally, the

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[205] *See Hayden*, 387 U.S. at 313 (Douglas, J., dissenting).

[206] Notably, the Court in *Schmerber* first broke with mere evidence rule *sub silentio* a year before *Hayden* by upholding a "search" of an individual's blood for evidence of driving under the influence of an intoxicant. *See* Schmerber v. California, 384 U.S. 757 (1966).

[207] *Hayden*, 387 U.S. at 310-11 (Fortas, J., concurring).

[208] *Id.* at 309-10.

[209] *Id.* at 302, 309-10.

[210] This view is expressed, most obviously, in *Hayden* itself. *See id.*

[211] *See id.* at 312-25 (Douglas, J., dissenting).

[212] Justice Douglas, dissenting in *Hayden*, defends the mere evidence rule, and his defense was likely "anchored" by both Supreme Court precedents and the traditions of the common law. *See id.*

[213] The mere evidence rule originated in "paper" search cases such as *Entick v. Carrington* and *Boyd*, and the principal concern motivating the rule in these cases can be viewed as the extreme invasiveness of the "paper" search on individual interests,

Court's rejection of any clearly established individual right under the Constitution—grounded in history, tradition, and precedent—is surely cause for real concern.

Even so, this Article is ultimately less concerned with the (de)merits of the mere evidence in isolation—whether in broad or narrow form—than it is with the broader consequences of the Court's peremptory abandonment of the rule for the development of other Fourth Amendment doctrines. In particular, this Article advances the view that the Warren Court's wholesale rejection of the mere evidence rule helped to legitimate a revisionist crime-control approach to Fourth Amendment "reasonableness" and eliminated a powerful doctrinal anchor in favor of a rights-protective understanding of the Fourth Amendment. It is to the foundation of these questions that this Article now turns.

B. The Rival Frames and Evidence-Gathering Searches

One can begin to explore the consequences of the Court's decision in *Hayden* by asking why the rival frames associated with the Fourth Amendment embraced different views of the legitimacy of evidence-gathering searches. The traditional "protected interest" view is rooted in the text of "security" in "persons, houses, papers, and effects" and in the background principles of the common law of property that provide the principal historical context of that text.[214] The "protected interest" view recognized the mere evidence rule first and foremost because that rule is rooted in the Fourth Amendment's historical context in the common law of property.[215]

On this basis, courts recognized a distinction grounded in property interests between a governmental search for items

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though broader language invoking property rights and justifying a broader form of the rule appears in both cases. A powerful argument can be made that the Court, prior to *Hayden*, had interpreted the mere evidence rule much too broadly to apply to all evidence-gathering searches and that the rule in its original narrow form confined to the "paper" search context of *Entick* and *Boyd* is quite defensible as a matter of Fourth and Fifth Amendment law and public policy. For a discussion of these points, see Morgan Cloud, *The Fourth Amendment During the* Lochner *Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 593-98 (1996).

[214] *See* Clancy, *supra* note 52, at 309-27; Clancy, *supra* note 150, at 991-92.

[215] *See* Clancy, *supra* note 52, at 309-27.

subject to seizure without a trespass on the owner's property rights—such as stolen goods which the government is recovering for the lawful owner or contraband goods which cannot be lawfully owned by anyone—and items not subject to seizure without a trespass because the items are lawfully owned even though they also happen to be evidence of crime.[216] On this view, the government could search for and seize stolen goods, contraband, and criminal instrumentalities because such searches are consistent with respect for individual property rights, but government could not search for and seize "mere evidence" of crime constituting lawfully owned property which the government has no right to take from its legitimate owner.

The legal pedigree of the mere evidence rule is quite strong. Lord Camden in the celebrated English case of *Entick v. Carrington* in 1765 condemned evidence searches of private papers,[217] and this decision arguably formed a part of the framers' understanding of the common-law background of the Fourth Amendment.[218] In *Entick*, Lord Camden noted that even when the government is investigating crimes such as "murder, rape, [or] robbery" the common law "provide[s] no paper search [for evidence] in [such] cases to help forward the conviction[ ]."[219] Lord Camden explained that the policy for this rule grounded in respect for property rights in papers might be found in either "a consideration that such a power would be more pernicious to the innocent than useful to the public" or perhaps "the gentleness of the law towards criminals."[220]

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[216] Entick v. Carrington, 19 How. St. Tr. 1029 (1765), 95 Eng. Rep. 807 (K.B. 1765).

[217] *Id.*

[218] *See* Clancy, *supra* note 52, at 309-27. Scholars continue to dispute the influence of *Entick* on the framers and the standing of the mere evidence rule as part of the original understanding of the Fourth Amendment. *See* Roger Roots, *The Originalist Case for the Fourth Amendment Exclusionary Rule*, 45 GONZ. L. REV. 1 (2010) (contending the framers of the Fourth Amendment embraced the mere evidence rule and that *Entick* or similar common-law sources shaped their views on the question); Davies, *supra* note 157, at 727 n.513 (contending that framers did not embrace the mere evidence rule and were likely not influenced by any discussion of the rule in *Entick*).

[219] *Entick*, 19 How. St. Tr. at 1073.

[220] *Id.*

The Supreme Court embraced Lord Camden's view in *Boyd v. United States* in 1887, and the Court stated that "every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with [*Entick* as a] monument of English freedom" and "considered it as the true and ultimate expression of constitutional law."[221] The Court in *Boyd* concluded that *Entick*'s understanding of the common law of search and seizure governed the Fourth Amendment because *Entick*'s "propositions were in the minds of those who framed the fourth amendment to the constitution."[222] In *Gouled v. United States* in 1921, the Court finally expressly formalized the adoption of the mere evidence rule in a decision without a single dissenter.[223] Justice Clarke, citing *Boyd*, stated for the Court that search warrants "may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making [a] search to secure evidence to be used against him in a criminal or penal proceeding."[224] To search, the government must be looking for items such as stolen goods or contraband.[225] Notably, Congress through this period had never authorized federal magistrates to issue search warrants to seize mere evidence of crime.[226]

The Warren Court's doctrinal revolution eroded the foundations of the mere evidence rule. The Court's new analysis rejected a traditional framework placing an emphasis on the security of protected interests within a common-law property context and instead embraced a new approach placing an emphasis on "reasonableness" inquiries. As part of this transition to these new "reasonableness" doctrines, the Court not

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[221] 116 U.S. 616, 626-27 (1886).

[222] *Id.*

[223] 255 U.S. 298 (1921).

[224] *Id.* at 309.

[225] *Id.* The Court later expanded the range of items which the government could search for consistent with the mere evidence rule to include criminal instrumentalities broadly defined. *See* Marron v. United States, 275 U.S. 192 (1927).

[226] Warden v. Hayden, 387 U.S. 294 (1967). The Court in *Hayden* notes that "[e]ven in the Espionage Act of 1917, where Congress for the first time granted general authority for the issuance of search warrants, the authority was limited to fruits of crime, instrumentalities, and certain contraband." *Id.* at 308.

surprisingly scrapped the common-law property-based mere evidence rule.[227]

Justice Brennan, writing the opinion of the Court in *Hayden*, in fact offered a range of reasons for the Court's sharp break with precedent. Justice Brennan first pointed to the text of the Fourth Amendment and its failure specifically to enumerate the mere evidence rule as a constitutional protection.[228] He also argued that the distinction between mere evidence of crime and stolen goods, contraband, and criminal instrumentalities was "irrational" and did not protect Fourth Amendment privacy interests in any principled fashion.[229] Further, the government has a general interest in "solving crime," Justice Brennan observed, quite apart from the question of whether the items sought by police are contraband or stolen goods.[230] Finally, while not disputing the historical pedigree of the mere evidence rule in the common law and in American cases, Justice Brennan pronounced the rule's grounding in property interests "discredited" by the recent evolution of American law.[231] Newer decisions, Justice Brennan contended, had endorsed a more direct protection of privacy interests through procedural mechanisms such as the warrant requirement and the remedy of the exclusionary rule.[232] In short, despite the mere evidence rule's deep foundations in the common law and in precedent, the Court felt free to discard the entire rule under a flexible interpretation of "reasonableness."

Three of the Court's liberal Justices in *Hayden* would have retained the mere evidence rule at least in part. Justice Fortas, joined by Chief Justice Warren, concurred in the Court's judgment but refused to join the majority's "broad . . . repudiation" of the mere evidence rule.[233] Justice Fortas preferred instead to embrace the creation of an additional exception to the rule tailored for the case at hand involving "hot pursuit" of a suspect and the seizure of

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[227] *Id.* at 309-10.
[228] *Id.* at 301-02.
[229] *Id.* at 302, 309-10.
[230] *Id.* at 306.
[231] *Id.*
[232] *Id.* at 306-09.
[233] *Id.* at 310 (Fortas, J., concurring).

"identifying clothing worn in the commission of a crime."[234] Justice Fortas, in sum, would have further narrowed the mere evidence rule but not—as he described it—"needlessly destroy[ ], root and branch, a basic part of liberty's heritage."[235]

Justice Douglas dissented—advancing a defense of the mere evidence rule as a fundamental part of the broad protections the Fourth Amendment guarantees to the people.[236] The Fourth Amendment, Justice Douglas recognized, had two deeply-rooted historical zones of protection, a procedural zone embodied in the warrant preference and a substantive zone reflected in the mere evidence rule, and he viewed both zones as protections of vital importance to the rights of the individual.[237] Justice Douglas recounted at length the mere evidence rule's deep roots in English common law and summarized the rule as one:

> [creating] a zone that no police can enter—whether in "hot pursuit" or armed with a meticulously proper warrant—[a crucial point] emphasized by *Boyd* and by *Gouled*. [These cases] have been consistently and continuously approved. I would adhere to them and leave with the individual the choice of opening his private effects (apart from contraband and the like) to the police or keeping their contents a secret and their integrity inviolate. The existence of that choice is the very essence of the right to privacy.[238]

Justice Douglas, in short, would have retained the mere evidence rule as both a historically-established rule and one ultimately essential to the protection of privacy.

The Court in *Hayden* rejected the views of these three Justices, repudiating the mere evidence rule in its entirety. No one can doubt that the demise of the mere evidence rule—for good or ill—fundamentally contracted the Fourth Amendment's guarantee of "security" in "persons, houses, papers, and effects" by eliminating the substantive dimension of that guarantee against

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[234] *Id.* at 312.
[235] *Id.*
[236] *Id.* (Douglas, J., dissenting).
[237] *Id.* at 313.
[238] *Id.* at 325 (footnote omitted).

government evidence-gathering searches and diverting the protection of Fourth Amendment rights to the procedural dimensions of the guarantee.[239] This was a fundamental shift in Fourth Amendment law, one which narrowed traditional protections and which also eliminated a doctrinal "forward base" that could have been used to build on those protections. This contraction in rights itself is also notable given the Warren Court's reputation for expanding the protections afforded to the individual rights under the Constitution.[240] Its possible implications for other Fourth Amendment doctrines are also quite disturbing.

C. Re-Anchoring Fourth Amendment "Reasonableness" in Crime-Control Policies

Not only did the Court dispense entirely with the substantive "zone" of security protected by the mere evidence rule, the discarding of the rule has almost certainly influenced later decisions and had substantial anchoring effects on Fourth Amendment "reasonableness" analyses more generally. As recounted in Parts II and III, the Court has reframed the basic application of the Fourth Amendment from a traditional emphasis on the "security" of "protected interests" to forms of "reasonableness" analysis—both the reasonableness of the expectation of privacy that the government has invaded and the reasonableness of the governmental invasion itself. These reasonableness analyses often produce either free-floating "inkblot" approaches to "reasonableness" (e.g., *Illinois v. Rodriguez*[241]) or a more elaborate "balancing" approach to "reasonableness" which weighs the individual interest against the social interest in crime control (e.g., *Summers*[242] and *Sitz*[243]).

The sweeping rejection of the mere evidence rule was part of this fundamental reframing of the Fourth Amendment around open-ended "reasonableness" tests, and one can easily conceive of

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[239] *See* Cloud, *supra* note 100, at 55-59.

[240] *See id.*

[241] 497 U.S. 177 (1990).

[242] Michigan v. Summers, 452 U.S. 692 (1981).

[243] Mich. Dept. of State Police v. Sitz, 496 U.S. 444 (1990).

Justice Brennan's opinion for the Court in *Hayden* as a template for later crime-control decisions under the Fourth Amendment, decisions which routinely provoked a dissent from Justice Brennan and the Court's more liberal Justices. The template on display in *Hayden* has the following basic pattern: (1) the Court states that the protection at issue, however strong its historical pedigree, is not specifically enumerated in the text of the first clause of the Fourth Amendment, which prohibits "unreasonable" searches and seizures—without defining "unreasonableness";[244] (2) the Court asserts that a recognition of the protection is not necessary to serve the ultimate policy interests underlying the Fourth Amendment;[245] (3) the Court contends that the protection will frustrate the important state interest in controlling crime and/or asserts that the protection is irrational, arbitrary, or doctrinally eroded;[246] (4) the Court concludes that the protection should be discarded—either in the category of case at issue or more generally.[247]

All these points are present in Justice Brennan's opinion in *Hayden*, and the basic pattern of analysis is also on display in part or in whole in a broad range of later crime-control opinions—such as *Rodriguez*,[248] *Summers*,[249] and *Sitz*,[250] as well as cases such as *California v. Acevedo*,[251] concerning the search of containers in automobiles and *South Dakota v. Opperman*,[252] concerning inventory search of automobiles. The opinion of the Court in cases such as these repeats variations of the basic argumentative maneuvers found in *Hayden* in order to justify a narrow view of the Fourth Amendment—refusing to recognize in some categories of cases the applicability of traditional Fourth Amendment protections such as the warrant requirement, probable cause, individualized suspicion, or privacy in personal effects. In *Hayden*,

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244 Warden v. Hayden, 387 U.S. 294, 301-302 (1967).
245 *Id.* at 301-02, 309-10.
246 *Id.* at 302, 306, 308-10.
247 *Id.*
248 Illinois v. Rodriguez, 497 U.S. 177 (1990).
249 Michigan v. Summers, 452 U.S. 692 (1981).
250 Mich. Dept. of State Police v. Sitz, 496 U.S. 444 (1990).
251 500 U.S. 565 (1991).
252 428 U.S. 364 (1976).

Justice Brennan and the Warren Court helped to establish and legitimate the analytical framework used to reject many of the basic protections the Fourth Amendment plausibly offers to the people in a broad range of later cases.

Even more important, the Court's complete rejection of the mere evidence rule has very likely had a profound effect on the balancing done under the reframed doctrinal question of "reasonableness," an effect strongly in favor of promoting crime-control policies over individual rights. This is so because the rejection of the mere evidence rule fundamentally changed the doctrinal standing in Fourth Amendment law of individual rights as a counter-weight to crime-control interests. As stated, the mere evidence rule holds that police may not search for mere evidence of a crime even when police have a valid warrant supported by probable cause. The mere evidence rule applies irrespective of the crime under investigation—and thus would bar evidence-gathering searches even in cases of murder, robbery, and rape. The effect of this rule speaks quite clearly for itself: The right to "security" in "protected interests" under the Fourth Amendment trumps even the compelling collective social goal of gathering evidence to prosecute serious crimes such as murder. The traditional mere evidence rule thus represents an uncompromising doctrinal rejection of the Fourth Amendment as a constitutional guarantee that simply balances in a common-sense policy fashion individual interests in privacy against collective interests in crime control—and that may ultimately weigh the balance strongly in favor of the state interest in fighting crime.

It is thus impossible to adhere to the mere evidence rule and also establish a coherent view of Fourth Amendment "reasonableness" that embraces crime-control interests over a broad view of privacy (or liberty)—as the Court does in decisions such as *Rodriguez* and *Sitz*. Both as an informal statement of the Fourth Amendment's underlying values and as a matter of formal stare decisis, the mere evidence rule anchored Fourth Amendment "reasonableness" in a vision which strongly privileges individual rights over the control of crime. Continued adherence to the mere evidence rule, a deeply-rooted doctrine of great significance to the practical operation of the law of search and seizure, would likely

have had a substantial influence over time on the views of judicial actors—even on those who ultimately opposed the rule. Fourth Amendment doctrine under the mere evidence rule would have been tied to the "anchoring" message of the rule, reinforced by the doctrine of state decisis, that individual interests broadly trump crime-control interests, not the reverse. The presence of the mere evidence rule thus could have held the Justices to a more rights-protective view of the Fourth Amendment than they have held in its absence.

The explicit and total rejection of the mere evidence rule—premised in part on the need for evidence searches to serve the state interest in suppressing crime[253]—empowered an alternative view of the Fourth Amendment as a mere prohibition of actions by police which are "unreasonable" from a policy perspective emphasizing the suppression of crime. *Hayden* is thus a pivotal precedent and doctrinal enabler for later crime-control decisions on Fourth Amendment "reasonableness" in the Burger and Rehnquist Courts. These later decisions, in turn, have ultimately produced a new anchoring effect on the Fourth Amendment in a strongly crime-control policy direction.

Significantly, the anchoring effects of *Hayden* remain deeply problematic even if the case is correct in some legal sense on the question it decided—whether or not to retain the mere evidence rule.[254] Even if *Hayden* is correct on that question in isolation, the decision nonetheless helped to legitimate and facilitate a revisionist crime-control approach to the Fourth Amendment. That revisionist approach would be invoked within a few years to erode other traditional Fourth Amendment protections—such as the warrant preference, probable cause, and individualized suspicion.

The possible consequences of the *Hayden* decision for Fourth Amendment rights did not go unnoticed at the time the case was decided. Justice Douglas in his dissent appears to have understood

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[253] Warden v. Hayden, 387 U.S. 294, 306 (1967).

[254] For instance, some scholars contend that the mere evidence rule does not represent the "original understanding" of the Fourth Amendment. *See* Davies, *supra* note 157. If this view is sound, then from a purely originalist perspective the Court in *Hayden* was right to abrogate the rule.

the mutually reinforcing facets of the substantive and procedural "zones" of Fourth Amendment protection, and he stated that without the mere evidence rule the Fourth Amendment would become a "ready instrument[ ]" to legitimate invasions of protected interests that the "Framers sought to avoid."[255] Indeed, each post-*Hayden* decision recognizing the "reasonableness" of more forceful and envelope-pushing police conduct—cases such as *Rodriguez* and *Summers* and *Sitz*—reinforces the anchoring of the Fourth Amendment in a crime-fighting policy framework, one in which Fourth Amendment "reasonableness" is equated with a center-right political view of what constitutes reasonable law enforcement behavior.

In an important sense, each decision in favor of a crime-control view of Fourth Amendment "reasonableness" further eases the way for the next case—both in a formal stare decisis sense and in the broader sense of re-anchoring Fourth Amendment doctrine in a crime-control understanding of the proper balance struck within the "reasonableness" frame. Doctrinal evolution is a dynamic process, and the momentum in recent decades has been increasingly with a law-and-order vision of the Fourth Amendment—as the recent cases of *Kentucky v. King*[256] and *United States v. Davis*[257] further illustrate. The framing and anchoring effects of the doctrines are self-reinforcing as later decisions reaffirm—implicitly or explicitly—the "reasonableness" frame and crime-control policy anchor of earlier decisions.

Further, these decisions affect how the broader legal community comes to view the underlying meaning of the Fourth Amendment. Indeed, the common feedback dynamic between constitutional meaning and constitutional doctrine (i.e., the process in which perceptions of constitutional meaning shape the creation of doctrines which in turn over time reshape the original

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[255] *Hayden*, 387 U.S. at 325 (Douglas, J., dissenting). The full quotation, with understandable hyperbole, is that "the Fourth Amendment and the Fifth are ready instruments for the police state that the Framers sought to avoid" without the mere evidence rule and the individual choice to protect privacy which it provides. *Id.*

[256] 131 S. Ct. 1849 (2011) (approving a broad range of police-created exigencies as justifications for warrantless searches).

[257] 131 S. Ct. 2419 (2011) (extending the "good faith" exception to the exclusionary rule to reasonable police reliance on binding appellate precedent).

perceptions of meaning) now favors a crime-control "reasonableness" paradigm of the Fourth Amendment as the broader legal community acclimates to the decisions of the Court and that in turn reshapes the community's view of the amendment. As a result, more expansive doctrinal understandings of the Fourth Amendment—whether rooted in earlier historical traditions or in a progressive vision of individual rights—are increasingly marginalized.[258] The Warren Court's wholesale abandonment of the mere evidence rule in *Warden v. Hayden* was an early and crucial step down this path to a much narrower conception of Fourth Amendment freedoms.

Over forty years after *Hayden*, it would be imprudent to attempt to revive the mere evidence rule as a broad Fourth Amendment doctrine—even if its ultimate merits as a matter of law and public policy seemed otherwise to warrant a restoration, which is certainly subject to debate.[259] Still, the Court could return in part to the rule's underlying vision of the Fourth Amendment—grounded in privileging individual rights over the control of crime—to reinvigorate the protection of Fourth Amendment rights within the Warren Court's established doctrinal framework. This Article will discuss the future of Fourth Amendment reform in more detail in Part V.

V. THE FUTURE OF SECURITY IN PROTECTED INTERESTS: STATUS QUO OR REFORM?

This Article has sketched an account of some of the unintended consequences of the Warren Court's criminal procedure revolution—the ways in which doctrinal innovations that the Court intended to expand the protections of the Fourth Amendment failed to do so and in fact contributed to the ultimate contraction of those protections. What, if anything, should be done about these failures—what is the right way moving forward? This

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[258] The fact that only Justice Ginsburg dissented in *King* and only Justices Breyer and Ginsburg dissented in *Davis* suggests just how marginalized broader views of the Fourth Amendment and exclusionary rule now are.

[259] For a thoughtful discussion of the merits of a narrow understanding of the mere evidence rule, one limited to its original "paper" search context in *Entick* and *Boyd*, see Cloud, *supra* 213, at 593-98.

Article addresses this question by articulating two plausible reactions to the sketch above both of which seek a practical way forward: an "establishmentarian" response in defense of the status quo and a "reform-minded" response which hopes to reinvigorate the protections of the Fourth Amendment. The author leans decidedly toward the second, while recognizing the power of the first.

The "establishmentarian" response is this: The failure of the Warren Court in this area has not in fact been a bad thing. This is so for a number of related reasons. Constitutional law is an applied science, and it has many moving parts which interact in complex ways: substantive rights, collective social goals, interpretive integrity, and governmental structure. In the face of this practical complexity, constitutional law has to serve real world interests, not the abstract ideals of fast-track progressives or the historical preoccupations of antiquarian conservatives. A Burkean "muddling through"[260] is the best one can hope for, and that approach will routinely achieve a better result than any alternative.

The Court has successfully "muddled through" to a healthy dilution of the rigors of the traditional Fourth Amendment. That dilution is not to be deplored, and it was almost inevitable to offset other overarching legal and social changes. First, the Court's expansion of the Fourth Amendment from a constitutional guarantee limiting only the federal government with its few law enforcement responsibilities to a provision "incorporated" through the Fourteenth Amendment limiting the fifty states with their greater law enforcement responsibilities[261] rendered a dilution of the Fourth Amendment imperative.[262] The Fourth Amendment

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[260] *See* EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE (1791) (advocating incremental political reform arising organically from a polity's long-standing traditions rather than sudden political change according to abstract rational design).

[261] Mapp v. Ohio, 367 U.S. 643 (1961) (applying the exclusionary rule to the states through the Fourteenth Amendment Due Process Clause); Wolf v. Colorado, 338 U.S. 25 (1949) (applying search and seizure limits associated with the Fourth Amendment to the states through the Fourteenth Amendment Due Process Clause).

[262] *Cf.* Duncan v. Louisiana, 391 U.S. 145, 182 n.21 (Harlan, J., dissenting) (stating that a "major danger of the 'incorporation' [is] that provisions of the Bill of Rights may be watered down" as a result of their application to the states).

can severely constrain law enforcement or it can apply to the state governments, but it cannot do both of these at once—at least not without creating an explosion in crime which the American people should not be forced to endure.

Second, the Court's creation of a Fourth Amendment exclusionary rule[263] and the expansion of that rule to the fifty states[264] also necessitated a major dilution in substantive Fourth Amendment protections.[265] If the Court mandates a sweeping rule that "[t]he criminal is to go free because the constable has blundered,"[266] then the Court farther down the road may have to narrow the category of criminal-freeing blunders. One can have a broader Fourth Amendment right with a narrower remedy or one can have a narrower Fourth Amendment right with a broader remedy (such as the exclusionary rule), but one should not expect to have both a broader right and a broader remedy, not with the responsibilities governmental actors have to keep the citizenry safe from crime.

Finally, Fourth Amendment doctrine must reflect the realities of contemporary law enforcement, contemporary (in)tolerance for the harm criminals do to the innocent, and contemporary crime rates. Professionalized police departments, citizens who demand safety, and shifting rates of crime all have consequences for the practical application of the Fourth Amendment which are not captured by the common law of the eighteenth century or the judicial precedents of the nineteenth and early twentieth centuries. Our Constitution was meant "to endure for the ages,"[267] and it must be interpreted to respond to the practical problems one faces today, not the historical problems of past ages or the theoretical problems of social utopians. No one should mourn for the mere evidence rule or the warrant preference. The Court has made its choices, and those choices

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[263] Weeks v. United States, 232 U.S. 383 (1914).

[264] *Mapp*, 367 U.S. 643.

[265] *Cf. id.* at 681 (Harlan, J., dissenting) (stating that the "Court should continue to forbear from fettering the States with an adamant [exclusionary] rule which may embarrass them in coping with their own peculiar problems in criminal law enforcement").

[266] People v. Defore, 150 N.E. 585, 587 (N.Y. 1926).

[267] McCulloch v. Maryland, 17 U.S. 316, 415 (1819).

strike a perfectly reasonable balance among all the competing goals of constitutional law.

The "reform" response is this: The failure of the Warren Court's reframing of Fourth Amendment doctrines has been a bad thing, and it should be a cautionary tale for the next generation of reformers. The rejection of many traditional Fourth Amendment rights over the last several decades is a very serious matter and should be an occasion for careful reflection. In particular, advocates for reform should not allow themselves to be lulled into a false sense of security by familiarity with the Court's current doctrines or by general respect for the authority of the Supreme Court to implement the Constitution.

A "security" in "protected interest" approach to the Fourth Amendment may seem strange today, but that is only because it is no longer the established approach in the courts. A prohibition of "unreasonable" invasions of "reasonable expectations of privacy" would have seemed even stranger to judges, lawyers, and others in, say, 1961. The Supreme Court has now endorsed the new "reasonableness" approach for almost fifty years, but the Court endorsed the traditional approach for at least eighty years before that. Even those persons who define their politics in terms of faith in progress should recognize that newer doctrines are not necessarily better doctrines and that the Warren Court's landmark precedents in any event have now become part of the "dead hand" of the past. To the extent that these newer doctrines have endangered our freedoms, they must be reconsidered.

Even so, uprooting decades of settled law on the hubristic assumption that one can craft something clearly better is also unwise. The Warren Court should not have launched its revolution in criminal procedure, but a counter-revolution to overturn almost a half-century of law built on Warren Court foundations in order to reinstate the traditional "security in protected interests" view could go astray just as easily. Doctrinal reform should be cautious, incremental, and experimental. "Muddling through" in light of the complex interactions of overarching legal and social changes is indeed the right approach and the consequences of constitutional reform for the realities of law enforcement must be carefully considered in each case. Still, the ultimate direction of the "muddling" must be determined, and

the right goal is that of providing greater protections for Fourth Amendment rights by returning in part to the earlier foundations of Fourth Amendment doctrine.

How could one achieve that? As suggested, *Kyllo* shows us the most obvious way: Use the nebulous Warren Court "reasonableness" formulations to begin slowly building back into Fourth Amendment doctrine the core protections of the traditional approach reflected in the common law and the pre-Warren Court era.[268] *Kyllo* uses the *Katz* "reasonable expectation of privacy" approach in the context of protections for "houses" but ultimately builds its analysis around the very questions *Katz* rejected—concerning the security of "houses" as constitutionally protected areas against actual physical invasions, an analysis drawn from older cases such as *Silverman*.

The same approach could be used in other areas. One could adhere to the *Katz* "reasonable expectations of privacy" approach in the context of e-mail accounts which are subject to third-party access by Internet Service Providers, but still build the Katzian "reasonableness" analysis on the solid common-law foundations of the traditional protected interest in "papers" as extended to their contemporary digital equivalents.[269] This "reasonable expectation of privacy" could be reoriented toward a respect for traditional "protected interests" which would emphasize the importance of the individual interest in "papers" while rejecting any broad "assumption of the risk" analysis.[270] Consistent with the broader contours of the Katzian doctrines, "reasonable expectations of privacy" can be reframed and re-anchored in part and over time as expectations that are "reasonable" because they reflect the traditional security of protected interests.

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[268] *See* Cloud, *supra* note 100, at 73 n.144; *cf.* Clancy, *supra* note 52, at 344-66 (advocating that the Court's Fourth Amendment privacy doctrines be reoriented toward a right to be "secure" understood as "the right to exclude the government").

[269] *Cf.* United States v. Warshak, 631 F.3d 266 (6th Cir. 2010) (recognizing a "reasonable expectation of privacy" in e-mail in part by emphasizing the individual interests at stake given that e-mail is used for "intimate," "sensitive," and "commercial" information and can provide what amounts to an "account of one's life" to government agents who examine it).

[270] *See supra* Part II.

Similarly, one could analyze contemporary Fourth Amendment "reasonableness" cases by emphasizing within the broad outlines of the "reasonableness" frame the more protective analysis of an earlier era. The central focus on the "reasonableness" analysis would pivot on the basic concept of security in protected interests—as Justice Ginsburg reoriented Fourth Amendment "reasonableness" around "security" in her dissent in *Kentucky v. King*.[271] In this fashion, "reasonable" police conduct doctrines under the Fourth Amendment can be carefully reframed and re-anchored—over time and in part—as doctrines mandating that police conduct afford "reasonable security" to protected interests in light of the traditions of the common law and the once well-established procedural limits on governmental searches such as the warrant preference.[272] This partial reframing would reorient the emphasis of the "reasonableness" doctrine around the provision of "security" and the need for compelling police justifications for incursions into protected interests such as the home.

As for the mere evidence rule and the "reasonableness" frame, rather than seek to overrule *Warden v. Hayden* and reinstate the rule in its broad form—overturning almost fifty years of precedent—reformers should aim for a more modest and realistic goal. The Court should act instead merely to discredit the perfunctory application of *Hayden*'s argumentative framework to eviscerate traditional Fourth Amendment protections and to revive something of the animating spirit behind the mere evidence rule, one which recognizes that the Fourth Amendment is designed to protect the rights of the people even at substantial cost to the interests of law enforcement. Thus a partial revival of the mere evidence rule—emphasizing its spirit rather than its formal letter—to inform the application of Fourth Amendment "reasonableness" represents the best path forward.[273]

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[271] 131 S. Ct. 1849, 1864-66 (2011) (Ginsburg, J., dissenting).

[272] Johnson v. United States, 333 U.S. 10, 14 (1948).

[273] The Court might also carefully consider a revival of the "paper" search aspect of the rule—barring evidence searches of personal papers but not other forms of property. *See* Cloud, *supra* note 213.

Scholars, lawyers, and others could work to maximize the appeal of these gradual and partial doctrinal reorientations by defending their grounding in law and policy as broadly as possible. The argument for doctrinal reorientation could be grounded in the Anglo-American common-law constitutional tradition to appeal to historically-oriented judicial conservatives, and the argument could also be grounded in a progressive vision of the rights of the people to appeal to policy-oriented judicial liberals. A conservative-liberal coalition of precisely this sort produced the majority opinion in *Kyllo*[274] and has also produced recent decisions affirming a broadly protective view of individual rights under the Sixth Amendment in cases involving both the right to jury trial[275] and the right to confront witnesses.[276] Such a coalition has the best promise both to succeed in the nearer run and to do so with the kind of broad legitimacy that is likely to preserve its successes over time.[277] In short, an incrementalist

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[274] The *Kyllo* majority consisted of Justices Scalia, Thomas, Souter, Ginsburg, and Breyer. Kyllo v. United States, 533 U.S. 27 (2001).

[275] *See* Blakely v. Washington, 542 U.S. 296 (2004) (holding that any fact used to increase a defendant's sentence above the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt). The *Blakely* majority consisted of Justices Scalia, Stevens, Souter, Thomas, and Ginsburg. *Id.*

[276] *See* Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011) (holding that the Confrontation Clause guarantees the basic right of a criminal defendant to confront an analyst who certifies a forensic laboratory report containing a testimonial certification introduced by the prosecution to prove a fact at a criminal trial). The *Bullcoming* majority consisted of Justices Ginsburg, Sotomayor, Kagan, Scalia, and Thomas. *Id.*

[277] Conservative Justices in recent years have also expressed support in other cases for a broad view of individual rights on historical grounds which converge substantively with views adopted by some liberal Justices as a broader matter of law and public policy. For instance, Justice Thomas, on originalist grounds, has expressed sympathy for the view that suspicionless stops at roadway checkpoints are impermissible. City of Indianapolis v. Edmond, 531 U.S. 32, 56 (2000) (Thomas, J., dissenting). Justice Brennan endorsed the same ultimate position in *Sitz*. Mich. Dept. of State Police v. Sitz, 496 U.S. 444, 456 (1990) (Brennan, J., dissenting). Further, Justice Thomas—joined by Justice Scalia—has also expressed some support for a broad view of the Fifth Amendment Self-Incrimination Clause that would extend the provision's protections from compelled testimonial evidence to compelled production of physical evidence. Justice Thomas states that a "substantial body of [historical] evidence suggests that the Fifth Amendment privilege protects against the compelled production not just of incriminating testimony, but of any incriminating evidence." United States v. Hubbell, 530 U.S. 27, 49 (2000) (Thomas, J., concurring). This view is similar to that endorsed by Justice Black—joined by Justice Douglas—in *Schmerber*,

and coalition-building approach is the most plausible path to "muddling through" to a better world. No doubt it will be an uphill struggle, but rebuilding the Fourth Amendment on stronger foundations is an important reform goal well worth the effort.

CONCLUSION

The characteristic failing of the Warren Court was disregard for constitutional tradition: the traditional role of the Court, traditional methods of legal interpretation, traditional respect for the authority of political institutions, and traditional rights. The American constitutional tradition—a living tradition,[278] as Justice Harlan, the "great dissenter" of the Warren Court,[279] put it when describing the doctrine of substantive due process—strikes a prudent balance between historical constitutional constraint and openness to constitutional change. That tradition is the best vehicle for adapting the Constitution to changing times—and the changing times to the Constitution. Rather than build on this tradition, the Warren Court's revolution in criminal procedure improvidently abandoned it—shattering the Fourth Amendment's doctrinal structure built on the solid rock of history and leaving the amendment resting precariously on the shifting sands of policy analysis.

The Warren Court's attempt to expand the protections of the Fourth Amendment by reframing its doctrines as open-ended "reasonableness" tests has failed and has left the amendment's protections unsure and subject to increasingly narrow interpretations. The doctrinal shifts from enumerated "protected interests" to "reasonable expectations of privacy," from Fourth Amendment "security" to the mere "reasonableness" of police conduct, from the mere evidence rule providing substantive

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arguing that the Fifth Amendment right against self-incrimination should be read broadly to protect an individual from state compulsion to submit to a blood alcohol test to collect physical evidence of driving under the influence of an intoxicant. Schmerber v. California, 384 U.S. 757, 773-78 (1966) (Black, J., dissenting).

[278] Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

[279] *See* TINSLEY E. YARBROUGH, JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT (1992). Notably, Justice Harlan, the "great dissenter," concurred in *Katz* and joined the opinion of the Court in *Hayden*.

Fourth Amendment protections to facilitating the law enforcement interest in "solving crime"[280] have all rendered Fourth Amendment rights less certain and less secure. As the Thomas More portrayed in *A Man for All Season*'s might put it, the Warren Court cut down the laws to get at a devil—aggressive policing—and the Court's liberal Justices in turn found no laws left to protect our rights when the devil turned and new political winds began to blow.[281]

The Court's contemporary Fourth Amendment doctrines descend from the Warren Court era, and the temptation to acclimate to them—to accept them as simply defining the legitimate mainstream of American criminal procedure and as marginalizing more protective views of the Fourth Amendment rooted in past traditions or in a progressive vision of the future—should be resisted. The obvious way forward to reinvigorate the protections of the Fourth Amendment is through a cautious, incremental, and partial restoration of the core of the amendment's traditional protections within the doctrinal framework established by the Warren Court. The best hope to achieve this goal is through an appeal to a potential conservative-liberal coalition, one wedded to the all-important nexus between respect for our older legal traditions and the "rights of the people" which justice demands. If we are to rebuild Fourth Amendment doctrine on a more solid foundation, that is the most promising path.

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[280] Warden v. Hayden, 387 U.S. 294, 306 (1967).

[281] ROBERT BOLT, A MAN FOR ALL SEASONS 56 (1954). The relevant scene reads:

> ROPER. So now you'd give the Devil benefit of law.
>
> MORE, *turning to Roper*. Yes. What would you do? Cut a great road through the law to get after the Devil?
>
> ROPER. I'd cut down every law in England to do that!
>
> MORE, *roused and excited*. Oh? And when the last law was down—(*He moves to r. of Roper*.) and the Devil turned round on you—where would you hide, Roper, the law's all being flat? (*He crosses to L.C.*) This country's planted thick with laws from coast to coast—Man's laws, not God's—and if you cut them down—and you're just the man to do it—you really think you could stand upright in the winds that would blow then? (*Quietly*.) Yes, I'd give the Devil benefit of law, for my own safety's sake.

Id.