INTERESTS PROTECTED BY THE FOURTH AMENDMENT

Professor Thomas K. Clancy

OBJECTIVES:

After this session you will be able to:

1. Summarize the three interests protected by the Fourth Amendment; and
2. Identify privacy and reduced expectations of privacy as the principal protections of the Fourth Amendment.

REQUIRED READING:

1. Thomas K. Clancy, *Interests Protected by the Fourth Amendment* (Feb. 2009) [NCJRL PowerPoint].................................................................................................................................1

Interests Protected by the Fourth Amendment

Thomas K. Clancy

Does the 4th Apply?

Applicability

part A: need gov't activity:
  "Search" or "Seizure"

part B: that activity must intrude upon a protected interest

this presentation is about Part B

protected interests

4th:

"The right of the people to be SECURE in their persons, houses, papers, and effects . . . ."
step #1: is object on list?

person, house, paper, or effect

step #2: quality protected?

does defendant have protected interest in that object implicated by gov’t activity?

objects protected

only four objects protected: persons, houses, papers, and effects

step #1: is object on the list?

(ex) open fields - not on list

(ex) "people" -- do not include foreigners in foreign country

(ex) "house" -- includes aps, hotel rooms, businesses

open fields

“the special protection accorded by the F/A to the people in their ‘persons, houses, papers, and effects,’ is not extended to the open fields. The distinction between the latter and the house is as old as the common law.”

Hester v. U.S., 265 U.S. 57 (1924)

agents trespassed onto private land investigating moonshiners

Hester’s holding “founded upon the explicit language of the Fourth Amendment”

applicability detailed

<table>
<thead>
<tr>
<th>objects protected</th>
<th>&quot;security&quot; of each object implicated by &quot;search&quot;:</th>
<th>by &quot;seizure&quot;:</th>
</tr>
</thead>
<tbody>
<tr>
<td>people</td>
<td>REP analysis liberty</td>
<td></td>
</tr>
<tr>
<td>houses</td>
<td>REP &quot;</td>
<td>possession</td>
</tr>
<tr>
<td>papers</td>
<td>REP &quot;</td>
<td>possession</td>
</tr>
<tr>
<td>effects</td>
<td>REP &quot;</td>
<td>possession</td>
</tr>
</tbody>
</table>

step #2: what does "secure" mean?

1. **Liberty**:
   
   freedom to go where one chooses
   
   **gov't activity: seizure**
   
   seizure occurs where there is some "meaningful interference, however brief, with an individual's freedom of movement."


2. **Possession**
   
   **gov't activity: seizure**
   
   "meaningful interference with an individual's possessory interests" in property
   
   *Soldal v. Cook County, 506 U.S. 56 (1992)*
3. Privacy: main interest protected

"The principal object of the Amendment is the protection of privacy . . . "

Soldal

Gov't Activity: "SEARCH"

Reasonable expectation of privacy test

1. person exhibits actual, subjective expectation of privacy

2. society recognizes that expectation as Justified / Reasonable / Legitimate

Smith v. Maryland, 442 U.S. 735, 740 (1979)

If either prong missing, no protected interest
partial list -- NO R.E.P.

Prison Cells
Handwriting
Facial Characteristics
Movements Outside
Open Fields
Bank Records
Trash
VIN numbers
Field testing of suspected drugs

NO PROTECTED INTEREST -- F/A does NOT apply --

Reduced Expectations of Privacy

- automobiles
- commercial property
  (especially highly regulated industries: gun dealer, coal mine, liquor business, auto junkyard)
- some employees at work: train operators, customs
- children at school
- individuals entering at international border
- probationers
- parolees (maybe none)

What happens if court finds reduced EP?

Departs from traditional reasonableness models.

What happens if court finds no REP?

Amendment inapplicable.

No inquiry into "Reasonableness"
expectation of privacy analysis

- **Reasonable expectations**: two prongs -
  1. actual EP
  2. society recognizes EP as legitimate

- **Reduced expectations**:
  apply govt friendly reasonableness analysis

- **No REP**:
  amendment does not apply as to search

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**Example: Vehicles**

<table>
<thead>
<tr>
<th>Reasonable expectations</th>
<th>Reduced expectations</th>
<th>No REP</th>
</tr>
</thead>
<tbody>
<tr>
<td>No one has full REP</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Driver / owners → reduced REP</td>
<td></td>
<td></td>
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<tr>
<td>Reasonable model changes: no warrant for probable cause based searches</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Car thief (Rakas)</td>
<td></td>
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<tr>
<td>Renter after lease expires (some courts)</td>
<td></td>
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<tr>
<td>Passengers (Rakas → as to glove box, under search)</td>
<td></td>
<td></td>
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<tr>
<td>Therefore: no standing</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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**How to find "legitimate" expectation of privacy?**

*Look to:*

1. Real property law
2. Personal property law
3. "Understandings that are recognized or permitted in society"

*California v. Ciraolo, 476 U.S. 207 (1986)*
Guests in houses

1. *Jones*
   - stayed in apt while owner away
   - had clothes, key

2. *Olson*
   - stayed overnight

3. *Carter*
   - bagged cocaine for a couple hours

Voluntary disclosure; assumption of risk

Assume risk that third party will disclose information, item to gov’t

Also --

Informants
Undercover agents

When are privacy expectations reduced / eliminated?

Techniques often case-specific but some tendencies:

- Modern technology

- Empirical approach: if something can be observed and conclude from that factual analysis whether person has protected interest

- Gov’t regulation: (ex) gun shops

- Individual’s status:
  - Child, probationer, parole, certain professions
in age where private and commercial flights in public airways is routine, unreasonable to expect privacy from the air

Ciraolo dissent: normative approach to REP
to determine REP, give weight to:

- intention of framers
- uses to which person has put location
- "societal understanding that certain areas deserve the most scrupulous protection from gov't intrusion"

"qualitative difference between police surveillance and other uses of the airspace. ... it is not easy to believe that our society is prepared to force individuals to bear the risk of this type of warrantless police intrusion ...."

recap --
structure of 4th Amendment analysis

IN EVERY CASE, ....

1. Does the 4th Apply?
   A. gov't activity: "Search" or "Seizure"
   B. Protected interest in object: liberty, possession, privacy

2. Is it Satisfied?
   "Reasonable"
   Warrant Clause requirements

[3. Remedies?]
sources!

Clancy, What Does the Fourth Amendment Protect: Property, Privacy, or Security,
33 Wake Forest L. Rev. 307 (1998)

Clancy, The Fourth Amendment: Its History and Interpretation
(Carolina Academic Press 2008)
WHAT DOES THE FOURTH AMENDMENT PROTECT:
PROPERTY, PRIVACY, OR SECURITY

Thomas K. Clancy*

In this article, Professor Clancy argues that the essential attribute of the Fourth Amendment’s right of persons “to be secure in their persons, houses, papers, and effects” is the ability of the individual to exclude the government from unreasonably intruding into those specified objects. Although privacy, human dignity, dislike for the government, and other states of mind may motivate the exercise of the right to exclude, they are not synonymous with the right. Thus, the Fourth Amendment right to be “secure” is not predicated upon positive attributes such as notions of privacy. Rather, the Fourth Amendment right to be “secure” is equivalent to the right to exclude.

“It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property” that violates the Fourth Amendment.¹

INTRODUCTION

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects.”² This article


2. U.S. CONST. amend. IV (emphasis added). In full, the Fourth Amendment provides:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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explores the proper analytical structure by which to measure the meaning of the right to be “secure.” Only by understanding the meaning of the term “secure” is it possible to determine the scope of the Fourth Amendment’s protections for individuals and, correlativey, the amount of unregulated governmental power the amendment allows. As one distinguished commentator has observed: “The key to the amendment is the question of what interests it protects.”

As the title to this article indicates, there are three possible candidates for defining the scope of the amendment’s protections: property, privacy, and security. As will be discussed, both the property and privacy approaches have proven to be inadequate. The Supreme Court initially grounded Fourth Amendment protections in common law property concepts. Part I traces the origins, development, and demise of the use of property principles to measure the scope of the amendment’s protections. Reacting to modern developments, the Court in the last third of the twentieth century adopted and currently employs the reasonable expectation of privacy test to define, at least in large part, the amendment’s protections. Part II examines that test.

The Fourth Amendment speaks of the right to be secure and Part III proposes invigorating that term and using it as the proper measure of the protection afforded by the amendment. Importantly, the amendment limits the right to be secure to specified objects: persons, houses, papers, and effects. The courts have developed specific meanings for these objects. See, e.g., United States v. Dunn, 480 U.S. 294, 301-03 (1987) (concluding that a barn is not within the curtilage of a “house” for purposes of the Fourth Amendment); 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 2.4(b), at 531 (3d ed. 1996) (concluding that houses are “by no means limited to residential buildings” and include business and commercial establishments). Only these items are protected. Thus, the government can intrude into any non-protected item at will because the Fourth Amendment is inapplicable. See, e.g., Oliver v. United States, 466 U.S. 170, 183-84 (1984) (holding that open fields are not protected by the Fourth Amendment); Hester v. United States, 265 U.S. 57, 59 (1924) (same).

7. U.S. CONST. amend. IV.
clusion argues that the Fourth Amendment’s protections act negatively—to exclude the government from unreasonably searching or seizing one’s person, house, papers, and effects. Without the ability to exclude, a person has no security. With the ability to exclude, a person has all that the Fourth Amendment promises: protection against unjustified intrusions by the government. Privacy, human dignity, a dislike for the government, and other states of mind may motivate the exercise of the right to exclude, but they are not synonymous with that right or with aspects of that right. To look beyond the right to exclude and seek positive attributes to the right to be secure, such as privacy, serves to limit—and ultimately defeat—that right.

I. THE ORIGIN, DEVELOPMENT, AND DEMISE OF THE PROPERTY TEST

A. Overview

The Fourth Amendment was a creature of the eighteenth century’s strong concern for the protection of real and personal property rights against arbitrary and general searches and seizures. That historical context has been viewed as a primary source for understanding the amendment. The English and colonial search and sei-

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8. See generally Edward L. Barrett, Jr., Personal Rights, Property Rights, and the Fourth Amendment, 1960 SUP. CT. REV. 46 (tracing the developments that resulted in interpreting the Fourth Amendment to afford greater protection to property rights than to personal liberty).

9. See, e.g., Oliver, 466 U.S. at 180-81 (applying the historical understanding of the Fourth Amendment to open fields); Chimel v. California, 395 U.S. 752, 760-61 (1969) (interpreting the Fourth Amendment in light of American colonial history); Stanford v. Texas, 379 U.S. 476, 481-85 (1965) (tracing the roots of the Fourth Amendment to general warrants, arbitrary searches, and conflicts between the king and the press in colonial America); Marcus v. Search Warrants, 367 U.S. 717, 729 (1961) (discussing the history of the Bill of Rights); Henry v. United States, 361 U.S. 98, 100-01 (1959) (noting that the Fourth Amendment’s probable cause determination reflects an aversion for the general warrant); Harris v. United States, 331 U.S. 145, 157 (1947) (Frankfurter, J., dissenting) (concluding that “[t]he provenance of the Fourth Amendment bears on its scope”), overruled in part by Chimel v. California, 395 U.S. 752 (1969); United States v. Lefkowitz, 285 U.S. 452, 466-67 (1932) (relying on the principles of eighteenth-century precedent to interpret the Fourth Amendment); Weeks v. United States, 232 U.S. 383, 389-91 (1914) (exploring the history of the Fourth Amendment in the eighteenth-century writs of assistance and general warrants and relying on English precedent from that period); Boyd v. United States, 116 U.S. 616, 623-30 (1886) (following English precedents and applying the Fourth Amendment to protect private property); see also Carroll v. United States, 267 U.S. 132, 149 (1925) (“The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted.”); Jacob B. Landynski, Search and Seizure and the Supreme Court 19 (1966) (noting that the Fourth Amendment was “the one procedural safeguard in the Constitution that grew directly out of the events
ure abuses and the reaction to those abuses, which culminated in the adoption of the Fourth Amendment, have been retold often.\textsuperscript{10} Reaction to the abuses often focused on correcting the arbitrary search and seizure procedures, which were the focus of many complaints.\textsuperscript{11} Although the revulsion often focused on the techniques used, the practices were offensive because they impinged upon things held dear by those subjected to the searches or seizures, such as their persons, homes, and private papers.\textsuperscript{12} Thus, the Fourth Amendment “took its origin in the determination of the framers” to create safeguards against those arbitrary and abusive invasions.\textsuperscript{13} The consequent expression of the individual’s rights was often phrased by reference to property, and the notion that “a man’s house [is] his castle” became “a part of our constitutional law in the clauses prohibiting unreasonable searches and seizures.”\textsuperscript{14}

The English case, \textit{Entick v. Carrington},\textsuperscript{15} discussed in detail the importance of property rights as affecting the government’s ability to search and seize. The United States Supreme Court has repeatedly cited the case, describing it as a “monument of English freedom” which was “undoubtedly familiar” to ‘every American statesman’ when the Constitution was adopted, and considered to be ‘the true and ultimate expression of constitutional law.”\textsuperscript{16} In \textit{Entick},

which immediately preceded the revolutionary struggle with England’); Richard M. Leagre, \textit{The Fourth Amendment and the Law of Arrest}, 54 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 393, 396 (1963) (noting that Fourth Amendment cases “are replete with reliance upon history”).

Based on the historical context of the Fourth Amendment, the Court has often been steadfast in its determination to defend individuals against governmental intrusion. \textit{See, e.g.}, \textit{Weeks}, 232 U.S. at 393 (concluding that although efforts to punish the guilty are important, they may not be facilitated by sacrificing hard-won constitutional principles).

\textsuperscript{10} See sources cited \textit{supra} note 9.


\textsuperscript{12} See, \textit{e.g.}, \textit{Entick v. Carrington}, 19 Howell’s State Trials 1029, 95 Eng. Rep. 807 (C.P. 1765) (holding invalid the invasion of a home and seizure of all private papers pursuant to a general warrant); \textit{Wilkes v. Wood}, 98 Eng. Rep. 489, 498 (K.B. 1763) (opining that the power to issue general warrants might “affect the person and property of every man in this kingdom, and [would be] totally subversive of the liberty of the subject”); \textit{Huckle v. Money}, 95 Eng. Rep. 768, 769 (K.B. 1763) (“To enter a man’s house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour . . . .”).

\textsuperscript{13} \textit{Weeks}, 232 U.S. at 390.

\textsuperscript{14} \textit{Id.} This view is shared by commentators. \textit{See, e.g.}, Osmond K. Fraenkel, \textit{Concerning Searches and Seizures}, 34 HARV. L. REV. 361, 364-65 (1921) (opining that it was “apparent” that the Fourth Amendment embodied the principle in English liberty that found “expression in the maxim ‘every man’s home is his castle’”).

\textsuperscript{15} 19 Howell’s State Trials 1029, 95 Eng. Rep. 807 (C.P. 1765).

pursuant to a warrant based on a charge that Entick was the author or was responsible for the publication of several seditious papers, Entick’s house was searched and his private papers were seized by government messengers. The warrant named Entick but was otherwise general as to the places to be searched and the papers to be seized. Entick sued the messengers in trespass and the jury returned a verdict in his favor.

Upholding the verdict, Lord Camden emphasized the fundamental role that property rights played in society and outlined a hierarchy of property rights. He stated that property rights were sacred and could only be abridged by laws passed for the public good. Evidencing the common law’s strong support for private property, Camden stated that “every invasion of private property, be it ever so minute,” was considered a trespass. Accordingly, anyone who entered the property of another without permission was liable for trespass, even if no damages occurred.

Camden also said that the government had no right to seize or inspect papers, which were considered the owner’s “dearest property.” Indeed, he said, to pronounce that practice legal “would be subversive of all the comforts of society.” Camden distinguished the right to search and seize for stolen goods based on the property rights involved. In the case of stolen goods, the owner is permitted to recapture his own goods; the seizure of private papers, however, involved a taking of property by the government. Camden also rejected the ability to search papers as a means of discovering evi-

41, 49 (1967); see also United States v. Lefkowitz, 285 U.S. 452, 466 (1932) (referring to Entick and stating that the “teachings of that great case were cherished by our statesmen when the Constitution was adopted”); TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 32 (1969) (describing Entick as “the last and most important” of the warrants cases).

17. See Entick, 19 Howell’s State Trials at 1031.
18. See id. at 1034, 1063-65.
19. See id. at 1036.
20. See generally id.
21. “The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole.” Id. at 1066. The exceptions for the public good included “[d]istresses, executions, forfeitures, and taxes.” Id.
22. Id.
23. See id. Camden noted that this premise “is proved by every declaration in trespass where the defendant is called upon to answer for bruising grass and even treading upon the soil.” Id. It was for the trespasser to justify or excuse his action. See id.
24. Id.
25. Id.
26. See id. Camden also distinguished the warrant for stolen goods based on the procedure that the common law required to secure a warrant. Id. at 1067; see also Clancy, supra note 11, at 490-517 (discussing the procedural aspects of Camden’s analysis, the importance of the common law search warrant procedure, and its influence on the drafting of the Fourth Amendment).
dence in either criminal or civil cases. He justified the rule by reference to the right against self-incrimination, saying that “the law obligeth no man to accuse himself . . . and it would seem that search for evidence is disallowed upon the same principle.”

Camden’s analysis proved to have a strong influence on the Supreme Court’s initial interpretation of the Fourth Amendment. Beginning with *Boyd v. United States*, and extending to the latter third of the twentieth century, the Supreme Court defined the interest secured by the Fourth Amendment largely in terms of property rights. Property rights analysis was used in two ways. First, in *Boyd*, the Court created a hierarchy of personal property rights, with the permissibility of a search or seizure premised on whether the government had a superior interest in the thing to be searched or seized. Based on that hierarchy, the Court refused to sanction any search or seizure of certain objects, regardless of the procedures utilized. Second, beginning with *Olmstead v. United States*, the Court used property law to define constitutionally protected areas and limited the Fourth Amendment inquiry to the protection of tangible items from physical invasions of real property. Based on that restrictive doctrine, the government had a great deal of freedom to utilize new technology to investigate without implicating the amendment.

Underlying *Boyd* and *Olmstead* were two conflicting visions of the Fourth Amendment, with the former advocating a liberal construction and the latter a literal one. However, because *Olmstead* primarily concerned the areas into which the government could intrude and *Boyd* primarily concerned what objects could be permissibly seized, they did not directly collide. Both of those lines of authority coexisted uneasily until 1967, when the Court rejected

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27. To emphasize how strong that substantive restriction on the government’s ability to search was, he said, “[Y]et there are some crimes, such, for instance, as murder, rape, robbery, and house-breaking, to say nothing of forgery and perjury, that are more atrocious than libeling. But our law has provided no paper-search in these cases to help forward the conviction.” *Entick*, 19 Howell’s State Trials at 1073.

28. *Id.*

29. 116 U.S. 616 (1886).


32. *Id.*


34. *Olmstead*, 277 U.S. at 464.

35. See *id.* at 464-65.

36. *Id.* at 464.

property analysis and substituted privacy analysis to measure the scope of the Fourth Amendment’s protections. Part II.B discusses *Boyd*, its liberal construction of the amendment, and the development of the hierarchy of personal property rights. Part II.C discusses *Olmstead* and the restrictive view limiting protections to physical invasions of real property. Part II.D discusses the demise of the major premise of both lines of authority—that property defines the right protected by the Fourth Amendment.

**B. Boyd v. United States**

*Boyd v. United States* marked the first extended treatment of the Fourth Amendment by the Supreme Court and is the case to which the Court has returned repeatedly for inspiration when deciding cases implicating that amendment. In *Boyd*, the Court gave the amendment a liberal interpretation, out of a concern that a strict construction would allow the “silent approaches and slight deviations from legal modes of procedure” by which “illegitimate and unconstitutional practices get their first footing.”

At issue in *Boyd* was the constitutionality of a statute requiring the compulsory process of private papers, which the Court construed to be a constructive search and seizure. According to the Court, the statute was the first of its kind in the United States or England because it required the defendant in a criminal or forfeiture proceeding to produce private papers for use as evidence against him or her. The statute provided that if the documents named in the subpoena were not produced, the government’s allegations would be treated as proven.

The Court examined the historical events leading up to the American Revolution, placing particular reliance on *Entick v. Carryington*. In what has been described as the most creative and controversial aspect of the opinion, the Court adopted *Entick’s* view that the search and seizure of private papers implicated both the right to be free from unreasonable searches and seizures and the right not to incriminate oneself.

The Court reasoned that the Fifth Amendment’s privilege against self-incrimination could help define what is an unreasonable search or seizure under the Fourth Amendment, since “the ‘unrea-

38. For a discussion of this transformation, see infra Part II.A.
39. See, e.g., Carroll v. United States, 267 U.S. 132, 147 (1925) (describing *Boyd* as the “leading case” interpreting the Fourth Amendment).
41. *Id.* at 619-20.
42. *Id.* at 622.
43. *Id.* at 622-23.
44. See *id.* at 620.
45. *Id.* at 624-30.
46. See LANDYNSKI, supra note 9, at 53.
sonable searches and seizures’ condemned in the Fourth Amend-
ment are almost always made for the purpose of compelling a man
to give evidence against himself.”

Consistent with *Entick*, the Court set forth a hierarchy of rights
in property, permitting the search for and seizure of some objects
but not others. Included in the list of seizable items were stolen or
forfeited goods, goods concealed to avoid the payment of duties, ex-
cisable goods and their records, contraband, and goods seized pur-
suant to a judicial writ, such as an attachment, a sequestration, or
an execution. The Court distinguished such searches and seizures
from searches and seizures involving private papers, concluding that
“in the one case, the government is entitled to the possession of the
property; in the other it is not.”

The individual’s and the government’s different property inter-
ests in each instance justified the different treatment. The govern-
ment has a property interest in the duty owed on “excisable” goods,
and it protects the property interest of the owner of stolen goods by
confiscating them. However, the owner of the papers at issue in
*Boyd*, and not the government, had a protected property interest.

In decisions following *Boyd*, the Court developed the theory
formed in *Boyd*: Whether the individual or the government had a
superior property right in the thing to be searched or seized deter-
mined the permissibility of the search or seizure. *Boyd* defined
the “realm of personal autonomy” protected by the amendment
“largely in terms of property rights.” The Court subsequently im-

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48. *Id.* This relationship of the amendments was repeatedly emphasized in
subsequent cases applying *Boyd*’s hierarchical property rights theory. *See*, e.g.,
United States v. Lefkowitz, 285 U.S. 452, 466-67 (1932) (quoting *Boyd* and
applying the mere evidence rule to papers and materials seized from petitioner’s
office). This relationship, however, has now been rejected. For a discussion of
the rejection of this relationship, see infra note 109.


50. *See id.*

51. *Id.* at 623.

52. *See id.* at 624.

53. *See id.*

54. *See generally* Cloud, supra note 30, at 581. Cloud analyzed *Boyd* and
the cases following it and concluded that the Court’s “property-based concepts
became a fundamental part of Fourth Amendment doctrine and were not aban-
donned unequivocally by the Supreme Court for eighty years.” *Id.* at 578.

55. *Id.* at 580. Cloud observed that the Court’s
conception of property rights probably strikes the contemporary
reader as archaic, and perhaps as wrong. Over the past half-century
the opposite presumption has become conventional wisdom. It per-
mits government to exercise expansive regulatory and police powers
over private property rights to promote the public good. But at the
end of the nineteenth century a contrary set of beliefs was commonly
held, and these beliefs were embodied in the *Boyd* opinion. Private
and government actors alike acted within separate spheres of power.
Therefore, the exercise of government power was invalid if it intruded
posed substantive restrictions on the government’s ability to search and seize and refused to permit any search or seizure of certain private papers, regardless of the procedures utilized, based on the individual’s property rights in the object.\textsuperscript{56} On the other hand, the Court readily permitted an intrusion when the government or another party had a superior property interest in the object.\textsuperscript{57} For example, when government agents discovered illegally possessed draft cards during the course of a search, the Court approved the seizure of the cards because they were the “property of the United States” and “the Government was entitled to possession.”\textsuperscript{58}

As another limitation on the government’s ability to search and seize property, the Court adopted what came to be known as the “mere evidence rule.” The mere evidence rule provided that search warrants could not be used as a means to gain access “solely for the purpose of making [a] search to secure evidence to be used against

\begin{enumerate}
\item Into the protected sphere of private property rights. Yet even these strong private rights were not absolute. Government could intrude into the private sphere—it could search and seize—when the private actor had no right to possess the property (stolen property, contraband), when the government had a superior claim to the property (imported goods upon which taxes were not paid), when the property posed a significant threat to the public welfare (criminal instrumentalties), or when the property fell within the proper realm of the police powers (required records). But if the property fell into none of these categories, or if it was classified as private papers, it was secure from government intrusion. Property rights were not absolute, but they supported a strong conception of liberty and a weak conception of police powers.
\item See id. at 578-79. Cloud identifies the procedural requirements as those “requirements set out in the Warrant Clause.” Id. at 590. Substantive restrictions, however, are based on factors such as the nature, type, and physical location of the property seized. See id. Under these substantive restrictions, private papers found in the home receive the highest level of protection. See id.; see also, e.g., United States v. Lefkowitz, 285 U.S. 452, 464-67 (1932) (extending the mere evidence rule to encompass situations where an arrest is “used as a pretext to search for evidence”); Weeks v. United States, 232 U.S. 383, 393-94 (1914) (requiring the return of letters and private documents illegally seized and held to be used as evidence).
\item See, e.g., United States v. Jeffers, 342 U.S. 48, 53-54 (1951) (recognizing that no property rights existed in contraband and that government agents may seize drugs as contraband when they are validly in position to observe the drugs); Davis v. United States, 328 U.S. 582, 588-89 (1946) (distinguishing between private papers and public property and permitting the seizure from a service station of “gasoline ration coupons which never became the private property of the holder but remained at all times the property of the government and subject to inspection and recall by it”); Carroll v. United States, 267 U.S. 132, 143, 153 (1925) (permitting warrantless seizure of liquor based on the National Prohibition Act, which provided that no property rights shall exist in liquor).
\end{enumerate}
[a person] in a criminal or penal proceeding." 59 Papers received no greater protection than other forms of property, in order to render them immune from search and seizure, as long as the papers were within one of the categories of seizable goods. 60 Thus, records required by law to be maintained could be seized, 61 as could private papers that were the instrumentalities of a crime. 62 Over time, the list of goods and papers that could be seized continued to grow and the distinctions between seizable and non-seizable papers blurred. 63

C. Olmstead v. United States

A second theme of case law, beginning with Olmstead v. United States, 64 limited Fourth Amendment rights in two important ways. First, the only things protected were tangible objects, such as houses, papers, and physical possessions. 65 Second, those objects were only protected against physical invasions. 66 Olmstead and its progeny, as with Boyd and its progeny, were grounded in the common law’s heightened protection of property rights. 67 Unlike Boyd, however, Olmstead was based on a literal approach to interpreting the amendment. 68


60. See id.

61. See, e.g., Wilson v. United States, 221 U.S. 361, 380 (1911) (permitting search and seizure of public records, official documents, and records required by law to be kept); cf. Zap v. United States, 328 U.S. 624, 628 (1946) (finding a waiver of the right to privacy in company papers when petitioner, in order to obtain government business, permitted inspection of his accounts and records), vacated, 330 U.S. 800 (1947).

62. See Abel v. United States, 362 U.S. 217, 237-39 (1960) (upholding the seizure of fake identifications and other papers used in espionage activities as instrumentalities of crime); United States v. Rabinowitz, 339 U.S. 56, 64 (1950) (finding forged stamps were instrumentalities of crime), overruled in part by Chimel v. California, 395 U.S. 752 (1969); Harris, 331 U.S. at 154 (finding forged checks were instrumentalities of crime).

63. See Warden v. Hayden, 387 U.S. 294, 309 (1967). The Court discussed its holding in Gouled v. United States, noting that the “Gouled distinction [was] attributable more to chance than considered judgment.” Id. at 308.


65. See Olmstead. 277 U.S. at 464-65 (finding that the Fourth Amendment was not violated where federal officers used a wiretap placed outside the home to intercept communications).

66. See id. at 466.

67. See, e.g., Cloud, supra note 30, at 610.

68. See id. at 609 (describing Olmstead as the “deathknell” of “the integration of property law with an expansive interpretation of constitutional provisions designed to protect individual liberty”). The struggle waged by the justices to impose either a liberal or a literal interpretation is a major pillar of Fourth Amendment jurisprudence. Compare California v. Hodari D., 499 U.S. 621, 626 (1991) (adopting a literal construction of the word “seizure”), with id. at 637 (Stevens, J., dissenting) (arguing for a liberal construction). Another
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The Olmstead Court was confronted with whether the installation and use of wiretaps constituted a “search” if the taps were placed on telephone lines outside the walls of the suspects’ homes and offices.\(^69\) Acknowledging that Boyd had stated that the Fourth Amendment was to be liberally construed, Chief Justice Taft, writing for a narrow majority, then gutted that principle by stating: “[b]ut that cannot justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight.”\(^70\)

Utilizing the language of the amendment, the Olmstead Court limited the objects protected to tangible things: “The amendment itself shows that the search is to be of material things—the person, the house, his papers, or his effects.”\(^71\)

Therefore, conversations were not protected because they were not on the list of tangible objects specified in the amendment.\(^72\)

The Court also grounded its decision on the belief that there was “no entry of the houses or offices of the defendants.”\(^73\) It reasoned that the telephone lines outside the buildings where the taps were placed were “not part of [a] house or office, any more than are the highways along which they are stretched.”\(^74\) Thus, the interception of conversations was not an intrusion into an area protected by the amendment.\(^75\) The Court also limited the type of governmental activity that was regulated by the amendment to physical invasions of the protected areas.\(^76\)

There was no search or seizure when the wiretaps were installed outside the buildings because there was no physical entry into a house or an office.\(^77\)

Recording a conversation, controversy involves the debate over the relationship between the Reasonableness and the Warrant Clauses of the Fourth Amendment. See, e.g., Clancy, supra note 11, at 517-26 (summarizing two principal views of the relationship between the clauses and discussing the shortcomings of each view). One view argues that the “reasonableness” of a search is defined by reference to the requirements specified in the Warrant Clause. Id. at 518. The other school of thought maintains that “reasonableness” has no inherent characteristics and the two clauses are distinct. Id. at 521. The third pillar has been the contest between positivism and pragmatism underlying the interpretation of the amendment. See generally Morgan Cloud, Pragmatism, Positivism, and Principles in Fourth Amendment Theory, 41 UCLA L. REV. 199 (1993) (discussing these competing theories). The history of the Court’s interpretation of the amendment in the twentieth century can be seen as largely an interaction of those six views, with the shifting alliances of justices who accept a different mix of those views being responsible for the great swings in interpretation of the amendment.

69. Olmstead, 277 U.S. at 456-57.
70. Id. at 465.
71. Id. at 464.
72. See id.
73. Id.
74. Id. at 465.
75. See id. at 464.
76. Id. at 466.
77. See id. at 464.
which the Court viewed as akin to eavesdropping, did not entail a physical invasion and, therefore, was not a search or seizure.\footnote{78}

Based on \textit{Olmstead}, the Fourth Amendment only regulated physical trespasses within constitutionally protected areas, and searches and seizures of people and tangible physical objects. \textit{Olmstead} created a theory of “property-based literalism,” which abandoned the liberal approach of \textit{Boyd} but preserved the link between property rights and the Fourth Amendment.\footnote{79} That conjunction of literalism and property theory “guaranteed that the Fourth Amendment would be irrelevant as a device for regulating the use of new technologies that allowed the government to invade formerly private places without committing a common law trespass.”\footnote{80}

The aspect of \textit{Olmstead} that limited the objects protected to tangible things attenuated over time, and the Court ultimately recognized that oral conversations could be the object of a search or seizure.\footnote{81} However, the part of the theory requiring a physical invasion into a protected place remained a cornerstone Fourth Amendment principle until \textit{Katz v. United States} in 1967.\footnote{82} Pursuant to that property-based analysis, the Court divided the world into...

\footnote{78. \textit{Id.} at 464-65. Justice Black was one of the most articulate defenders of this approach. \textit{See} \textit{Katz} v. United States, 389 U.S. 347, 365-66 (1967) (Black, J., dissenting); \textit{see also} \\

79. \textit{See} \textit{Cloud}, \textit{supra} note 30, at 611.

80. \textit{Id.}

81. \textit{See} \textit{Desist} v. United States, 394 U.S. 244, 248 (1969) (discussing the demise of the belief that oral conversations could not be the object of a search or seizure); \textit{Berger} v. New York, 388 U.S. 41, 52 (1967) (same); \textit{see also} Hoffa v. United States, 385 U.S. 293, 301 (1966) (reiterating that the Fourth Amendment’s protections apply to oral statements as well as tangibles and that such protection can be violated with or without physical intrusions); \textit{Wong Sun} v. United States, 371 U.S. 471, 485 (1963) (stating that verbal statements are protected from seizure under the Fourth Amendment just as papers and effects are, and, therefore, they can be excluded from admission into evidence using the “fruit of the poisonous tree” doctrine); \textit{Lanza} v. New York, 370 U.S. 139, 142-43 (1962) (explaining that eavesdropping by federal officers would produce the physical intrusion necessary to support a search of speech); \textit{Silverman} v. United States, 365 U.S. 505, 510-12 (1961) (cataloguing cases and recognizing that the presence or absence of a physical invasion into a constitutionally protected area was the vital consideration); \textit{Irvine} v. California, 347 U.S. 128, 132 (1954) (discussing the interplay between Fourteenth Amendment due process protections and the Fourth Amendment guarantee to be secure in one’s home from eavesdropping by the police). \textit{But see} \textit{Katz} v. United States, 389 U.S. 347, 365-67 (1967) (Black, J., dissenting) (arguing that \textit{Olmstead} rightly concluded that oral conversations were not covered by the Fourth Amendment and that the Court had not retreated from that position until the “amorphous holding in \textit{Berger}”); \textit{Berger}, 388 U.S. at 78-81 (Black, J., dissenting) (arguing that \textit{Olmstead} correctly held eavesdropping to be outside the ambit of the Fourth Amendment).

82. \textit{389 U.S.} at 353 (holding that the reach of the Fourth Amendment cannot solely turn on the presence or absence of a physical intrusion into an enclosure).}
those areas that were constitutionally protected and those that were not, compiling a list of each.83 “At the very core [stood] the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”84 Expanding on the justification for that core area, the Court explained:

A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty—worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man’s castle.85

It was within the defined constitutionally protected areas that a person could be secure:

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. There he is protected from unwarranted governmental intrusion. And when he puts something in his filing cabinet, in his desk drawer, or in his pocket, he has the right to know it will be secure from an unreasonable search or an unreasonable seizure.86

The cases consistently turned on the determination of whether the government had physically entered a protected area.87 Thus, where a hotel room was separated from a room occupied by federal agents by two doors with a small air space between the rooms and

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83. See Lanza, 414 U.S. at 143. In rejecting a claim that a prison cell was a constitutionally protected area, the Court gave a partial list of areas which were protected:

A business office is a protected area, and so may be a store. A hotel room, in the eyes of the Fourth Amendment, may become a person’s “house,” and so, of course, may an apartment. An automobile may not be unreasonably searched. Neither may an occupied taxicab. Yet, without attempting either to define or to predict the ultimate scope of Fourth Amendment protection, it is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room. In prison, official surveillance has traditionally been the order of the day.

84. Silverman, 365 U.S. at 511-12.

85. Id. at 512 n.4 (quoting United States v. On Lee, 193 F.2d 306, 315-16 (2d Cir. 1951) (Frank, J., dissenting), aff’d, 343 U.S. 747 (1952)).

86. Hoffa, 385 U.S. at 301 (footnote omitted).

87. See, e.g., Silverman, 365 U.S. at 510-12 (cataloguing cases and recognizing that the presence or absence of a physical invasion into a constitutionally protected area was the vital consideration).
the agents taped a microphone to the door on their side,\textsuperscript{88} or where the agents placed a sensitive receiver against a partition wall,\textsuperscript{89} the Court concluded that no Fourth Amendment rights were violated because there was no physical intrusion into the suspect’s room, which was the constitutionally protected area.\textsuperscript{90} On the other hand, when a “spike mike” was inserted into the party wall until it contacted the heating duct serving the suspect’s house, thus converting the entire heating system into a conductor of sound, that minor physical intrusion triggered the applicability of the Fourth Amendment.\textsuperscript{91}

\section*{D. Demise of the Property-Based Theories}

The property-based theories of \textit{Boyd} and \textit{Olmstead} succumbed within months of each other in 1967 when \textit{Warden v. Hayden}\textsuperscript{92} dismantled the mere evidence rule, rejecting any hierarchy of property rights and any substantive restrictions on the ability of the government to search personal property.\textsuperscript{93} \textit{Katz v. United States}, the better known but less articulately reasoned case, rejected \textit{Olmstead’s} view that the country was divided into two areas—those that were constitutionally protected and those that were not.\textsuperscript{94} Both \textit{Hayden} and \textit{Katz} asserted that privacy, not property, was the centralizing principle upon which Fourth Amendment rights were premised.\textsuperscript{95}

After \textit{Hayden}, the Fourth Amendment has been viewed as only providing a procedural mechanism to ensure that the search or sei-

\begin{itemize}
\item \textsuperscript{88} See \textit{Desist v. United States}, 394 U.S. 244, 246 n.2 (1969). The Court refused to apply \textit{Katz v. United States} retroactively, stating that “to the extent \textit{Katz} departed from previous holdings of this Court, it should be given wholly prospective application.” \textit{Id.} at 246.
\item \textsuperscript{90} See also \textit{Kaiser v. New York}, 394 U.S. 280, 281-82 (1969) (refusing to apply \textit{Katz} retroactively and finding no violation of the Fourth Amendment when a listening device that recorded a phone conversation in a bar was attached to a central terminal in the basement of the building in which the bar was located); \textit{cf.} \textit{On Lee v. United States}, 343 U.S. 747, 751-52 (1952) (holding that where an undercover agent wearing a body wire that transmitted conversations was in another’s home by consent, no trespass was committed, and the introduction of conversations into evidence did not violate the Fourth Amendment).
\item \textsuperscript{91} See \textit{Silverman}, 365 U.S. at 506-09 (explaining that the Court need not worry about the future technological development of listening devices employed by the police because the case at hand involves “physical penetration into the premises occupied by the petitioners”).
\item \textsuperscript{92} 387 U.S. 294 (1967).
\item \textsuperscript{93} See \textit{id.} at 309-10.
\item \textsuperscript{94} \textit{Katz}, 389 U.S. at 351.
\item \textsuperscript{95} \textit{Id.; Hayden}, 387 U.S. at 304.
\end{itemize}
zure is reasonable.\textsuperscript{96} The majority opinion in \textit{Hayden} had two goals: first, disassembling the intellectual basis for the mere evidence rule and its substantive restrictions on the ability of the government to search and seize based on a hierarchy of property rights; and second, promoting privacy as the basis for Fourth Amendment protections.\textsuperscript{97} \textit{Hayden} involved the permissibility of the introduction of clothing that a robber had worn while committing a crime and which the government seized in a search of the robber’s home.\textsuperscript{98} Writing for the majority, Justice Brennan first turned to the task of dismantling the basis for the mere evidence rule.\textsuperscript{99} He examined the language of the amendment and found nothing there to support “the distinction between ‘mere evidence’ and instrumentalities, fruits of crime, or contraband.”\textsuperscript{100} He asserted:

On its face, the provision assures the “right of the people to be secure in their persons, houses, papers, and effects . . .” without regard to the use to which any of these things are applied. This “right of the people” is certainly unrelated to the “mere evidence” limitation. Privacy is disturbed no more by a search directed to a purely evidentiary object than it is by a search directed to an instrumentality, fruit, or contraband. A magistrate can intervene in both situations, and the requirements of probable cause and specificity can be preserved intact. Moreover, nothing in the nature of property seized as evidence renders it more private than property seized, for example, as an instrumentality; quite the opposite may be true. Indeed, the distinction is wholly irrational, since, depending on the circumstances, the same “papers and effects” may be “mere evidence” in one case and “instrumentality” in another.\textsuperscript{101}

The Court viewed the mere evidence rule as being based on “the dual, related premises that historically the right to search for and seize property depended on the assertion by the Government of a valid claim of superior interest, and that it was not enough that the purpose of the search and seizure was to obtain evidence to use in

\textsuperscript{96} See, \textit{e.g.}, Zurcher v. Stanford Daily, 436 U.S. 547, 554 (1978) (“Under existing law, valid warrants may be issued to search any property, whether or not occupied by a third party, at which there is probable cause to believe that fruits, instrumentalities, or evidence of a crime will be found.”). \textit{But cf.} Tennessee v. Garner, 471 U.S. 1, 9-22 (1985) (holding that, based on balancing individual and government interests, the police use of deadly force to stop a fleeing suspect is restricted).

\textsuperscript{97} \textit{Hayden}, 387 U.S. at 300-10.

\textsuperscript{98} \textit{Id.} at 297-98, 300.

\textsuperscript{99} \textit{Id.} at 301.

\textsuperscript{100} \textit{Id.} Not surprisingly, given that the word “privacy” does not appear in the Fourth Amendment, Justice Brennan did not repeat his examination of the language of the amendment in that portion of the opinion where he argued that privacy was the value sought to be preserved by the amendment. \textit{Id.} at 304-10.

\textsuperscript{101} \textit{Id.} at 301-02.
apprehending and convicting criminals.”102 The Court viewed those premises as outdated:

The premise that property interests control the right of the Government to search and seize has been discredited. Searches and seizures may be “unreasonable” within the Fourth Amendment even though the Government asserts a superior property interest at common law. We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts.103

The Court also showed why it believed that privacy had replaced property as the measure of the Fourth Amendment’s protections. It viewed the “shift in emphasis from property to privacy” as the result of “a subtle interplay of substantive and procedural reform.”104 Whereas at common law the remedial structure of such actions as trespass and replevin depended on demonstrating a superior property right,105 the remedial structure of Fourth Amendment jurisprudence had changed from one permitting the return of illegally seized property before trial to one suppressing evidence in a criminal trial under circumstances that did not require proof of a superior property interest.106 According to the Court, the following factors also supported the view that privacy was the object protected: the extension of the remedy of exclusion to intangible evidence, the recognition that an actual trespass under local property law was not necessary, and the extension of the remedy of suppression to stolen goods, instrumentalities of a crime, and contraband, which at common law could have been seized with impunity.107 The Court also viewed as a fiction the need of the government to assert a property interest in the objects it sought to seize, “obscuring the reality that government has an interest in solving crime.”108 Turning the amendment into a mere procedural device, the Court stated that the requirements of probable cause, particularity, and the intervention of a magistrate secured “the same protection of privacy whether

102. Id. at 303.
103. Id. at 304.
104. Id.
105. See id. at 303-04.
106. See id. at 304-05, 307 n.11.
107. Id. at 305-06.
108. Id. at 306; but see Daniel B. Yeager, Search, Seizure and the Positive Law: Expectations of Privacy Outside the Fourth Amendment, 84 J. CRIM. L. & CRIMINOLOGY 249, 250 (1993) (“A property interest makes lawful the government’s temporary . . . or permanent . . . confiscation of property from another’s possession.”).
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the search is for ‘mere evidence’ or for fruits, instrumentalities or contraband.”

109. Hayden, 387 U.S. at 306-07. Because the Court in Hayden believed that the clothing seized was not testimonial in nature, it left open the question whether there were “any items of an evidential value whose very nature preclude[d] them from being the object of a reasonable search and seizure.” Id. at 302-03. Subsequent decisions, however, have made it clear that the testimonial privilege does not extend to private papers. See, e.g., United States v. Doe, 465 U.S. 605, 618 (1984) (O’Connor, J., concurring) (asserting that the Court had finally sounded the “death-knell” for Boyd’s Fifth Amendment protection of papers). Boyd’s broad view of the interrelationship of the Fourth and Fifth Amendments has now been rejected. See generally Note, The Life and Times of Boyd v. United States (1886-1976), 76 Mich. L. Rev. 184, 212 (1977) (stating that “Boyd is dead”). A principal reason for that demise has been the Court’s restriction of the right not to incriminate oneself only to compelled testimony or communications. See, e.g., Schmerber v. California, 384 U.S. 757, 761 (1966) (holding that the privilege against self-incrimination only applies to evidence of a testimonial communicative nature). This reason had its seeds in the Court’s declaration in Gouled v. United States that papers possessed “no special sanctity” as compared to other forms of property, thereby obliterating the distinction between private papers and other property. 255 U.S. 298, 309 (1921), overruled in part by Warden v. Hayden, 387 U.S. 294 (1967). This conflicts with Boyd, which adopted Entick’s pre-constitutional view that the use of a person’s private papers violated the right against self-incrimination. See Cloud, supra note 30, at 593-94 (discussing the impact of Gouled and arguing that “[p]apers, after all, possess inherent testimonial attributes”). Thus, the Court removed the self-incrimination aspect of the prohibition on the use of private papers, leaving only the Fourth Amendment to regulate its production.

Cloud seeks a return to the view that papers, as distinguished from other forms of property, are testimonial in nature and, hence, there should be substantive restrictions on the government’s ability to seize them. Id. at 594-97, 619-21. He believes that “most property can be the legitimate object of a valid search warrant, but some property—that which contains testimonial characteristics equivalent to oral testimony—cannot.” Id. at 597. Several justices have also sought heightened constitutional protection for private papers. See, e.g., Zurcher v. Stanford Daily, 436 U.S. 547, 577-83 (1978) (Stevens, J., dissenting) (“For the innocent citizen’s interest in the privacy of his papers and possessions is an aspect of liberty protected by the Due Process Clause of the Fourteenth Amendment.”); Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 530 (1977) (Burger, C.J., dissenting) (stating that papers concerning family and political decisionmaking are “of the most private nature, enjoying the highest status under our law”). Contrary to those views, the Court was right in Hayden to eliminate the mere evidence rule as well as any substantive restrictions on the ability to search and seize papers because the hierarchy of property rights analysis proved unworkable. Although the privilege against self-incrimination may, in some instances, extend to the protection of private papers, Entick and the concurring opinion in Boyd demonstrate that the enhanced protection for papers arose primarily on the basis of the privilege against self-incrimination, which is now protected by the Fifth Amendment. The Fifth Amendment’s exclusionary rule should be applied in such circumstances. Police officers, in searching and seizing, are not in the position to ascertain what papers may or may not be covered by the privilege against self-incrimination. Just as confessions are suppressed when taken in violation of the Fifth Amendment, so too could the use of private papers in appropriate circumstances be restricted.
Shortly after Hayden was decided, Katz v. United States rejected the trespass theory and its property law premise. In Katz, federal agents placed an electronic listening and recording device outside a public phone booth, from which Katz placed his calls. In its analysis, the Court announced that the Fourth Amendment protected people and not places, thereby shifting away from the physical trespass theory. The Court stated:

It is true that the absence of [physical] penetration was at one time thought to foreclose further Fourth Amendment inquiry . . . for that Amendment was thought to limit only searches and seizures of tangible property. But “[t]he premise that property interests control the right of the Government to search and seize has been discredited.” . . . Thus, although a closely divided Court supposed in Olmstead that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested. Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements overheard without any “technical trespass under . . . local property law.” . . . Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people—and not simply “areas”—against unreasonable searches and seizures it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.

The Court’s analysis was not sweeping. It did not acknowledge the depth of the precedent following Olmstead and expended little effort rejecting Olmstead’s reliance on the twin premises that the Constitution protects only some areas and that the protections extend only to physical invasions. The Court did not base its rejection of the physical trespass theory on a broad philosophical view of the amendment or adopt Boyd’s liberal construction of the amendment. Indeed, it did not even cite Boyd. Its decision was premised primarily on extending protection to intangible interests, which was the

110. 389 U.S. 347, 353 (1967). Before Katz, the Court had consistently reiterated that test and declined invitations to abandon it. See, e.g., Desist v. United States, 394 U.S. 244, 248 (1969) (characterizing Katz as “a clear break with the past”); Berger v. New York, 388 U.S. 41, 64 (1967) (“[O]ur concern with the statute here is whether its language permits a trespassory invasion of the home or office . . . .”); Lopez v. United States, 373 U.S. 427, 438-39 (1963) (stating the test is whether there has been “an unlawful physical invasion of a constitutionally protected area”); Silverman v. United States, 365 U.S. 505, 512 (1961) (stating the test is whether there has been an “actual intrusion into a constitutionally protected area”).


112. Id. at 351.

113. Id. at 352-53 (citations and footnotes omitted).
aspect of *Olmstead* that had been sapped of its vitality before *Katz*.\(^\text{114}\) Despite this, Justice Stewart, writing for the majority, pressed his case on that ground:

The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was as visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. No less than an individual in a business office, in a friend’s apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment.\(^\text{115}\)

Justice Brandeis, dissenting in *Olmstead*, set forth a broad-based philosophical argument, premised on the language and spirit of *Boyd*.\(^\text{116}\) His approach was subsequently adopted by other critics of *Olmstead*.\(^\text{117}\) Brandeis began with the proposition that, because it was a constitution that the Court was expounding, which was to be applied “over objects of which the fathers could not have

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\(\text{114. For a discussion of cases premised primarily on extending protection to intangible interests, the aspect of } \text{*Olmstead* which was sapped of vitality before *Katz*, see supra note 81.}\)

\(\text{115. 389 U.S. at 352 (footnotes omitted). Other justices in prior cases had also directed their attention to perceived infirmities with the physical trespass theory. See, e.g., Silverman v. United States, 365 U.S. 505, 512-13 (1961) (Douglas, J., concurring) (noting that the “invasion of privacy is as great in one case [electronic device on the outside wall of a house] as in the other [electronic device that penetrates the wall],” but that the Fourth Amendment protection was only extended for the latter case); see also Goldman v. United States, 316 U.S. 129, 139-40 (1942) (Murphy, J., dissenting) (making similar argument); Barrett, supra note 8, at 58-59. Barrett states:}\)

\(\text{[T]he Court makes the issue turn on traditional tort law concepts. If the officer trespasses upon the property of the suspected person, he can justify his action only by showing that he has complied with the Fourth Amendment requirements governing searches. If he restricts the liberty of movement of the suspect sufficiently to commit the tort of false imprisonment, he can justify his action only by demonstrating that he had probable cause to make a formal arrest. If the investigation can be carried on without trespass or false imprisonment, then it appears that the Fourth Amendment has no application and the official conduct needs no justification.}\)

\(\text{The result of this all-or-nothing approach is to place too little restraint on some investigative techniques and too great restraint on others.}\)

\(\text{Id. (footnotes omitted).}\)


\(\text{117. See, e.g., Lopez v. United States, 373 U.S. 427, 459 (1963) (Brennan, J., dissenting); *Goldman*, 316 U.S. at 137-40 (Murphy, J., dissenting).}\)
When the Fourth and Fifth Amendments were adopted, “the form that evil had theretofore taken” had been necessarily simple. Force and violence were then the only means known to man by which a government could directly effect self-incrimination. It could compel the individual to testify—a compulsion effected, if need be, by torture. It could secure possession of his papers and other articles incident to his private life—a seizure effected, if need be, by breaking and entry. Protection against such invasion of “the sanctities of a man’s home and the privacies of life” was provided in the Fourth and Fifth Amendments by specific language. . . . But “time works changes, brings into existence new conditions and purposes.” Subtler and more far-reaching means of invading privacy have become available to the government. Discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.120

Brandeis accordingly rejected giving the Fourth Amendment a literal construction.121 He favored giving the Fourth Amendment broad scope, stating, “Every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.”122

Justice Stewart’s opinion for the Court in Katz was therefore notable for what it did not say. It did not rely on Boyd or Brandeis’ dissent in Olmstead. It offered no broad philosophical basis for its decision; there was no vision.123 It merely substituted terms: people, not places; privacy, not property. But if the promise of Katz was that privacy would broaden protections when substituted for prop-

118. Olmstead, 277 U.S. at 472 (Brandeis, J., dissenting).
119. Id.
120. Id. at 473 (citation omitted).
121. Id. at 476.
122. Id. at 478-79.
123. See, e.g., John B. Mitchell, What Went Wrong with the Warren Court’s Conception of the Fourth Amendment?, 27 NEW ENG. L. REV. 35, 47-53 (1992) (criticizing the Katz decision’s failures to contextualize the concept of privacy and to articulate a broader conception of the Fourth Amendment).
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property analysis, that promise has been unfulfilled. If the promise of *Katz* was narrow, as Justice Stewart’s opinion suggests, extending the protections of the amendment only to intangible interests such as phone conversations, then *Katz* had little—and has had little—guiding effect on other situations. It appears that the latter reading is more proper.

II. THE ORIGIN, DEVELOPMENT, AND EVISCERATION OF THE PRIVACY TEST

A.

*Katz* sought to extinguish inquiry into constitutionally protected areas and to substitute privacy as the interest protected by the amendment. Justice Stewart’s opinion for the Court showed how

124. For a discussion of the unfulfilled promise of *Katz*, see infra Part II.B.C.

125. For a discussion of Justice Stewart’s opinion, see supra notes 109-24 and accompanying text.

126. The word “privacy” had been used often by the Court before *Katz* when referring to the scope of the protections afforded by the Fourth Amendment. However, it was almost exclusively used, without definition or elaboration, as shorthand to label the individual’s protected interest. See, e.g., Linkletter v. Walker, 381 U.S. 618, 630 (1965) (calling the right of privacy “the core of the Fourth Amendment”) (quoting *Wolf v. Colorado*, 338 U.S. 25, 27 (1949), overruled by *Mapp v. Ohio*, 367 U.S. 643 (1961)); United States v. Ventresca, 380 U.S. 102, 105 (1965); *Mapp v. Ohio*, 367 U.S. 643, 655-57 (1961) (referring to the amendment’s “right to privacy” as “basic to a free society”) (quoting *Wolf*, 338 U.S. at 27); *Jones v. United States*, 357 U.S. 493, 498 (1958) (stating that “the essential purpose of the Fourth Amendment [is] to shield the citizen from unwarranted intrusions into his privacy”); *Trupiano v. United States*, 334 U.S. 699, 709 (1948) (discussing that the Fourth Amendment protects the right of privacy); *Harris v. United States*, 331 U.S. 145, 173 (1947) (Frankfurter, J., dissenting) (discussing that the purpose of the Fourth Amendment protects the right to privacy), overruled in part by *Chimel v. California*, 395 U.S. 752 (1969); *Feldman v. United States*, 322 U.S. 487, 489-90 (1944) (stating that the purpose of the Fourth and Fifth Amendments is “to maintain inviolate large areas of personal privacy”); *Goldman v. United States*, 316 U.S. 129, 136 (1942) (Murphy, J., dissenting) (discussing the Fourth Amendment safeguards of “the right of personal privacy”); *United States v. Lefkowitz*, 285 U.S. 452, 464 (1932) (referring to the Fourth Amendment’s safeguards of “the right of privacy”); *Weeks v. United States*, 232 U.S. 383, 390 (1914) (noting that the Fourth Amendment took its origin with the Framers’ determination to protect people from unreasonable searches and seizures under general warrants, which had been “invasions of the home and privacy of the citizens”).

Indeed, the Court often used the term in conjunction with other phrases. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968) (stating that the Fourth Amendment protects privacy, security, and liberty); *Berger v. New York*, 388 U.S. 41, 53 (1967) (recognizing that the Fourth Amendment protects “privacy and security”) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967)); *Schmerber v. California*, 384 U.S. 757, 767, 772 (1966) (stating that the Fourth Amendment protects privacy, human dignity, and personal integrity); *Jones v. United States*, 362 U.S. 257, 261 (1960) (noting that the Fourth Amendment is
prior case law had structured the question to be whether there had been a physical penetration of a constitutionally protected area and, as discussed, rejected that test. Justice Stewart also sought to explain what the Fourth Amendment did protect and the relation of that protection to the concept of privacy. However, the Court's initial embrace of privacy was not without reservation and it did little to explain what it meant by the term.

Justice Stewart did little more to explain what the Fourth Amendment protected. He used the term "privacy," but explicitly said there was no general right of privacy; and he explicitly refused to limit the protections afforded solely to a privacy analysis. The lessons of the majority opinion can be briefly stated: "[T]he Fourth Amendment protects people, not places"; its protections are not limited to tangible property; and property interests do not control the determination of whether a search or seizure has occurred. Beyond those black letter legal concepts, the majority's opinion had little lasting impact on future decisions.

"designed for protection against official invasion of privacy and the security of property"), overruled by United States v. Salvucci, 448 U.S. 83 (1980); Frank v. Maryland, 359 U.S. 360, 362 (1959) (referring to the Fourth Amendment's "security of one's privacy against arbitrary invasion by the police") (quoting Wolf, 338 U.S. at 27)), overruled in part by Camara v. Municipal Court, 387 U.S. 523 (1967); Stefanelli v. Minard, 342 U.S. 117, 119 (1951) (same); Wolf, 338 U.S. at 27-29 (describing immunity from unreasonable searches and seizures in terms of "the security of one's privacy against arbitrary intrusion" and "the right to privacy").

Justice Brandeis in his dissent in Olmstead was perhaps the first justice to use the term privacy to have a meaning beyond a shorthand form of expression. He characterized privacy as "the most comprehensive of rights and the right most valued by civilized men." Olmstead, 277 U.S. at 478 (Brandeis, J., dissenting). Several other justices before Katz advocated use of the term to define the person's protected interest. See, e.g., Time, Inc. v. Hill, 385 U.S. 374, 415 (1967) (Fortas, J., dissenting) (asserting that privacy is a "basic right"); Osborn v. United States, 385 U.S. 323, 340-52 (1966) (Douglas, J., dissenting) (discussing extensively the right to privacy); United States v. Ventresca, 380 U.S. 102, 117 (1965) (Douglas, J., dissenting) (referring to the amendment as protecting the "constitutional right of privacy"); see also Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965) (referring to the Fourth and Fifth Amendments and the other specific guarantees of the Bill of Rights as having penumbras that, together, created a right of privacy).

128. Id. at 352-53.
129. Id. at 350-51. In an accompanying footnote, Justice Stewart explained his comments that the amendment protects interests other than privacy. Id. at 350 n.4 (citing Griswold, 381 U.S. at 509 (Black, J., dissenting)).
130. Id. at 350.
131. See id. at 350-52.
132. Id. at 351.
133. See id. at 353.
134. See id.
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It was Justice Harlan’s concurring opinion in *Katz* that endured.\(^{135}\) Harlan’s opinion is the origin of the “reasonable expectation of privacy” test, which came to be used by the Court almost exclusively as the measure for the scope of the Fourth Amendment’s protections.\(^{136}\) As formulated by Harlan, that test requires that a person exhibit an actual subjective expectation of privacy and that this expectation be one that society recognizes as reasonable.\(^{137}\) If either prong is missing, no protected interest is established.\(^{138}\)

Unlike the majority opinion, which spoke in terms of unadorned “privacy,” without modification by any inquiry into subjectivity or reasonableness,\(^{139}\) Justice Harlan limited the privacy interest protected in two ways. First, an actual expectation of privacy must exist; second, that expectation must be reasonable.\(^{140}\) Also, unlike the majority, Justice Harlan did not reject inquiry into whether the place was a “constitutionally protected area,” although the Court has overlooked this aspect of Justice Harlan’s opinion.\(^{141}\) Instead, Justice Harlan concluded that the telephone booth was such a constitutionally protected area.\(^{142}\) He also stated that, although the Fourth Amendment protects people not places, “[g]enerally, . . . the answer to that question requires reference to a ‘place.’”\(^{143}\)

**B.**

After adopting privacy as the measure of the individual's interest protected by the Fourth Amendment, the Court had to retrofit its prior case law to coincide with it. Thus, privacy analysis was sometimes superimposed on established principles, confusing what

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135. *Id.* at 360-62 (Harlan, J., concurring).
136. See, e.g., *Maryland v. Garrison*, 480 U.S. 79, 90-91 (1987) (Blackmun, J., dissenting) (noting that Justice Harlan articulated “the proper test” in *Katz*); *California v. Ciraolo*, 476 U.S. 207, 214 (1986) (stating that “Justice Harlan made it crystal clear that he was resting on the reality that one who enters a telephone booth is entitled to assume that his conversation is not being intercepted”); *Smith v. Maryland*, 442 U.S. 735, 740 (1979) (stating that the Harlan test “embraces two discrete questions”).
137. See *Katz*, 389 U.S. at 361 (Harlan, J., concurring). The Court in subsequent cases has sometimes used other words, such as “legitimate” and “justifiable” as substitutes for “reasonable,” but those terms do not have a different meaning. See, e.g., *Ciraolo*, 476 U.S. at 219-20 n.4 (Powell, J., dissenting); *Smith*, 442 U.S. at 740.
138. See *Katz*, 389 U.S. at 361 (Harlan, J., concurring). Harlan concluded that the physical trespass theory was “bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion.” *Id.* at 362 (Harlan, J., concurring).
139. *Id.* at 348-59.
140. *Id.* at 361 (Harlan, J., concurring).
143. *Id.*
had been previously straightforward principles. Indeed, the analysis was sometimes strained and awkward.

One fundamental aspect of Supreme Court analysis until Katz was the relational aspect of the concept of security: A person was secure in specified objects—one’s person, house, papers, and effects. That analysis was, of course, driven by the language of the amendment. For example, the Court had established in Hester v. United States that the amendment did not apply to open fields. That decision was premised not on a definition of the word “secure,” but on excluding open fields from the list of objects specified by the amendment as protected. That is, an open field was not included in the concept of a person, house, paper, or effect. Katz seemingly decoupled that relationship with a broad substitution of privacy: People, not places were protected, regardless of where that person was. The Court’s subsequent cases confronted whether privacy protections were limited to the four objects specified in the amendment. In Air Pollution Variance Board v. Western Alfalfa Corp., the Court addressed the question whether an inspector standing in a factory’s yard in an area open to the public could test the smoke coming from the factory’s chimneys. The Court, while acknowledging Hester’s exclusion of protection for open fields, confused the analysis by stating that any invasion of privacy was only “abstract and theoretical.” Ten years later, the Court was again confronted with the question in Oliver v. United States. In Oliver, the Court noted that Hester’s holding was “founded upon the explicit language of the Fourth Amendment,” and recognized that open fields were not on the list of objects protected. Further, the Court added a privacy analysis to reach the result that one does not have a protected interest to remain free from intrusion in open fields. Justice White rejected this privacy analysis by stating that “there is no need to go further and deal with the expectation of privacy matter” because the ruling in Hester alone disposes of the issue. Over the succeeding years, the relational aspect of a person’s protected inter-

146. 265 U.S. 57 (1924).
147. See id. at 59.
148. See id.
150. Id. at 862-63.
151. Id. at 865.
153. Id. at 176. The Court also stated that “[t]he Amendment reflects the recognition of the Framers that certain enclaves can be free from arbitrary governmental interference.” Id. at 178.
154. Id. at 177-80.
155. Id. at 184 (White, J., concurring).
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The early cases after *Katz* often showed signs that privacy would be a vital source of protection of individual interests. For example, the Court initially rejected any lesser expectation of privacy for those traveling by automobile and observed that auto travel is “a basic, pervasive, and often necessary mode of transportation” and that many people undoubtedly “find a greater sense of security and privacy in traveling in an automobile than they do in exposing themselves by pedestrian or other modes of travel.” 157 Similarly, the Court rejected any reduced expectation of privacy in a house damaged by fire for the purpose of conducting an arson investigation, 158 asserting that the claim was “contrary to common experience. People may go on living in their homes or working in their offices after a fire. Even when that is impossible, private effects often remain on the fire-damaged premises.” 159 Furthermore, the Court rejected the claim that a person who had shot and killed a police officer had no expectation of privacy in his home where the shooting occurred. 160

However, as the composition of the Court changed, those early indications gave way to a view that used privacy analysis not to expand protected individual interests, but to reduce the scope of the amendment’s protections. 161 Reminiscent of the hierarchical approach of property law theory—where some types of property interests completely barred a search, or the absence of such an interest barred raising an objection to a search—the Court created a hierarchy of privacy interests. Expectations of privacy that “society is ‘prepared to recognize as legitimate’” have, at least in theory, the

156. See, e.g., California v. Greenwood, 486 U.S. 35, 43 (1988) (stating that “Fourth Amendment analysis must turn on such factors as ‘our societal understanding that certain areas deserve the most scrupulous protection from governmental invasion’” (quoting Oliver v. United States, 466 U.S. 170, 178 (1984)). For a discussion of protected personhood interests and the home, see infra notes 252-70 and accompanying text.


159. *Id.* at 505.


161. For example, in *Michigan v. Clifford*, 464 U.S. 287 (1984), the Court, while acknowledging *Tyler*, significantly undercut it by stating: Privacy expectations will vary with the type of property, the amount of fire damage, the prior and continued use of the premises, and in some cases the owner’s efforts to secure it against intruders. Some fires may be so devastating that no reasonable privacy interests remain in the ash and ruins, regardless of the owner’s subjective expectations.

*Id.* at 292.
The Court's cases rejecting any legitimate expectation of privacy now comprise a long list of situations. As to the person, there is no expectation of privacy as to characteristics of one's voice, face, or handwriting. A traveler in an automobile has none as to his movements from place to place. As to places, a person has none when standing in the threshold of one's dwelling. A citizen has none as to objects or activities in open fields. There is none, even within the curtilage of the home, as to observations made from an aircraft. As to commercial premises, none exists in those portions of a store where the public may enter and transact business. A person probably has none in prison cells—or at least it is diminished. A passenger in an automobile has none as to the areas under the seat or in an unlocked glove compartment. As to effects, there is none as to bank records, none as to records given

163. See id. at 342 n.8 (“Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal . . . .”); accord Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 624-25 (1989).
164. See, e.g., Rakas v. Illinois, 439 U.S. 128, 148-49 (1978) (holding that a passenger in an automobile has no legitimate expectation of privacy in the passenger compartment of a vehicle and, therefore, cannot challenge the legality of a vehicle's search).
169. See California v. Ciraolo, 476 U.S. 207, 214 (1986); see also Florida v. Riley, 488 U.S. 445, 450 (1989) (plurality opinion) (stating that there is no reasonable expectation of privacy as to observations through a hole in the roof of a greenhouse from a helicopter); Dow Chem. Co. v. United States, 476 U.S. 227, 239 (1986) (stating that there is no reasonable expectation of privacy as to aerial observations of an industrial complex).
170. See Maryland v. Macon, 472 U.S. 463, 469 (1985); cf. Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 329 (1979) (stating that even though items in a store are displayed in areas open to the general public, a person may still have a legitimate expectation of privacy against governmental intrusion and warrantless search).
173. The Court at one point attempted to distinguish among types of containers in ranking expectations of privacy. Luggage had high expectations of privacy. See, e.g., United States v. Chadwick, 433 U.S. 1, 13 (1977) (contrasting the reduced expectation of privacy surrounding an automobile with luggage and stating that “a person’s expectations of privacy in personal luggage are substantially greater than in an automobile”); accord Florida v. Jimeno, 500 U.S. 248, 253-54 (1991) (Marshall, J., dissenting). But other containers did not “deserve
to an accountant to prepare income taxes,\textsuperscript{175} none as to trash left for collection,\textsuperscript{176} and none as to an automobile’s vehicle identification number (VIN) number.\textsuperscript{177} Similarly, there is no expected privacy interest in contraband that a person puts in a container after the container has been lawfully seized and its contents identified by the government,\textsuperscript{178} none as to field-testing a substance to determine whether it is a controlled dangerous substance,\textsuperscript{179} none in a person’s container after a private party search when the party has alerted government agents,\textsuperscript{180} none as to a beeper in a container of goods sold to a person to monitor its location—so long as the container is outside the home,\textsuperscript{181} and none as to phone numbers dialed on a person’s telephone.\textsuperscript{182}

the full protection of the Fourth Amendment.” Arkansas v. Sanders, 442 U.S. 753, 764 n.13 (1979). “Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance.” \textit{Id.}; \textit{accord} Walter v. United States, 447 U.S. 649, 658 n.12 (1980).

The bankruptcy of distinguishing between types of containers soon became evident, at least to a plurality of the Court, as the justices found no basis in the language of the amendment, which “protects people and their effects, whether they are ‘personal’ or ‘impersonal.’” Robbins v. California, 453 U.S. 420, 426 (1981) (plurality opinion), \textit{overruled in part} by United States v. Ross, 456 U.S. 798 (1982). Thus, the contents of a closed footlocker or a closed suitcase and opaque containers were immune from a warrantless search because the owners “reasonably manifested an expectation that the contents would remain free from public examination.” \textit{Id.} (quoting \textit{Chadwick}, 433 U.S. at 11). Moreover, it was “impossible to perceive any objective criteria” to make any distinction between such containers. \textit{Id.} However, other justices maintained that such a distinction could be made by finding that while many containers, such as personal luggage, were inevitably linked with an expectation of privacy, other containers, “varying from a plastic cup to the ubiquitous brown paper grocery sack, consistently lack such an association. In the middle are containers, such as cardboard boxes and laundry bags, that may be used, although imperfectly, as repositories of personal effects.” \textit{Id.} at 434 n.3 (Powell, J., concurring). A majority of the Court later adopted the view that there was no distinction between “worthy” and “unworthy” containers. \textit{See} United States v. Ross, 456 U.S. 798, 822 (1982); \textit{accord Jimeno}, 500 U.S. at 253-54; \textit{see also} California v. Carney, 471 U.S. 386, 394 (1985) (rejecting a distinction between worthy and unworthy motor vehicles); New Jersey v. T.L.O., 469 U.S. 325, 337-38 (1985) (stating that a student has a protected privacy interest in her purse at school). \textit{But see} California v. Greenwood, 486 U.S. 35, 40-41 (1988) (holding that a person leaving plastic trash bags for collection has no reasonable expectation of privacy as to the contents of the bags).


\textsuperscript{177} \textit{See} New York v. Class, 475 U.S. 106, 114 (1986).


\textsuperscript{180} \textit{See} \textit{id.} at 119.


\textsuperscript{182} \textit{See} Smith v. Maryland, 442 U.S. 735, 743-44 (1979).
The Court has compiled a similarly long list of situations where individuals have a reduced expectation of privacy. It has been repeatedly established as to automobiles and even extends to mobile homes. Owners of commercial property have lesser expectations of privacy. This is particularly so in highly regulated industries, such as gun dealers, coal mines, and automobile junkyards. But not only owners of businesses have reduced expectations; so do employees at their workplace. That reduced expectation may extend to the employee’s desks, file cabinets, and offices. Certain employees, such as railroad workers and custom officials, are subject to state-authorized drug testing as a result of the employment they choose. In addition, children at school, particularly student athletes, have reduced privacy expectations.

183. See, e.g., Pennsylvania v. Labron, 518 U.S. 938 (1996) (per curiam) (holding that the Fourth Amendment allows police searches of automobiles without a warrant if probable cause exists); Florida v. Jimeno, 500 U.S. 248, 252 (1991) (Marshall, J., dissenting) (stating that “an individual's consent to a search of the interior of his car should not be understood to authorize a search of closed containers” therein); United States v. Chadwick, 433 U.S. 1, 12-13 (1977) (distinguishing the reduced privacy expectations as to a search of an automobile from a warrantless search of luggage in the car); South Dakota v. Opperman, 428 U.S. 364, 367-69 (1976) (delineating the characteristics of automobiles that justify warrantless searches); Cardwell v. Lewis, 417 U.S. 583, 589-92 (1974) (distinguishing the less stringent search requirements as to automobiles from persons or property).


186. See, e.g., United States v. Biswell, 406 U.S. 311, 316 (1972) (“When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection.”).

187. See Donovan, 452 U.S. at 602 (finding “that the warrantless inspections required by the Mine Safety and Health Act do not offend the Fourth Amendment”).

188. See Colonnade Catering Corp. v. United States, 397 U.S. 72, 76-77 (1970) (stating that the liquor industry has long been subject to close supervision).

189. See Burger, 482 U.S. at 707 (finding that a junkyard dealer has a reduced expectation of privacy in that his is a “closely regulated” business).


191. See O’Connor v. Ortega, 480 U.S. 709, 717 (1987) (plurality opinion) (finding employees’ expectation of privacy in office and desks may be reduced by virtue of the realities of office practices and procedures).

192. See National Treasury Employees Union v. Von Raab, 489 U.S. 656, 672 (1989) (holding that customs officials have reduced Fourth Amendment privacy interests); Skinner v. Railway Executives’ Ass’n, 489 U.S. 602, 628 (1989) (holding that railroad workers involved in accidents have reduced privacy interests).
expectations of privacy. Finally, individuals seeking to enter the country at the international border also have reduced expectations of privacy. The Court has created this hierarchy using several different techniques. The Court's methods reflect its pragmatic reasoning and are often case-specific. Thus, a complete catalogue of its techniques is neither worthwhile nor possible, given the Court's chameleon-like approach. Some tendencies, however, can be identified on a level of generality. One technique has been to find that the effect of modern life, with its technological and other advances, serves to eliminate or reduce a person's justified expectation of privacy. For example, the Court's reaction to aircraft fly-overs, which may observe activities within the fenced curtilage of a home, illustrates this technique. Thus, the Court has found that "[i]n an age where private and commercial flight in the public airways is routine," it is unreasonable to expect privacy from the air. Similarly, in finding that no legitimate expectation of privacy was impinged by taking aerial photographs of the smokestacks of an industrial complex, the Court reasoned, "Any person with an airplane and an aerial camera could readily duplicate [such photos]. . . [T]he technology of photography has changed in this century . . . enhancing industrial processes, and . . . law enforcement tech-

193. See Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 546, 654-57 (1995) (stating that school officials' power over students is "custodial and tutelary" and that minors "lack some of the most fundamental rights of self-determination"); New Jersey v. T.L.O., 469 U.S. 325, 348 (1985) (Powell, J., concurring) (stating that "students within the school environment have a lesser expectation of privacy than members of the population generally").


195. The Court's sometimes other-worldly conclusion that an individual does not have a protected interest is also driven by the rigidity of Fourth Amendment analysis. See generally Amsterdam, supra note 3, at 388-95 (discussing the dilemma of the Court's all-or-nothing approach). If a person has a protected interest, the usual rule is that the police must have probable cause to justify an intrusion and, unless an exigency is presented, a warrant. Although the requirements of probable cause and a warrant have been increasingly rejected in recent years, a finding that the person simply does not have a protected interest avoids the necessity for justifying a departure from those standards. See, e.g., United States v. Jacobsen, 466 U.S. 109, 123 (1984) (finding that there is no protected interest invaded when agents perform chemical analysis to ascertain if a substance is a controlled dangerous substance). A second technique to avoid the probable cause and warrant standards is to find that the investigative tool used by the police does not constitute a search. See, e.g., United States v. Place, 462 U.S. 696, 707 (1983) (holding that a dog sniffing luggage is not a search).

196. See, e.g., California v. Ciraolo, 476 U.S. 207, 215 (1986) (finding that in an age where commercial flights are routine, it is unreasonable for an individual to expect marijuana plants to be constitutionally protected from aerial observation).

197. Id. at 213-14.

198. Id. at 215.
niques.” Thus, the overall tendency of the Court has been to contract the protected individual interest as a consequence of modern technological advances and their utilization by the government.

Another method is the Court’s use of an empirical approach to determine what constitutes a legitimate expectation of privacy. An empirical approach examines whether an act is observable, and concludes from that factual analysis whether the individual has a protected interest. For example, the Court has stated that because police officers could see marijuana plants when they flew over a homeowner’s backyard the homeowner had no reasonable expectation of privacy. The Court viewed the police’s actions as “simple visual observations from a public place.”

Yet another technique employed by the Court to find that there is no protected interest is to permit regulation to eliminate any subjective expectation of privacy. Thus, as regulation increases, Fourth Amendment protections shrink. Illustrating this technique is the Court’s approval of warrantless and suspicionless searches of industries subject to close governmental supervision and inspection. The Court has reasoned that the pervasiveness and regularity of the industry’s regulation reduces any expectation of privacy and affords sufficient notice, obviating the need for a warrant or particularized suspicion. For example, in New York v. Burger, a

200. See, e.g., United States v. Karo, 468 U.S. 705, 712-18 (1984) (holding that it is permissible to use a beeper in a container of goods sold to the person to monitor its location so long as the container is outside the home); see also Smith v. Maryland, 442 U.S. 735, 743-44 (1979) (finding that installation of a device to record phone numbers dialed on a person’s telephone was not a search).
201. See, e.g., California v. Greenwood, 486 U.S. 35, 40 (1988) (finding that there is no reasonable expectation of privacy in trash left for collection because the garbage bags were readily accessible to animals, children, scavengers, snoopers, and other members of the public, and because it was left for a third party to collect).
204. See, e.g., United States v. Biswell, 406 U.S. 311, 316-17 (1972) (stating that one who chooses to engage in a highly regulated industry does so with the knowledge that he and his business will be subject to effective inspections).
205. See 4 LAFAVE, supra note 6, § 10.2; Clancy, supra note 11, at 563-68.
206. See New York v. Burger, 482 U.S. 691, 700 (1987) (stating that in closely regulated industries, the owner has an attenuated expectation of privacy over the stock); Donovan v. Dewey, 452 U.S. 594, 603, 605 (1981) (upholding warrantless inspections of underground and surface mines by emphasizing that the federal statute regulating mine safety was “specifically tailored” to assure “the certainty and regularity” of the inspection program, and that “the owner of such a facility cannot help but be aware that he ‘will be subject to effective inspection’”) (quoting Biswell, 406 U.S. at 316); Marshall v. Barlow’s, Inc., 436 U.S. 307, 313 (1978) (rejecting a claim that the search fit within the closely regulated industries exception by stating that warrantless searches of such industries rested on a history of government oversight so that no reasonable expectation of
state statute required that automobile junkyards obtain licenses and maintain a record of motor vehicles and major vehicle parts.\textsuperscript{207} The law authorized the police to inspect the record and the junkyard without a warrant or suspicion and provided for criminal penalties for non-compliance.\textsuperscript{208} After the police searched Burger’s junkyard and discovered stolen vehicles and parts, Burger was arrested for possession of stolen property and for unregistered operation as a vehicle dismantler.\textsuperscript{209} Finding that the statute made the business closely regulated and that the proprietor had a reduced expectation of privacy,\textsuperscript{210} the Court upheld the search.

The effect of government regulation on protected interests has not been limited to business. It now extends to what traditionally has been the most shielded human activity involving the human body. For example, the Court has now repeatedly upheld suspicionless drug testing of various persons.\textsuperscript{211} In \textit{Skinner v. Railway Labor Executives’ Ass’n},\textsuperscript{212} the Court upheld two sets of federal regulations, one mandating suspicionless blood and urine testing for the presence of alcohol and illegal drugs of railway employees involved in certain train accidents, and the other requiring suspicionless breath and urine testing of employees who violated certain safety rules.\textsuperscript{213} The Court found that blood tests were commonplace, involved virtually no risk, trauma, or pain, and were not an unduly extensive imposition on a person’s bodily integrity.\textsuperscript{214} Breath tests were viewed as even less intrusive than blood tests because they did not have to be conducted in a hospital and occasioned only minimal embarrassment and inconvenience.\textsuperscript{215} Although urine tests required persons to “perform an excretory function traditionally shielded by great privacy,” the Court opined that the regulations reduced the degree of intrusiveness by requiring the sample be collected in a medical environment that did not include direct visual observation.\textsuperscript{216} More importantly, the Court reasoned, railway employees had a diminished expectation of privacy by reason of their participation in an industry that was pervasively regulated to en-

\begin{itemize}
  \item \textsuperscript{207} 482 U.S. at 694-96 nn.1, 3.
  \item \textsuperscript{208} See \textit{id.} at 694 n.1.
  \item \textsuperscript{209} See \textit{id.} at 695-96.
  \item \textsuperscript{210} Id. at 707, 718.
  \item \textsuperscript{211} See generally Stephen J. Schulhofer, \textit{On the Fourth Amendment Rights of the Law-Abiding Public}, 1989 SUP. CT. REV. 87 (discussing the Supreme Court’s drug testing cases).
  \item \textsuperscript{212} 489 U.S. 602 (1989).
  \item \textsuperscript{213} \textit{id.} at 634 (citing \textit{Schmerber v. California}, 384 U.S. 757, 771 (1966)).
  \item \textsuperscript{214} \textit{id.} at 625.
  \item \textsuperscript{215} See \textit{id.}
  \item \textsuperscript{216} \textit{id.} at 626.
\end{itemize}
sure safety.\textsuperscript{217} The Court therefore concluded that drug tests posed “only limited threats” to the employees’ justifiable expectations of privacy.\textsuperscript{218}

Illustrating the malleability of the Court’s analysis, in \textit{National Treasury Employees Union v. Von Raab},\textsuperscript{219} the Court validated the suspicionless urinalysis testing of United States Customs Service employees seeking transfer or promotions to positions engaged directly in drug interdiction and of those who were required to carry firearms.\textsuperscript{220} While \textit{Skinner} was premised on the effect of government regulation,\textsuperscript{221} the \textit{Von Raab} Court opined that “certain forms of public employment may diminish privacy expectations even with respect to such personal searches.”\textsuperscript{222} Thus, the Court found that Customs Service employees engaged in drug interdiction should expect the government to inquire into their fitness and honesty, and that employees who carried weapons should expect inquiry into their fitness.\textsuperscript{223}

More recently, in \textit{Vernonia School District 47J v. Acton},\textsuperscript{224} the Court upheld drug testing of high school students who participated in school sports.\textsuperscript{225} In \textit{Vernonia}, neither government regulation nor employment justified such searches. The Court therefore added another justification: “[T]he legitimacy of certain privacy expectations . . . may depend upon the individual’s legal relationship with the State.”\textsuperscript{226} Analyzing the student’s interests solely in terms of privacy,\textsuperscript{227} the Court first asserted that school children had a reduced expectation of privacy because school administrators have distinct custodial and tutelary power over the children entrusted to them.\textsuperscript{228} Children’s rights were viewed as being only that which “is appropriate for children in school” and, accordingly, Fourth Amendment

\ \textsuperscript{217} \textit{Id.} at 627.
\textsuperscript{218} \textit{Id.} at 628.
\textsuperscript{219} 489 U.S. 656 (1989).
\textsuperscript{220} \textit{Id.} at 679.
\textsuperscript{221} 489 U.S. at 627 (recognizing the long history of governmental regulation of the railroad industry).
\textsuperscript{222} \textit{Von Raab}, 489 U.S. at 671. The majority illustrated its point with two examples:

Employees of the United States Mint, for example, should expect to be subject to certain routine personal searches when they leave the workplace every day. Similarly, those who join our military or intelligence services may not only be required to give what in other contexts might be viewed as extraordinary assurances of trustworthiness and probity, but also may expect intrusive inquiries into their physical fitness for those special positions.
\textsuperscript{223} \textit{Id.} at 672.
\textsuperscript{224} 515 U.S. 646 (1995).
\textsuperscript{225} \textit{Id.} at 664-65.
\textsuperscript{226} \textit{Id.} at 654.
\textsuperscript{227} \textit{See id.} at 654-57.
\textsuperscript{228} \textit{Id.} at 655.
rights were “different in public schools than elsewhere.”229 Because children are “routinely required to submit to various physical examinations, and to be vaccinated against various diseases,”230 the Court concluded that students have a reduced expectation of privacy.231 The Court concluded that “students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy.”232 In reaching this conclusion, the Court noted the degree of regulation in sports, the voluntary nature of student participation in sports, and that the configuration of locker rooms was “not notable for the privacy they afford.”233

229. Id. at 656.
230. Id.
231. Id. at 657.
232. Id.
233. Id.
C.

The Court’s expectation of privacy analysis has many flaws.\textsuperscript{234} It has no textual support in the language of the amendment. It accordingly leaves the fluid concept of privacy to the vagaries of shifting Court majorities, which are able to manipulate the concept to either expand or contract the meaning of the word at will.\textsuperscript{235} Indeed,

\begin{itemize}
\item \textsuperscript{234} The academic critics are legion. See, e.g., Amsterdam, supra note 3, at 384 (arguing that an individual’s actual subjective expectation of privacy can “neither add to, nor can its absence detract from, an individual’s claim to fourth amendment protection”); Laurence A. Benner, \textit{Diminishing Expectations of Privacy in the Rehnquist Court}, 22 J. MARSHALL L. REV. 825, 825 (1989) (arguing that the Supreme Court’s decisions “have so diminished our expectations of privacy that the Amendment’s original function has become distorted and lost from view”); Cloud, supra note 30, at 616-17 (“[T]he \textit{Katz} approach has degenerated into a standardless ‘expectations’ analysis that has failed to protect either privacy or property interests.”); Cloud, supra note 68, at 259 n.269 (“[E]xpectations analysis seems more rooted in the Justices’ subjective values, experiences, and views of the social good than in any of the various criteria cited by the Justices.”); Melvin Guterman, \textit{A Formulation of the Value and Means Models of the Fourth Amendment in the Age of Technologically Enhanced Surveillance}, 39 SYRACUSE L. REV. 647, 670-71 (1988) (arguing that post-\textit{Katz} cases radically altered \textit{Katz’s} promise, reducing the scope of the amendment’s protection); John M. Junker, \textit{The Structure of the Fourth Amendment: The Scope of the Protection}, 79 J. CRIM. L. \\& CRIMINOLOGY 1105, 1183 (1989) (“The doctrinal record during the twenty years since \textit{Katz} reveals a Court hostile to privacy and, of greater concern, willing to ignore or subvert the constraints of language and structure in its quest for the favored result.”); Lewis R. Katz, \textit{In Search of a Fourth Amendment for the Twenty-first Century}, 65 IND. L.J. 549, 554 (1990) (stating that “in the two decades since \textit{Katz} was decided, the Court has applied the standard to reduce rather than enhance fourth amendment protections,” twisting that standard “to allow the government access to many intimate details about our lives without having to establish the reasonableness of its behavior”); Scott E. Sundby, \textit{“Everyman’”s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?}, 94 COLUM. L. REV. 1751, 1758-71 (1994) (discussing privacy’s failure as a guardian of Fourth Amendment rights); James J. Tomkovicz, \textit{Beyond Secrecy for Secrecy’s Sake: Toward an Expanded Vision of the Fourth Amendment Privacy Province}, 36 HASTINGS L.J. 645, 647-48 (1985) (arguing that the Supreme Court’s interpretation of privacy after \textit{Katz} has not provided a clear vision of what it is and it has “allowed a restrictive, de facto conception of privacy to operate”); Yeager, supra note 108, at 251 (stating that “\textit{Katz} has been a dismal failure–unpredictable and saddled with a stingy conception of privacy”); Note, \textit{Protecting Privacy Under the Fourth Amendment}, 91 YALE L.J. 313, 314 (1981) (noting that “the Court and scholars alike acknowledge that the constitutional law of search and seizure as it operates to protect privacy is in disarray”) [hereinafter \textit{Protecting Privacy}].
\item \textsuperscript{235} See \textit{Katz} v. United States, 389 U.S. 347, 373 (1967) (Black, J., dissenting).
\end{itemize}

By clever word juggling the Court finds it plausible to argue that language aimed specifically at searches and seizures of things that can be searched and seized may, to protect privacy, be applied to eavesdropped evidence of conversations that can neither be searched nor seized. Few things happen to an individual that do not affect his privacy in one way or another. Thus, by arbitrarily substituting the Court’s language, designed to protect privacy, for the Constitution’s
it is difficult—if not impossible—to say exactly what the concept means.\textsuperscript{236} Thus, while a liberal Court substituted privacy in lieu of property analysis to expand protected interests,\textsuperscript{237} a conservative Court has employed privacy analysis as a vehicle to restrict Fourth Amendment protections.\textsuperscript{238}

The Court has too readily made privacy expectations contingent on technology,\textsuperscript{239} empiricism,\textsuperscript{240} and government regulation,\textsuperscript{241} highlighting the problem of relying on privacy to define the person’s protected interest. Given that the number and varieties of official intrusions into individuals’ lives has increased exponentially as a result of the increasing complexities of society, the Court’s willing-

language, designed to protect against unreasonable searches and seizures, the Court has made the Fourth Amendment its vehicle for holding all laws violative of the Constitution which offend the Court’s broadest concept of privacy.\textit{Id.} (Black, J., dissenting); \textit{see also} \textit{Nixon v. Administrator of Gen. Servs.}, 433 U.S. 425, 545 n.1 (1977) (Rehnquist, J., dissenting) (stating that “[t]he concept of ‘privacy’ can be a coat of many colors’); \textit{Berger v. New York}, 388 U.S. 41, 76-77 (1967) (Black, J., dissenting) (criticizing the Court’s use of privacy to define the protections of the amendment and asserting that the right of privacy, “like a chameleon, has a different color for every turning,” arguing that the use of the word simply gave the Court a useful tool to “usurp the policy-making power of the Congress and to hold more state and federal laws unconstitutional’); Griswold v. Connecticut, 381 U.S. 479, 509 (1965) (Black, J., dissenting) (arguing that privacy is such a “broad, abstract and ambiguous concept” that could easily be “shrunken in meaning” or could be used broadly); Katz, \textit{supra} note 234, at 556 (claiming that the privacy test “leaves room for broad swings of judicial interpretation and maneuvering”).

\textsuperscript{236} A recent effort by a distinguished Task Force of the American Bar Association simply gave up on attempting to define privacy.

\textsuperscript{237} For a discussion of liberal expansionism, \textit{see supra} notes 126-60 and accompanying text.

\textsuperscript{238} For a discussion of conservative restrictionism, \textit{see supra} notes 161-233 and accompanying text.

\textsuperscript{239} For a discussion of the Court’s use of technology, \textit{see supra} notes 196-200 and accompanying text.

\textsuperscript{240} For a discussion of the Court’s use of empiricism, \textit{see supra} notes 201-03 and accompanying text.

\textsuperscript{241} For a discussion of the Court’s use of government regulations, \textit{see supra} notes 204-33 and accompanying text.
ness to reduce privacy expectations will too often lead to the conclusion that no protected individual interest has been invaded by the government. Use of an empirical approach in conjunction with permitting technological advances to reduce a person’s protected interest inexorably leads to a smaller and smaller oasis of protection afforded by the amendment. It may be possible to observe a homeowner’s activities from an airplane, and, in that sense, viewing one’s home from an airplane is not private. However, it is not so obvious that the homeowner has relinquished his right to be secure—that is, if normative values invigorate the concept of security.

Another criticism involves the Court’s characterization of some interests as involving only lesser expectations of privacy. Some of the most private aspects of life have been so characterized. For example, high school athletes and those employed in certain professions must give blood and urine samples. Such intrusions defy a long history of shielding a person’s body and excretory functions

242. For example, Justice Powell, dissenting in *Ciraolo*, adopted a normative approach and maintained that, even if the actions could be observed, a reasonable expectation of privacy should be found based on standards to measure legitimacy. California v. Ciraolo, 476 U.S. 207, 220 n.5 (1986) (Powell, J., dissenting). Such standards include real property law, personal property law, and “understandings that are recognized or permitted in society.” *Id.* (Powell, J., dissenting) (quoting Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978)). The inquiry “necessarily focuses on personal interests in privacy and liberty recognized by a free society.” *Id.*; see also Florida v. Riley, 488 U.S. 445, 456 (1988) (Brennan, J., dissenting) (arguing that any conclusion that a reasonable expectation of privacy exists ultimately depends on the judgment “whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society”) (quoting Amsterdam, *supra* note 3, at 403); California v. Greenwood, 486 U.S. 35, 53-54 (1988) (Brennan, J., dissenting) (arguing that the police are required to “adhere to norms of privacy that members of the public plainly acknowledge,” and concluding that a person has a reasonable expectation of privacy in trash left for collection); Dow Chem. Co. v. United States, 476 U.S. 227, 248-49 (1986) (Powell, J., concurring in part and dissenting in part) (using trade secret laws to justify the conclusion that an expectation of privacy was reasonable); *cf.* Jerome Atrens, *A Comparison of Canadian and American Constitutional Law Relating to Search and Seizure*, 1 Sw. J.L. & TRADE AM. 29, 34-35 (1994) (contrasting the empirical approach of the United States Supreme Court in measuring a reasonable expectation of privacy with the normative approach of the Canadian Supreme Court); Katz, *supra* note 234, at 564 (arguing that the Court has turned the principle of knowing exposure to the public into a simple assumption-of-risk test, resulting in stripping the individual of a “great measure of fourth amendment protection” due to “living in a high-tech society,” thereby stripping the Fourth Amendment of its “normative values”).

243. For a discussion of the Court using diminished expectations of privacy, see *supra* notes 183-94 and accompanying text.

244. For a discussion of high school athletes’ diminished privacy interest, see *supra* note 193 and accompanying text.
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from governmental intrusion. If privacy interests are so easily diminished by participation in sports or the nature of one’s employment, it would seem that all individual privacy interests are readily reducible to minimal levels. The “peculiar logic” of the diminished expectation of privacy rationale, therefore, is that it permits the scope of Fourth Amendment protections to diminish as governmental regulation increases. Yet, “the mandates of the Fourth Amendment demand heightened, not lowered, respect, as the intrusive regulatory authority of government expands.” To rely exclusively or primarily on a privacy analysis in the face of society’s ever-increasing intrusions into all aspects of daily life serves to eviscerate the legitimacy of individual interests.

The Court has also incorrectly identified the perspective from which to measure privacy interests. One of the two requirements of the privacy test is that a person must have a subjective expectation of privacy in order to qualify for protection.

[A] person’s subjective belief can neither confer nor defeat fourth amendment protection. The paranoid and the Pollyanna are entitled to the protection the amendment secures to

245. See, e.g., Schmerber v. California, 384 U.S. 757, 767-72 (1966) (finding that blood tests are only permitted when reasonable and justified by the circumstances); Storms v. Couglin, 600 F. Supp. 1214, 1224 (S.D.N.Y. 1984) (concluding that urinalysis is unreasonable if done in disregard of "human dignity and privacy").

246. Donovan v. Dewey, 452 U.S. 594, 612 (1981) (Stewart, J., dissenting); see also id. at 608 (Rehnquist, J., concurring) (maintaining that the pervasiveness of the regulation could not justify the result but noting that "had Congress enacted a criminal statute similar to that involved here . . . the warrantless search would be struck down under our existing Fourth Amendment line of decisions"); 4 LAFAVE, supra note 6, § 10.2(c), at 413-14 ("Notice . . . does not establish either implied consent or an unprotected expectation of privacy, but is a factor bearing upon the reasonableness of the inspection program."); Peter S. Greenberg, The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See, 61 CAL. L. REV. 1011, 1025-26 (1973).

The difficulty with the [Court’s] analysis . . . is the implication that government intention and action, if sufficiently well publicized, colors a citizen’s constitutionally cognizable privacy expectations. Were a municipality to inform its citizens that henceforth houses would be searched for narcotics without warrants, the practice would be no more proper than before the promulgation of the government’s intention. . . . The procedures . . . are proper, then, only if they adequately meet the demands of the various interests covered by the fourth amendment, not because the citizen subjected to them knows what to expect.

Id. at 1026 (footnotes omitted).

247. Donovan, 452 U.S. at 612 (Stewart, J., dissenting).

248. For a discussion of the subjective expectancy prong, see supra notes 137-43 and accompanying text.
them, no less and no more. . . . [An] “expectation” about the scope of the amendment that is different from the protection it actually confers cannot expand or diminish the application of the amendment. Thus, “expectations” are only relevant when they are identical to the technical judgments about the scope of the protection, which is equivalent to saying that “expectations” are not relevant at all.249

Indeed, the Court has repudiated consideration of subjective intent in other Fourth Amendment contexts as irrelevant and unworkable.250 The sole measure of a person’s protected interest should be the objective aspects of the situation. An objective analysis includes such considerations as any restraint on the individual’s freedom of

249. Junker, supra note 234, at 1166. Justice Harlan introduced reliance on a person’s subjective expectations in his concurring opinion in Katz. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). Harlan later questioned that reliance, asserting that privacy analysis must “transcend the search for subjective expectations or legal attribution of assumptions of risk” and examine the “desirability of saddling [such expectations] upon society.” United States v. White, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting). Commentators have also rejected the subjective prong of the privacy test. See, e.g., Amsterdam, supra note 3, at 384 (“An actual, subjective expectation of privacy obviously has no place in a statement of what Katz held or in a theory of what the fourth amendment protects.”); Gutterman, supra note 234, at 665 (claiming that by using a subjective component, “Justice Harlan failed to acknowledge that there are privacy rights to which the people are entitled”); Katz, supra note 234, at 560 & nn.50-52 (discussing Harlan’s view and cataloguing authorities). Even if a subjective analysis were appropriate, the Court’s assessment of how persons view the impact of various police investigative techniques on their privacy “may be well off the mark.” Christopher Slobogin & Joseph E. Schumacher, Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at “Understandings Recognized and Permitted by Society,” 42 DUKE L.J. 727, 732 (1993).

250. See, e.g., Whren v. United States, 116 S. Ct. 1769, 1774 (1996) (rejecting a Fourth Amendment challenge based on officers’ actual motivations since “[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis”); Brower v. County of Inyo, 489 U.S. 593, 598 (1989) (applying an objective standard to determine whether erection of a roadblock by police constituted a seizure); Michigan v. Chesternut, 486 U.S. 567, 575 n.7 (1988) (stating that the subjective intent of an officer is irrelevant for seizure analysis unless such intent has been communicated to the suspect); Maryland v. Macon, 472 U.S. 463, 470-71 (1985) (“Whether a Fourth Amendment violation has occurred . . . [does] not [turn] on the officer’s actual state of mind at the time the challenged action was taken.”); United States v. Mendenhall, 446 U.S. 544, 554 n.6 (1980) (Stewart, J.) (stating that the subjective intent of a government agent to detain a suspect is irrelevant unless it is conveyed to that suspect); Scott v. United States, 436 U.S. 128, 138 (1978) (“[T]he fact that [an] officer does not have the state of mind which is hypothesized by the reasons which provide the legal justification for the officer’s action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.”).
movement, the nature of the search or seizure, or other circumstances surrounding an encounter. The most important and fundamental flaw in the Court’s reliance on privacy analysis is that the inquiry has abandoned the structure of the Fourth Amendment and is based on confusing motivation for exercising the right to be secure with the right itself. As discussed below, the interest of individuals protected by the Fourth Amendment’s right to be secure cannot be adequately described by reliance on a privacy analysis.

III. THE RIGHT TO BE SECURE

A.

During the reigns of the property and privacy interest theories, individual justices and majority opinions have, from time to time, indicated that the protections of the amendment are broader than either of those interests. During property’s reign, words such as “privacy” were often used, typically without elaboration, to describe

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251. Cf. United States v. Place, 462 U.S. 696, 709 (1983) (“The length of the detention of [the airline passenger’s] luggage alone precludes the conclusion that the seizure was reasonable in the absence of probable cause.”).

252. The Court has also relied on an analysis of the individual’s subjective intent to assess the reasonableness of an intrusion. See Clancy, supra note 11, at 589-92. Such an analysis is misplaced, because by examining the subjective intrusion, the Court becomes an amateur psychiatrist, seeking to divine the subjective impressions of accosted persons. This mode of analysis is unpersuasive, serving only to bootstrap policy results that the majority seeks to enshrine. . . . [D]ifferent people react differently to the same situations, and to base the permissibility of a search or seizure upon some notion of what the majority of individuals may feel as a result of the intrusion is footless.

Id. at 590-91.

253. The Court has also linked the Fourth Amendment with other constitutional provisions in broadly expressing the scope of the amendment’s protections. See, e.g., Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 63 (1989) (holding that there is no hierarchy of property to be seized under the Fourth Amendment, with the exception for materials covered by the First Amendment); United States v. United States Dist. Court, 407 U.S. 297, 313-14 (1972) (finding that the First and Fourth Amendments converge in national security cases and recognizing that the historical “struggle for freedom of speech and press in England was bound up with the issue of the scope of search and seizure power”) (quoting Marcus v. Search Warrants, 367 U.S. 717, 724 (1961)); Stanford v. Texas, 379 U.S. 476, 485 (1965) (recognizing that the First, Fourth, and Fifth Amendments are closely related and safeguard privacy, protection against self-incrimination, and the “conscience of human dignity and freedom of expression”) (quoting Frank v. Maryland, 359 U.S. 360, 376 (1959) (Douglas, J., dissenting), overruled in part by Camara v. Municipal Court, 387 U.S. 523 (1967)); Bram v. United States, 168 U.S. 532, 543-44 (1897) (stating that the Fourth and Fifth Amendments together are designed to perpetuate “principles of humanity and civil liberty”).
the scope of the individual’s protected interest.254 In the post-
*Katz* era, privacy has been at times coupled with other words, such as security255 or liberty,256 in defining the interest protected. Indeed, even after *Katz*, occasional references to property as a ground for the amendment’s protections have been made—even in majority opinions.257 Still, the home remains a central protected place, even when the owner is not present.258 It has retained that special status despite the contentions that people, not places, have been the identified protected entities and that privacy, not property, is the protected interest.259 The home has been described repeatedly as a sanctuary260 and as receiving “special protection.”261 Indeed, the physical entry into the home has been described as the “chief evil

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254. For a discussion of the scope of protection offered by the term “privacy” under the Fourth Amendment, see supra note 126 and accompanying text.


256. See, e.g., *United States v. Ortiz*, 422 U.S. 891, 895 (1975) (stating that a “central concern of the Fourth Amendment is to protect liberty and privacy from . . . interference by government officials”).

257. See *United States v. Padilla*, 508 U.S. 77, 82 (1993) (“Expectations of privacy and property interests govern the analysis of Fourth Amendment search and seizure claims.”); see also *Minnesota v. Dickerson*, 508 U.S. 366, 380 (1993) (Scalia, J., concurring) (recognizing that the purpose of the amendment “is to preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted”).

258. See *Alderman v. United States*, 394 U.S. 165, 176 (1969) (holding that the owner of the premises is entitled to have illegally recorded conversations suppressed, even if not present when they occurred).

259. See, e.g., *Segura v. United States*, 468 U.S. 796, 820 (1984) (Stevens, J., dissenting) (asserting that expectations of privacy are greatest in the home); *Gooding v. United States*, 416 U.S. 430, 462-63 (1974) (Marshall, J., dissenting) (stating that there is no greater expectation of privacy than the expectation of being left alone at home at night and that “the intrusion upon privacy engendered by a search of a residence at night is of an order of magnitude greater than that produced by an ordinary search”); *Alderman*, 394 U.S. at 180 (arguing that *Katz* “was [not] intended to withdraw any of the protection which the Amendment extends to the home”).


against which the wording of the Fourth Amendment is directed.”\textsuperscript{262} In referring to protected personhood interests, it has been sometimes stated that the Fourth Amendment protects the right to be left alone,\textsuperscript{263} individual freedom,\textsuperscript{264} personal dignity,\textsuperscript{265} bodily integrity,\textsuperscript{266} the “inviolability of the person,”\textsuperscript{267} the “sanctity of the person,”\textsuperscript{268} and the right of free movement.\textsuperscript{269} As to effects, the Court has clearly distinguished one other protected interest in addition to...

\begin{itemize}
  \item[262.] United States v. United States Dist. Court, 407 U.S. 297, 313 (1972); accord Welsh, 466 U.S. at 748 (1984); Payton, 445 U.S. at 585.
  \item[263.] \textit{See}, e.g., Wilson v. Schnettler, 365 U.S. 381, 394 (1961) (Douglas, J., dissenting) (“Under the Fourth Amendment, the judiciary has a special duty of protecting the right of the people to be let alone . . . .”).
  \item[264.] \textit{See}, e.g., \textit{Ker}, 374 U.S. at 52 (“Implicit in the Fourth Amendment’s protection from unreasonable searches and seizures is its recognition of individual freedom.”).
  \item[266.] \textit{See Skinner}, 489 U.S. at 617; \textit{Winston}, 470 U.S. at 759; \textit{Schmerber}, 384 U.S. at 772; cf. \textit{Tennessee v. Garner}, 471 U.S. 1, 9 (1985) (describing the person as having a “fundamental interest” in life and holding that the shooting by an officer of an escaping, but nondangerous, minor felon is prohibited as unreasonable); \textit{Rochin v. California}, 342 U.S. 165, 172 (1952) (concluding that the police officers’ actions “shock[ed] the conscience” when they illegally entered the accused’s home, struggled with the accused to extract capsules containing morphine from his mouth, and then had a doctor administer an emetic solution to induce vomiting to recover the capsules).
  \item[268.] \textit{Sibron v. New York}, 392 U.S. 40, 65-66 (1968) (finding that the sanctity of the person was violated when an officer thrust his hand into the defendant’s pocket before conducting an initial pat-down).
  \item[269.] \textit{See}, e.g., \textit{Maryland v. Wilson}, 117 S. Ct. 882, 885 (1997) (discussing driver’s and passenger’s liberty interests when a police officer orders them out of a lawfully stopped car); \textit{Skinner}, 489 U.S. at 616 (noting that the detention of an individual for drug or alcohol testing is a meaningful interference with an individual’s freedom of movement); \textit{Michigan v. Chesternut}, 486 U.S. 567, 573 (1988) (arguing that an objective standard is used when ascertaining what prompts an individual to conclude he is not free to leave); \textit{Hayes v. Florida}, 470 U.S. 811, 815-16 (1985) (noting that police procedures inherently intrude on a suspect’s freedom of movement); \textit{United States v. Martinez-Fuerte}, 428 U.S. 543, 557-58 (1976) (holding that a routine traffic stop may intrude on a motorist’s right to uninterrupted free passage); \textit{see also Cruzan v. Director, Mo. Dep’t of Health}, 497 U.S. 261, 287 (1990) (O’Connor, J., concurring) (arguing that the Fourth Amendment echoes the same concern as the Due Process Clause—namely, that notions of freedom are “inextricably entwined with our idea of physical freedom and self-determination”); \textit{Barrett, supra} note 8, at 46 (summarizing that, as to seizures of a person, the Court has acknowledged that “security” means “protection of personal liberty”). \textit{But see Michigan Dep’t of State Police v. Sitz}, 496 U.S. 444, 473 (1990) (Stevens, J., dissenting) (criticizing the majority’s failure to give any weight to a person’s interest in freedom from unannounced investigatory seizures in upholding drunk-driving checkpoints).
\end{itemize}
privacy—that is, the individual’s possessory interest in an object. 270 
This has occurred in the context of distinguishing between searches 
and seizures: although a search implicates privacy concerns, a sei-
zure implicates the person’s interest in retaining possession of his or 
her property. 271 

Taken as a whole, however, although occasional references to 
other candidates have illuminated the limitations of using privacy to 
define the individual’s protected interest, only privacy has been de-
developed as a distinct Fourth Amendment interest. Moreover, even 
as to possession in the context of seizures of effects, and liberty in 
the context of seizures of persons, there has been no extended dis-
cussion of those interests in the broader scheme of the Fourth 
Amendment. On the contrary, since Katz, the Court has repeatedly 

270. See Horton v. California, 496 U.S. 128, 134 (1990) (holding that a sei-
zure of an article in plain view does not involve an invasion of privacy but does 
invade the owner’s possessory interest).

271. See id. at 132; Segura v. United States, 468 U.S. 796, 807 (1984) (agree-
ing that the warrantless seizure of a footlocker interfered with the owner’s pos-
sessory interest but not his privacy expectations); United States v. Jacobsen,
466 U.S. 109, 113 (1984) (distinguishing a search from a seizure in that “[a] ‘search’ occurs when an expectation of privacy that society is prepared to con-
sider reasonable is infringed,” whereas “[a] ‘seizure’ of property occurs when 
there is some meaningful interference with an individual’s possessory interests 
in that property”); United States v. Place, 462 U.S. 696, 705-07 (1983) (arguing 
that intrusion on possessory interests is not significant when the police briefly 
detain luggage for limited investigative purposes); Texas v. Brown, 460 U.S.
730, 748 (1983) (Stevens, J., dissenting) (reiterating that possessory and private 
interests “are not always present to the same extent”).

272. This singular tying of individual interests to privacy has been repeat-
edly stated when the Court examines standing to challenge a violation of the 
Fourth Amendment, with the Court asserting that a person’s Fourth Amend-
ment rights are violated “only when the challenged conduct invaded his legiti-
mate expectation of privacy.” United States v. Payner, 447 U.S. 727, 731
person’s Fourth Amendment rights are violated when the individual’s subjec-
tive expectations of privacy are ones that society accepts as objectively reason-
able); see also Skinner, 489 U.S. at 617 (stating that a search occurs when the 
government intrudes on a reasonable expectation of privacy).


274. See, e.g., Dalia v. United States, 441 U.S. 238, 259-60 (1979) (Brennan, 
J., dissenting) (recognizing an interest against physical intrusions).
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On another occasion Brennan wrote that, although one aspect of privacy is the right to keep certain information beyond the scrutiny of public officials, the Fourth Amendment does “not protect only information. It also protects, in its own sometimes-forgotten words, ‘[t]he right of the people to be secure in their person, houses, papers, and effects.’” Accordingly, he asserted, the Court’s reduction of the right to privacy to the right to secrecy may be in part an “unintended consequence” of Katz in 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. In recognizing the importance of secrecy, however, Katz did not extinguish the relevance of security.” He then stated: “[T]he Fourth Amendment protects security as well as secrecy.”

On other rare occasions, the word “security” seemed to be studiously applied. For example, in Terry v. Ohio, which involved the stop and frisk of a person, the Court acknowledged that it had recently held that the amendment protected a person’s right to privacy. However, the Court instead emphasized the words chosen by the Framers, asserting that the “inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs.” Indeed, the Court said: “No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.” The Court asserted that the issue in Terry was whether the person’s “right to personal security was violated” by the on-the-street encounter. In the balance of the opinion, the Court focused on the word security as defining the person’s protected interest.

277. Id. at 776 n.4 (Brennan, J., dissenting).
278. Id. at 778 (Brennan, J., dissenting).
280. Id. at 9.
281. Id. at 8-9.
282. Id. at 9 (quoting Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891)); see also id. at 17 (referring to a stop and frisk as a “serious intrusion upon the sanctity of the person”).
283. Id. at 9.
284. Id. at 11-12, 17 n.14, 19, 23-25.
Soldal v. Cook County provides perhaps the strongest, or at least the latest, expression, that individuals have protected interests beyond privacy. Soldal involved the physical removal of a trailer home from a mobile home park by disconnecting it from the sewer and water connections and towing it out of the park. In rejecting the claim that the Fourth Amendment was inapplicable, the Court stated that a seizure of property occurs when there has been some meaningful interference with an individual’s possessory interest in the property. The Court then rejected the intermediate appellate court’s position that there was a seizure of the home only in a technical sense and that, because neither privacy nor liberty were implicated, the Fourth Amendment was inapplicable. Justice White wrote for a unanimous Supreme Court, proclaiming that “[t]he Amendment protects the people from unreasonable searches and seizures of ‘their persons, houses, papers, and effects.’” This language, he asserted, “cuts against” the intermediate appellate court’s ruling and “our cases unmistakably hold that the Amendment protects property as well as privacy.” White explained that the amendment protected “two types of expectations” in property: “one involving ‘searches,’” the other involving “seizures”; a search occurred when a reasonable expectation of privacy was infringed, and a seizure occurred when there was some meaningful interference with an individual’s possessory interest. The Soldal Court also identified one other interest protected by the amendment—namely, a person’s “liberty interest in proceeding with his itinerary” unimpeded by the government.

White further opined that, while the “principal’ object” of the amendment was the protection of privacy, the shift in the emphasis in Katz and Hayden to privacy had not “snuffed out the previously recognized protection of property under the Fourth Amendment.” White repeated Katz’s assertion that the Fourth Amendment did not confer a “general constitutional right to pri-
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privacy” and that, although it protected individual privacy against certain kinds of governmental intrusion, its protections went further, and often had nothing to do with privacy. 295 He then concluded that what is protected and “[w]hat matters is the intrusion on the people’s security from governmental interference.” 296

Soldal may presage a new era of a broader understanding of the individual interests protected by the Fourth Amendment. It may, on the other hand, have been simply a swan song for Justice White, who was nearing the end of his career and had written a great deal on the Fourth Amendment while on the Court. 297 At the very least, Soldal does clearly identify three distinct interests protected by the amendment: property “as such”; 298 privacy, which is its “principal’ object”; 299 and liberty, 300 all of which are subsumed into the broader inquiry of whether there has been an intrusion into a person’s “security from governmental interference.” 301

B.

Common themes and values underlay the concept of security throughout history. The term “secure” in a non-Fourth Amendment context has been associated with being safe or free from danger. The principal dictionary definitions of the word have changed little in the past two hundred years. Samuel Johnson’s dictionary offered several definitions of the word, including: “free from fear”; “sure, not doubting”; and “free from danger, that is, safe.” 302 Similarly, he defined “to secure” to include the following: “to make certain”; “to put out of hazard”; “to protect”; “to make safe”; and “to insure.” 303 The Oxford English Dictionary states that the word “secure” is derived from Latin and in late Latin meant “safe, free from danger.” 304 That

295. Id. (citing Katz v. United States, 389 U.S. 347, 350 (1967)).
296. Id. at 69.
298. Soldal, 506 U.S. at 62 n.7.
299. Id. at 64 (quoting Warden v. Hayden, 387 U.S. 294, 304 (1967)).
300. See id. at 64 n.8.
301. Id. at 69. Justice Black, a staunch critic of the Court’s adoption of “privacy” to define the scope of the amendment’s protections made similar observations at the beginning of the privacy era: “I think it belittles [the Fourth] Amendment to talk about it as though it protects nothing but ‘privacy.’ . . . The average man would very likely not have his feelings soothed any more by having his property seized privately and by stealth. He simply wants his property left alone.” Griswold v. Connecticut, 381 U.S. 479, 509 (1965) (Black, J., dissenting).
303. Id.
dictionary, with abundant references to literature and other written works dating to the colonial era, defines “secure,” inter alia, as meaning—as to times, places, and actions—“being free from fear or anxiety.”

Similarly, the word connotes having or affording ground for confidence and being safe. As a verb, the word is used to convey the meaning “to make safe, to guard, or to protect.”

To illustrate, the Oxford Dictionary offered this usage from 1754: “A very safe road, secured from all winds.” From 1756, it employed this usage: “Is the Watch doubled? Are the Gates secur’d [sic] Against Surprize [sic]? And from 1784, it used this reference: “The hedge-hog, so well secured against all assaults by his prickly hide.”

Indeed, Blackstone defined property as “that sole and despotic dominion which one . . . claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”

The word “secure” does not lose its common meaning when used by the Fourth Amendment. However, for the Framers, it took on an additional, contextual meaning when used by the amendment: the security was (1) from unreasonable governmental intrusion and (2) the right applied to specific objects—persons, houses, papers, and effects.

1.

As to the first relation, security from unreasonable governmental intrusion, the Framers were referring to the ability to exclude the government. The court in Entick inextricably linked security with the ability to exclude. After stating that the great end for which men had entered into society was to “secure” their property, Camden asserted: “No man can set his foot upon my ground without my licence [sic].”

In 1766, in a speech before Parliament, William Pitt similarly emphasized the right to exclude:

The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; but the King

305. Id.
306. See id.
307. See id. at 852.
308. Id. (citation omitted).
309. Id.
310. Id.
311. Yeager, supra note 108, at 270-71 (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES *2).
313. Id.
of England may not enter; all his force dares not cross the
threshold of the ruined tenement.314

Across the Atlantic, the use of the word “secure” by the Ameri-
can colonists, expressing dismay with British search and seizure
practices, related to the arbitrary exercise of power to invade their
property; security, for them, was the ability to prevent such inva-
sions. In 1762, in his argument against the writs of assistance,
which allowed customs officials in Massachusetts to search any-
where they desired,315 James Otis argued that the writ “is against
the fundamental principles of law, the privilege of house. A man,
who is quiet, is as secure in his house as a prince in his castle. . . .”316 Similarly, a contemporaneous newspaper article recounting
the evils of the writs asserted that, if the writs were to be granted,
“every householder [sic] in this province, will necessarily become
less secure than he was before this writ” because it would permit
any officer to forcibly enter into a dwelling house and rifle every
part of it.317 Appearing in the Philadelphia press in 1768, and sub-
sequently made widely available, was one of John Dickinson’s
“Farmer’s Letters,” which criticized the writs of assistance as “danger-
ous to freedom, and expressly contrary to the common law, which
ever regarded a man’s house as his castle, or a place of perfect secu-

314. NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH
AMENDMENT TO THE UNITED STATES CONSTITUTION 49-50 (1937) (citation omit-
ted). Pitt’s speech has been repeatedly cited by the Court. See, e.g., Payton v.
315. See, e.g., LANDYNISKI, supra note 9, at 33-36 (discussing the use of writs
of assistance).
316. Id. at 34 (quoting JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND
ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MAS-
SACHUSETTS BAY BETWEEN 1761 AND 1772, at 471 (1865)). Another version of
Otis’ argument has him saying that a man who is quiet in his house “is as well
guarded as a prince in his castle.” TAYLOR, supra note 16, at 37; M.H. SMITH,
The Writs of Assistance Case 344 (1978). The discrepancy results from the
two sources of the speech; the first is from Adams’ original notes and the second
is from Adams’ abstract made 50 years after the argument. See QUINCY, supra,
317. QUINCY, supra note 316, at 489 (quoting BOSTON GAZETTE, Jan. 4, 1762).
318. SMITH, supra note 316, at 493.
319. QUINCY, supra note 316, at 466.
320. Id. at 467.
aged and plundered, by Wretches, whom no prudent Man would venture to employ even as Menial Servants; whenever they are pleased to say they suspect there are in the House, Wares, [etc.] for which the Duties have not been paid. Flagrant instances of the wanton exercise of this Power, have frequently happened in this and other seaport Towns. By this we are cut off from that domestic security which renders the Lives of the most unhappy in some measure agreeable. These Officers may under the color of Law and the cloak of a general warrant, break through the sacred Rights of the Domicil, ransack Mens [sic] Houses, destroy their Securities, carry off their Property, and with little Danger to themselves commit the most horrid Murders.321

Thus, there was clear historical precedent for use of the term “secure.”322 The word was not an innovation of the Framers and it was not used by accident. The Framers valued security and intimately associated it with the ability to exclude the government.

After eliminating the gloss of the Supreme Court’s property and privacy analyses, the underlying common theme that the amendment protects the right to exclude has appeared often in the Court’s opinions. Although the physical trespass theory of Olmstead and its progeny was too narrow because it only protected against physical invasions, that protection was the ability to exclude unreasonable intrusions.323 As the Court explained:

A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty—worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man’s castle.324

322. The Fourth Amendment uses the word “secure” to define the right protected. U.S. CONST. amend IV. That word was taken from the Massachusetts Constitution of 1780, which served as the model for the Fourth Amendment. See SOURCES OF OUR LIBERTIES 376 (Richard L. Perry & John C. Cooper eds., 1959). The New Hampshire Constitution of 1784 contained identical language. Id. at 384. However, the other Colonial state constitutions used different language to describe the right protected. Virginia, Delaware, and Maryland spoke in terms of “grievous and oppressive” general warrants. Id. at 312, 339, 348. North Carolina described general warrants as “dangerous to liberty,” Id. at 355. Pennsylvania and Vermont said the people had a right to be “free from search and seizure.” Id. at 330, 366.
323. For a discussion of Olmstead, see supra Part I.C.
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The post-<i>Katz</i> era Court has confused reasons for exercising the right protected with the right itself. A purpose of exercising one’s Fourth Amendment rights might be the desire for privacy, but the individual’s motivation is not the right protected.325 The right to be secure permits one to do as one wishes for whatever reasons that motivate the person.326 The Fourth Amendment is an instrument—a gatekeeper that keeps out the government. The gatekeeper does not ask why one desires to exclude the government; it simply follows orders.327 As a gatekeeper, the amendment permits other rights to flourish. However, the purpose of exercising one’s Fourth Amendment rights neither adds to nor detracts from the scope of the protection afforded by the amendment.328

325. Indeed, one concept of privacy is simply the power “‘to control access by others to a private object (to a private place, to information, or to an activity). [It] is the ability to maintain the state of being private or to relax it as, and to the degree that, and to whom one chooses.” STANLEY I. BENN, A THEORY OF FREEDOM 266 (1988). quoted in Benner, supra note 234, at 855; see also Protecting Privacy, supra note 234, at 329 (“The essence of privacy is twofold: the ability to keep personal information unknown to others and to keep one’s self separate from interaction with others.”). Is this not to say that people have the power to exclude? If privacy is only the power to exclude, then there is no reason to refer to the concept, which serves only to confuse what the individual’s right is, particularly given the many uses that “privacy” has. Cf. Yeager, supra note 108, at 284 (“Whatever privacy means, it surely must include the right to exclude others.”).

326. Cf. Bowers v. Hardwick, 478 U.S. 186, 206-08 (1986) (Blackmun, J., dissenting) (arguing that the purpose for the Fourth Amendment protecting the home “is more than merely a means of protecting specific activities that often take place there”); Hayden, 387 U.S. at 301 (“On its face, the [Fourth Amendment] assures the right of the people to be secure in their persons, houses, papers, and effects . . . without regard to the use to which any of these things are applied.”) (quoting U.S. CONST. amend. IV); Lloyd L. Weinreb, Generalities of the Fourth Amendment, 42 U. CHI. L. REV. 47, 85 (1974) (“It would misconceive the great purpose of the amendment to see it primarily as the servant of other social goods, however large and generally valuable.”).

327. Property draws a circle around the activities of each private individual or organization. Within that circle, the owner has a greater degree of freedom than without. Outside, he must justify or explain his actions, and show his authority. Within, he is master, and the state must explain and justify any interference.


328. Professor Tomkovicz has argued that privacy is the person’s protected interest and that “the main reason for constitutionalizing informational privacy is its instrumental role as a medium within which other rights and interests can survive, even flourish.” Tomkovicz, supra note 234, at 667. Tomkovicz is on the right track to this point. However, he then creates an elaborate construct for the analysis of Fourth Amendment claims, depending on the individual’s motivation in seeking secrecy:

The essence of the instant proposals . . . is that the instrumental purposes for according secrecy-type privacy against the government must be accorded significant roles in fourth amendment boundary cases. Of course, that requires identification of the various rights whose protection is the objective of a constitutional privacy guarantee. The enti-
The privacy era cases have value because they afforded protection to intangible interests against non-physical intrusions. But it was this concern with extending protection to intangible interests and guarding against non-physical invasions that served to distort Fourth Amendment doctrine. Rather than recognizing that intangible objects must be protected against non-physical invasions, the Court went wildly astray by rejecting the Fourth Amendment's structure and superimposing a privacy analysis. It does not, however, require reworking the entire Fourth Amendment to reject Olmstead's limitations on the protections afforded as being inconsistent with the Framers' intent.

Id. at 702. He lists numerous examples, including the First Amendment guarantees, privacy rights in the Ninth and Fourteenth Amendments, property rights under the Fourth and Fifth Amendments, and common law and statutory benefits. See id. at 702-03. He then concludes:

In sum, questions of fourth amendment coverage should be decided by reference to the instrumental character of fourth amendment privacy. In assessing legitimate needs for privacy to determine if the fourth amendment operates at all, rights and freedoms that thrive on privacy but starve without it must be considered. If protection against informational quests by the government is important to the free enjoyment of such rights, then fourth amendment regulatory safeguards ought to be triggered.

Id. at 703-04. If Tomkovicz were correct, then the opposite must also be true: If one were motivated by a desire to cover up a crime or some other “base” intent in seeking to maintain secrecy, then the person would have less or no Fourth Amendment protection. Between the base and noble are such motivations as commercial and business secrets, which presumably would justify some intermediate level of protection. Nothing in the historical record supports such a hierarchical approach; indeed, the persons seeking protection from the writs of assistance were smugglers. It is also not obvious that such an approach of exalting some desires for privacy while deprecating others would improve on the Court’s present analytical structure.

329. For a discussion of the privacy era cases, see supra notes 157-94 and accompanying text.

330. Cf. California v. Hodari D., 499 U.S. 621, 627 n.3 (1991) (”What Katz stands for is the proposition that items which could not be subject to seizure at common law (e.g., telephone conversations) can be seized under the Fourth Amendment.”). As one commentator pointed out:

[It] is obvious that Camden and the Fourth Amendment’s framers were vitally concerned with informational privacy. . . . [T]hink of Entick’s reference to private papers as their owner’s “dearest property” and the Fourth Amendment’s inventory of items essential to sustaining individual identity. In Katz, Stewart simply acknowledged a brute fact of modern life—that changes in technology have made it possible for the government routinely to interfere with informational control in settings where facts about a person’s life are not embedded in a tangible object.”

Heffernan, supra note 285, at 644.
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The Court has acknowledged, at least in part, the failings of privacy analysis. Thus, for example, in Soldal, the Court identified three interests protected by the amendment: privacy, possession of property, and freedom of movement. For each of these interests, the essential attribute of the right to be secure is the ability of the individual to exclude the government from intruding. Thus, as to a search, one may exercise the right to prevent the intrusion; as to seizure of property, the individual may exercise the right to remain in possession; and, as to seizure of a person, one may exercise the right to continue with one’s itinerary. In each case, there is an exercise of the ability to exclude the government from interfering with one’s person, house, papers, or effects. This ability to exclude is so essential to the exercise of the right to be secure that it is proper to say that it is equivalent to the right—the right to be secure is the right to exclude. Without the ability to exclude, a person has no security. With the ability to exclude, a person has all that the Fourth Amendment promises: no non-justified intrusions by the government. In other words, the Fourth Amendment gives the right to say no to the government’s attempts to search and seize. Privacy, human dignity, a dislike for the government, and other states of mind may be motivations for exercising the right to exclude, but they are not synonymous with that right or with aspects of the right. The right to exclude is the sum and essence of the right protected. Of course, the right is not absolute. It extends only to protect against unreasonable searches and seizures.

2.

As to the second relation, the concept of security cannot be divorced from the object protected. The meaning of security will vary somewhat in relation to the protected interest specified by the amendment: persons, houses, papers, or effects. However, the core concept remains the right to exclude. Privacy analysis purported to abandon reliance on the principle of constitutionally pro-

331. For a discussion of these acknowledged failings, see supra notes 246-52 and accompanying text.
333. See U.S. CONST. amend. IV.
334. Cf. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 672-73 (1995) (O’Connor, J., dissenting) (stressing as important in the analysis of permissibility of the collection of urine to test for drugs that it is a search of a person, and thus one of the four categories of searches the Fourth Amendment lists by name); Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (stating that although the Fourth Amendment protects people, not places, “[g]enerally . . . the answer to that question requires reference to a ‘place’”); Cloud, supra note 30, at 580 (reiterating that Boyd defined the “realm of personal autonomy” protected by the amendment “largely in terms of property rights,” and arguing that that approach is “consistent with the text of the Amendment, which specifically links some aspects of liberty and privacy to property, and a person’s relationship to it”).
tected areas, with *Katz* asserting that the amendment protects people, not places.\(^{335}\) Such a claim simply ignores the language and structure of the amendment: People have the right to be secure only as to their persons, houses, papers, and effects.\(^ {336}\)

When speaking of a seizure of the person, even in *Katz* the Court acknowledged that the amendment protected interests other than privacy:

> The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth... And a person can be just as much, if not more, irritated, annoyed and injured by an unceremonious public arrest by a policeman as he is by a seizure in the privacy of his office or home.\(^ {337}\)

The person on the street, patently, has no property or privacy interests implicated by an unreasonable seizure. Something else must underlie the Fourth Amendment right to be secure in that context.\(^ {338}\) This is why the Court in *Terry v. Ohio* placed such emphasis on the “inestimable right of personal security,” which “belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs.”\(^ {339}\) Indeed, the Court said that “‘[n]o right is held more sacred, or is more carefully guarded... than the right of every individual to the possession and control of his own person.’”\(^ {340}\) The Court has variously described that underlying personhood interest, using such terms as dignity,

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335. For a discussion of the effect of privacy analysis on Fourth Amendment protection, see *supra* notes 152-94 and accompanying text. See also *Katz*, 389 U.S. at 359.

336. The right to exclude is not coincident with Fourth Amendment protections; the object of the intrusion must also be protected. For example, although a person may have a common law right to exclude those who trespass on her open field, she has no protected Fourth Amendment right against governmental intrusions. See *Oliver v. United States*, 466 U.S. 170, 183 & n.15 (contrasting the common law right to exclude with a person’s Fourth Amendment privacy interest and asserting that “trespass law extends to instances where the exercise of the right to exclude vindicates no legitimate privacy interest”).


339. 392 U.S. 1, 8-9 (1968).

340. *Id.* at 9 (quoting *Union Pac. Ry. v. Botsford*, 141 U.S. 250, 251 (1891)).
freedom of movement, or the right to be left alone.\textsuperscript{341} However, though such concerns may motivate the individual’s exercise of the Fourth Amendment right, that right does no more than prohibit the government from intruding upon the person without sufficient justification. Thus, the core concept, the right to exclude, remains—the ability of the individual to refuse to accede to the government intrusion.

As to searches of the person, the essential right is the right to exclude government agents from intruding into her body. Speaking in terms of a “dignity” interest or other interest confuses the issue. For example, in \textit{Skinner v. Railway Executives’ Ass’n},\textsuperscript{342} Justice Marshall observed: “Compelling a person to produce a urine sample on demand . . . intrudes deeply on privacy and bodily integrity. Urination is among the most private of activities. It is generally forbidden in public, eschewed as a matter of conversation, and performed in places designed to preserve this tradition of personal seclusion.”\textsuperscript{343} Marshall went on to observe that the violation of one’s privacy while performing an excretory function has been viewed as “extremely distressing, as detracting from one’s dignity and self esteem.”\textsuperscript{344} Such concerns, however, may motivate a person to insist on his rights; but those motivations should not be confused with the right. Otherwise, by regulation and other means, one can whittle away at dignity interests and change perceptions. Indeed, to substitute the right to exclude with an analysis of whether a person has a protected privacy interest leads to cases such as \textit{Vernonia School District 47J v. Acton}.\textsuperscript{345} In \textit{Vernonia}, the Court readily deprecated the privacy interests of school children and permitted suspicionless urinalysis of student athletes by maintaining that student athletes had a lesser expectation of privacy due to such things as the configuration of locker rooms.\textsuperscript{346} People have different needs for privacy. Those subjective and relativistic needs do not serve to define or defeat the right to be secure. As another example, in \textit{Winston v. Lee},\textsuperscript{347} which concerned whether the government could compel a person to undergo the surgical removal of a bullet, the Court felt compelled to emphasize repeatedly that the “privacy” interest of the person in such circumstances encompassed dignity and bodily integrity.\textsuperscript{348} The Court suggested that it was the individual’s \textit{right} to exclude the government from intruding into his body that was impli-

\textsuperscript{341} For a discussion of how the Court has employed the underlying personhood interest, see \textit{supra} notes 263-69 and accompanying text.
\textsuperscript{342} 489 U.S. 602 (1989).
\textsuperscript{343} Id. at 645-46 (Marshall, J., dissenting).
\textsuperscript{344} Id. at 646 (quoting Charles Fried, \textit{Privacy}, 77 YALE L.J. 475, 487 (1968)).
\textsuperscript{345} 515 U.S. 646 (1995).
\textsuperscript{346} Id. at 657.
\textsuperscript{347} 470 U.S. 753 (1985).
\textsuperscript{348} Id. at 753, 758-63.
icated; he may have been motivated to exercise that right out of a concern for bodily integrity, privacy, or dignity—or simply a desire to thwart the government’s efforts to convict him—but none of those motivations limited or defined the right given to him under the Fourth Amendment.349

Three types of property—houses, papers, and effects—are afforded Fourth Amendment protection. These types of property may be treated alike for present purposes. The right to exclude has long been considered an essential attribute of the ownership of private property. 350 This right has been most consistently recognized in the context of physical invasions of the home. 351 The right to be secure

349. Id. As to one’s person, the right to exclude has been long recognized as protected in tort and criminal law. See, e.g., Rollin M. Perkins & Ronald N. Boyce, Criminal Law 152 & n.14 (3d ed. 1982) (defining battery as any unlawful touching of another); William L. Prosser, Privacy, 48 CAL. L. REV. 383, 389-92 (1960) (cataloguing actionable physical and non-physical intrusions of a person’s seclusion).

350. See, e.g., Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) (stating that the right to exclude is “one of the most essential sticks in the bundle of rights that are commonly characterized as property”) (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)); Yee v. Escondido, 503 U.S. 519, 528 (1992) (same); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982) (“The power to exclude has traditionally been considered one of the most treasured strands in an owner’s bundle of property rights.”); Kaiser, 444 U.S. at 179-80 (stating that the right to exclude is “universally held to be a fundamental element of the property right”).

351. See, e.g., Alderman v. United States, 394 U.S. 165, 176-78 (1969) (stressing the Court’s consistent protection of the home against physical invasions). Similarly, permanent physical occupations of property invariably have been found to constitute a taking under the Takings Clause. See, e.g., Loretto, 458 U.S. at 427. However, as with regulatory takings, which the Court has had a great deal of difficulty resolving, see, e.g., Yee, 503 U.S. at 528-33 (distinguishing between physical and regulatory takings), the Court has had more difficulty analyzing the significance of non-physical invasions under the Fourth Amendment. Compare Dow Chem. Co. v. United States, 476 U.S. 227, 237 (1986) (distinguishing between actual physical entry of commercial property and aerial observations), with Alderman, 394 U.S. at 177-80 (rejecting any distinction between physical and electronic invasions of the home).

There are some other interesting parallels in the treatment of property interests in the twentieth century under the Fourth and Fifth Amendments. See Heffernan, supra note 285, at 652 (stating that the Olmstead-Katz-Soldal line of cases, viewed in light of a larger trend in American constitutional law, reveals “that Soldal is part of a wide range of cases in which property interests have gained new-found respect in the Court”). For example, in the early part of the century, property interests were strongly protected. Substantive due process was in its heyday; there were substantive limitations on the government’s ability to search or seize; and property analysis was employed to measure whether an individual had a protected Fourth Amendment interest. By the 1960s, substantive due process was discredited as protecting property rights, property rights protection was generally at a low ebb, see, e.g., Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 138 (1978) (holding that landowners could not establish a “taking” merely because they had been denied the right to use superadjacent airspace), and Katz had substituted a privacy analysis for
in that context has always been “the right to shut the door on officials of the state unless their entry is under proper authority of law.”\textsuperscript{352} This concept was the essence and purpose of \textit{Olmstead’s} trespass theory. \textit{Katz} properly extended the right to exclude non-physical invasions of intangible objects. However, with its broad substitution of privacy for property, \textit{Katz} undermined the theoretical basis for protecting the house, as such, from invasions. Yet, despite its lack of theoretical justification under \textit{Katz}, the house has remained a core protected place, regardless of the presence of the owner.\textsuperscript{353} Justice Stevens has grasped the reason for this:

The cases are legion holding that a citizen retains a protected possessory interest in his home and the effects within it which may not be infringed without a warrant even though that person is in custody. \ldots Even when a person is in custody after an arrest based on probable cause, he still, of course, owns his house and his right to exclude others—including federal narcotics agents—remains inviolate.\textsuperscript{354}

To illustrate, if one lives in a totally glass house, such that the authorities may observe all of its details from the outside, the owner does not have a reasonable expectation of privacy in the contents of the house or in the conduct of his activities in the house. Does this mean that the authorities may walk into the house any time they desire? Is there some unarticulated residual privacy interest remaining that prevents the police from entering upon whim? If so, what is it? No one appears able to identify it.\textsuperscript{355} Yet, homeowners would surely be offended to learn that the police are therefore permitted to enter. If the protected interest is defined as the right to exclude, living in a glass house presents no problem; although the homeowner in such a house has given up, at least partially, the right to exclude—he has made no attempt to exclude the unaided.

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\textsuperscript{352} Frank v. Maryland, 359 U.S. 360, 365 (1959), overruled in part by \textit{Camara v. Municipal Court}, 387 U.S. 523 (1967); see also Note, \textit{Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment}, 28 U. CHI. L. REV. 664, 667-69 (1960-1961) (discussing the right to shut one’s door to official intrusion and opining that a property-based right “may be the only civil liberty operating on the amendment which has been clearly articulated by the courts”).

\textsuperscript{353} For a discussion of the sanctity of one’s home, see \emph{supra} notes 258-62 and accompanying text.


\textsuperscript{355} For a discussion of this inability to define the privacy interest, see \emph{supra} note 236 and accompanying text.
eye—he has not given up the right to exclude a physical invasion. The reason the police cannot enter is because the owner has the right to exclude; he does not have to justify that right by reference to any other interest. It is his right and he may exercise it when the police come to his door.

Similarly, as to personal effects, Justice Stevens again had it right when he commented on the government’s placement of an electric monitoring device in a can of chemicals, with the consent of the seller, before delivery to the buyer. Justice Stevens believed that the buyer’s rights were infringed when the delivery of the can occurred:

The attachment of the beeper . . . constituted a “seizure.” The owner of property . . . has a right to exclude from it all the world, including the Government, and a concomitant right to use it exclusively for his own purposes. When the Government attaches an electronic monitoring device to that property, it infringes that exclusionary right; in a fundamental sense it has converted the property to its own use. Surely such an invasion is an “interference” with possessory rights; the right to exclude, which attached as soon as the can respondents purchased was delivered, had been infringed. That interference is also “meaningful”; the character of the property is profoundly different when infected with an electronic bug than when it is entirely germ free.

C.

The right to be secure must have a normative basis; otherwise, any definition will be subject to depreciation by interpretation favoring governmental needs. Along with a normative view, there

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356. This assumes that the police observe nothing illegal or anything else that would justify an entry. If, on the other hand, they do, the underlying concern in such circumstances is not with any residual privacy interest but whether a warrant should be required to enter the house and arrest an occupant or seize evidence. That is a separate issue and depends on one’s view of the warrant requirement. For a discussion of the Warrant Clause, see supra note 68.

357. Cf. Rawlings v. Kentucky, 448 U.S. 98, 112 (1980) (Blackmun, J., concurring) (stating that the “right to exclude’ often may be a principal determinant in the establishment of a legitimate Fourth Amendment interest”).


359. The need for establishing normative-based principles to guide Fourth Amendment analysis is admirably demonstrated by Professor Morgan Cloud in his article, Pragmatism, Positivism, and Principles in Fourth Amendment Theory, 41 UCLA L. REV. 199 (1993), supra note 68. After analyzing the pragmatic basis that has come to dominate the Court’s opinions in the latter part of the twentieth century, he concludes: “The Court’s opinions demonstrate that if the fourth amendment is to function as a device that protects individual autonomy by limiting government power, its interpretation must rest upon a theory that
must be an interpretation of the amendment favorable to the promotion of individual rights—the “liberal” values expressed in Boyd. Otherwise, as has been seen, a majority of the Court may use any definition of the individual’s protected interest, be it grounded in property, privacy, or security, in a way inimical to individual rights. A proper understanding of the Framers’ use of the term “secure” meets those requirements. Defining security as having the right to exclude has historical roots and meaning; the Framers lived in a time that equated security with the ability to exclude. It provides an easily identified and applied rule designed to protect an individual’s right to be safe as to his or her person, house, papers, and effects. It removes unworkable references to a person’s motivations in seeking protection. It properly places on the government the burden to justify its actions.

Little interpretative skill needs to be utilized when the government physically invades. Even Olmstead’s literalist approach guarded against such invasions. Similarly, little analysis is re—

emphasizes strong rules, yet is sufficiently flexible to cope with the diverse problems arising under the fourth amendment.” Id. at 286. He then argues for a rule-based interpretive theory of the amendment, with the rules derived “from normative claims justified by the history and text of the amendment, but ultimately grounded in a value-based claim about the nature of the amendment.” Id. at 294. The fundamental principle he perceives is that the Fourth Amendment exists to enhance individual liberty by containing government power. See id. at 295. He then claims, rightfully I believe, “Simply put, if liberty is the goal, rules are needed.” Id. at 297. He ultimately concludes that “the fourth amendment example teaches us that without some coherent system of rules designed to limit [the power of the government], solitary individuals who claim the right to be free from government intrusions will lose, and the principle of liberty embodied in the amendment gradually will disappear.” Id. at 302; see also Clancy, supra note 11, at 627-35 (arguing that individualized suspicion is an inherent element of reasonableness based on examination of the amendment’s purpose, which is to protect individuals, the historical context, the Framers’ intent, and the need for a rule to provide guidance to courts and governmental officials to avoid unprincipled analysis, which has led to an erosion of individual liberty).

360. See, e.g., Amsterdam, supra note 3, at 353 (“The Bill of Rights in general and the fourth amendment in particular are profoundly anti-government documents.”); Cloud, supra note 30, at 626-27 (arguing that the values underlying the amendment, to protect individual rights, must be reflected in its application to modern conditions, where scientific invention has made it possible for government agents to violate privacy rights without employing physical power).

361. Cf. Junker, supra note 234, at 1156-59 (explaining the Court’s twenty years of interpretation of Katz). Specifically, Junker asserts:

At the root of such results must lie a majority that consistently prefers collective over individual values at the constitutional margin, a circumstance the doctrine is powerless to prevent. Because each decision demands doctrinal congruence with the value choice it implements, the resulting constitutional doctrine of necessity tends increasingly to reflect, accommodate and compel such results.

Id. at 1156.

362. For a discussion of Olmstead’s literalist approach, see supra Part I.C.
quired when seizure of a person or property occurs. In each situation, the right to be secure has been patently invaded. A problem arises, however, when the government uses non-physical investigative techniques to obtain information. Indeed, this problem has perplexed the Court throughout the twentieth century. In such situations, the admonition of Boyd which prefaces this article must be understood and applied: “It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property” that violates the Fourth Amendment.363 This is a call for a normative, liberal approach to interpreting the amendment. Analyzing this passage, Morgan Cloud has insightfully written:

The Court’s conception of the relevant rights must be [the] starting point for understanding this critical passage. First, these rights were indefeasible. This is the language of strong fundamental rights—rights that trump social policies . . . . Indeed, these rights are so strong that the Constitution prohibits the most minimal transgressions against them, as well as the most severe. Second, these rights are indefeasible not only because the fundamental constitutional text defines them, but also because they are natural rights that are embodied in the Bill of Rights. Finally, these rights work in harmony, defining and amplifying one another. Personal security, liberty, and private property are not discrete interests; they unite to define significant attributes of individual freedom in the democracy.364

Cloud has captured the main justification for the normative liberal approach of Boyd: the importance of giving wide scope to Fourth Amendment protections due to their fundamental constitutional character.365 One does not have to believe in natural rights theory as a prerequisite to a normative interpretation.366 Instead, one can find that normative basis in interpreting the amendment as the Framers intended—“is, in their belief that persons have the

365. See T. Alexander Aleinikoff, Constitutional Law in the Age of Balancing, 96 YALE L.J. 943, 991 (1987) (“Constitutional law provides a set of peremptory norms—a checking power—that is basic to the American notion of a government of limited powers.”).
366. See id.
367. The Court has repeatedly interpreted the amendment in light of the Framers’ intent. See, e.g., Zurcher v. Stanford Daily, 436 U.S. 547, 559 (1978) (rejecting the claim that more than an ordinary search warrant should be required to search a newsroom because the “Fourth Amendment has itself struck the balance between privacy and public need, and there is no occasion or justification for a court to revise the Amendment and strike a new balance”); Harris v. United States, 331 U.S. 145, 198 (1947) (Jackson, J., dissenting) (asserting
fundamental right to be secure and in seeking to determine the values the Framers believed animated that right. Cloud comes close to the nature of the right involved when he asserts that security, liberty, and property rights “are not discrete interests.” However, these interests do not unite to define significant attributes of freedom. Instead, they stem from a common origin: the Framers’ intent to give persons the right to exclude the government from interfering with those interests. The Fourth Amendment, at its most fundamental level, is designed to protect people from the government. It is no great leap to say that it should therefore be interpreted in a manner favorable to the enhancement of individual liberty.

A normative liberal approach is particularly necessary in today’s world, where technology threatens to make all the details of one’s life detectable. Modern surveillance techniques create great danger: “The insidious, far-reaching and indiscriminate nature of electronic surveillance—and most important, its capacity to choke off free human discourse that is the hallmark of an open society—

that, even if the Framers “may have overvalued privacy,” it was not up to him to substitute his judgment), overruled in part by Chimel v. California, 395 U.S. 752 (1969); James J. Tomkovicz, California v. Acevedo: The Walls Close in on the Warrant Requirement, 29 AM. CRIM. L. REV. 1103, 1138 (1992) (“[If] the Framers chose certain principles, it is not for us to set their choices aside in favor of our preferences.”); see also sources cited supra note 9.

368. Cloud, supra note 30, at 576.
369. Technological devices used to invade privacy already include: “minia
ture transmitters, bugs, beepers and phone taps, more sophisticated items like parabolic microphones, image intensifiers, pen registers, computer usage moni
tors, electronic mail monitors, cellular radio interception, satellite beam interception, pattern recognition systems and detector systems operating on vibra
tions, ultrasound and infrared radiation sensors.” Benner, supra note 234, at 866. Current laser technology poses even greater threats to privacy because of the ability to translate conversations from the vibrations produced on a closed window pane. Id.

An articulation of the dangers of the effects of technological advances and calls for a liberal construction have been repeatedly made throughout the twentieth century, beginning with Justice Brandeis’ dissent in Olmstead v. United States. 277 U.S. at 438, 472-80 (1928) (Brandeis, J., dissenting), overruled in part by Katz v. United States, 389 U.S. 347 (1967); and Berger v. New York, 388 U.S. 41 (1967). Since Olmstead, many other justices have expressed similar concerns. See, e.g., California v. Ciraolo, 476 U.S. 207, 218, 226 (1986) (Powell, J. dissenting) (noting that advances in technology allow police to conduct surveil
makes it almost, although not quite, as destructive of liberty as 'the kicked-in door.'”370 Permitting the use of sensory enhancing devices encourages extraordinary efforts and technological innovation to defeat the ability to exclude the government. At what point does one voluntarily expose something: when the government can discover it by using binoculars; by looking over a fence; by looking from an airplane?371 Rather than making arbitrary decisions to differentiate among efforts made to keep secrets or among the effects of various technological devices, the inquiry must examine the essence of what

370. Amsterdam, supra note 3, at 388 (footnote omitted).

371. Justice Harlan, concurring in Katz, viewed voluntary exposure by a person as a situation where one does not have a protected Fourth Amendment right. Katz, 389 U.S. at 361 (Harlan, J., concurring). The majority’s opinion had a similar view. Id. at 351. The original conception of voluntary exposure was narrow and “[n]ot every limited exposure would constitute a . . . renunciation of the fourth amendment protection.” Katz, supra note 234, at 563. The Court subsequently so expanded and distorted the concept of voluntary exposure that it has reduced the privacy standard to an assumption-of-risk analysis. See id. at 563-64. The Court’s assumption-of-risk methodology and results have been often criticized. See, e.g., Benner, supra note 234, at 868-72 (criticizing the standard as a curtailment of individual rights); Junker, supra note 234, at 1128-30 (suggesting that the Court’s analysis is inconsistent with Fourth Amendment principles); Katz, supra note 234, at 562-75 (rejecting the Katz Court’s assumption of risk analysis); Tomkovicz, supra note 234, at 684-94 (identifying the unsuitability of the Court’s approach). No attempt to comprehensively discuss the topic is made here. However, a principal vice is the Court’s finding of a voluntary disclosure whenever there has been any empirical evidence that the object had or might have been disclosed to public view, regardless of how remote or accidental the possibilities. In today’s world, technology can invade any recess and expose any whisper. Utilizing an empirical approach will drive people further and further into the recesses of their homes. See Florida v. Riley, 488 U.S. 445, 466 (1989) (Brennan, J. dissenting) (quoting Amsterdam, supra note 3, at 402). That approach adds to the “coarsening of our national manners that ultimately give the Fourth Amendment its content.” National Treasury Employees Union v. Von Raab, 489 U.S. 656, 687 (1989) (Scalia, J., dissenting); cf. Richards v. Wisconsin, 117 S. Ct. 1416, 1421 n.4 (1997) (recognizing the dangerousness of grounding an exception to constitutional protections based on “the social norms of a given historical moment” and contending that the Fourth Amendment must be construed “to preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted”) (quoting Minnesota v. Dickerson, 508 U.S. 366, 380 (1993) (Scalia, J., concurring)). The inquiry should be whether the person has given up the right to exclude. When one invites another person into one’s house, see, e.g., Hoffa v. United States, 385 U.S. 293, 295 (1966) (involving an undercover informant), places something in plain view, see, e.g., Katz, 389 U.S. at 361 (Harlan, J., concurring) (discussing “plain view” observations), or abandons property, one might be said to give up the right to exclude. But that does not mean that other, more limited disclosures serve as a complete renunciation of Fourth Amendment protections. See Katz, supra note 234, at 565-75 (discussing the concept of limited disclosure); Tomkovicz, supra note 234, at 680-81 (same). Such judgments are at least as much normative as empirical. See, e.g., Smith v. Maryland, 442 U.S. 735, 750-51 (1979) (Marshall, J., dissenting) (arguing for a normative basis for assumption-of-risk analysis).
the amendment seeks to protect: the right to be secure—that is, the ability to exclude others from prying. Yet in today’s society, technological and other advances preclude the ability to shield anything absolutely. To adequately protect and give recognition to the ability to exclude, normative values must be employed. Do the precautions taken by the person objectively evidence an intent to exclude the human senses? Does the particular surveillance technique utilized by the government defeat the individual’s right to exclude? Would the “spirit motivating the framers” of the amendment “abhor these new devices no less” than the “direct and obvious methods of oppression” that inspired the Fourth Amendment? The answer to each of these questions may be an empirical inquiry at times, but is always a value judgment.

CONCLUSION

There are “few issues more important to a society than the amount of power it permits its police to use without effective control.” Only by understanding what is protected by the Fourth Amendment can one know what the police may do without implicating it. Shortly after the *Katz* decision, one commentator wrote that the Fourth Amendment’s

operative function is exclusionary: it works negatively to keep out the unwelcome agencies of government. It logically follows, however, that where something is to be kept out, that from which it is barred deserves recognition in a positive sense. It is for this reason that the fourth amendment should be looked upon as safeguarding an affirmative right of privacy.

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372. *Goldman*, 316 U.S. at 139 (Murphy, J., dissenting).

373. *See also* Amsterdam, *supra* note 3, at 403 (“The ultimate question . . . is whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society.”).

374. *Id.* at 377; *cf.* Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting) (“Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.”); Harris v. United States, 331 U.S. 145, 161 (1947) (Frankfurter, J., dissenting) (stating that the protection against police search and seizure afforded by the Fourth Amendment “is not an outworn bit of Eighteenth Century romantic rationalism but an indispensable need for a democratic society”), *overruled in part by Chimel v. California*, 395 U.S. 752 (1969).

Within this syllogism is the flaw that has plagued courts and commentators. The Fourth Amendment does act negatively, to exclude. But that is also the essence of the right to be secure. To look beyond the right to exclude and seek positive attributes to the right to be secure, whether those attributes be called privacy or something else, serves to limit—and ultimately defeat—that right. Indeed, those attributes are mere motivations for exercising the right; they do not define it. The exclusionary function of the amendment is so bound up with the right to be secure as to be equivalent to it: There is no security if one cannot exclude the government from intruding.

Therefore, the ability and the right to exclude agents of the government is the essence of the security afforded by the Fourth Amendment. The commands of the amendment are, after all, “practical and not abstract.” As to a person’s house, it is “the right to shut the door on officials of the state unless their entry is under proper authority of law.” This was the core understanding expressed in the physical trespass theory of Olmstead. Of course, Olmstead read the right too literally. The ability to exclude must extend to all invasions, tangible and intangible, and must protect both tangible and intangible aspects of the amendment’s protected objects. That was the essential lesson of Katz. Katz and the privacy theory, however, failed to grasp the essence of the interest protected. Although it may have been Katz’s expectation that his conversation was not being heard, it was his right to exclude others the substantive right to be protected and the act that will negate the affirmative right.

376. Cf. Benner, supra note 234, at 827 (“An examination of [colonial and English] history and the literal language of the Amendment as well reveals that the Framers did not attempt to define the contours of a comprehensive right to privacy. Rather, they attempted to construct a restraint upon governmental action.”) (footnote omitted); Richard H. Fallon, Jr., Individual Rights and the Powers of Government, 27 GA. L. REV. 343, 364-65 (1993) (arguing that the foundation of some constitutional rights is to prevent abuse of power by government and that, rather than those rights forming “an independent limit on government power... anxiety about abuse of power generates rights”); Jed Rubenfeld, The Right of Privacy, 102 HARV. L. REV. 737, 740 (1989) (contrasting the right of privacy, which attaches to the rightholder’s own actions such as marriage and abortion, with expectations of privacy under the Fourth Amendment and “the right of privacy protected by tort law,” with the latter concept used to “govern the conduct of other individuals who intrude in various ways upon one’s life” and to “limit[ ] the ability of others to gain, disseminate, or use information about oneself”).


379. For a discussion of Olmstead’s restrictive view limiting Fourth Amendment protections to physical invasions of real property, see supra Part I.C.

380. For a discussion of Katz’s privacy theory, see supra Part II.A.
from hearing. It is not privacy which may motivate a person to assert his or her right. It is the right to prevent intrusions—to exclude—which affords a person security.

Justice Frankfurter articulated well the meaning of security in this sense, explaining that “[t]he tenet that there exists a realm of sanctuary surrounding every individual and infrangible, save in a very limited class of circumstances . . . has in the intervening years found expression not only in the Fourth Amendment . . . but also in the fundamental law of every state.” Justice Frankfurter further stated that “the kicked-in door is the symbol of a rule of fear and violence fatal to institutions founded on respect for the integrity of man” and that “[t]he essence of liberty protected by the common law and by the American constitutions was . . . ‘the right to resist unauthorized entry’” and thus secure information to “‘fortify the coercive power of the state against the individual.’”

If one extends Frankfurter’s comments to all of the objects protected by the amendment, with the understanding that those objects include both tangible and intangible qualities that can be the subject of either physical or non-physical invasions, the proper scope of its protections is understood. The proper question is whether the papers or personal property are mine, whether the house is mine, whether the body is mine? If the answer is yes, then one has the

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381. Cf. Amsterdam, supra note 3, at 385 (“Mr. Katz’s conversation in a pay telephone booth was protected because he ‘justifiably relied’ upon its being protected—relied, not in the sense of an expectation, but in the sense of a claim of right.”) (footnote omitted).

382. Monroe, 365 U.S. at 208-09 (Frankfurter, J., dissenting in part).

383. Id. at 209 (Frankfurter, J., dissenting in part) (quoting Frank, 389 U.S. at 365).

384. The sentence in text is oversimplified if applied to standing to challenge a search or seizure. To establish standing, a person must have a personal constitutional right infringed by the search or seizure. See, e.g., United States v. Payner, 447 U.S. 727, 731 (1980). To determine whether a person has a personal right infringed, the question would be whether that person has a right to exclude the government. Cf. Rawlings v. Kentucky, 448 U.S. 98, 105 (1980) (stating that a person who suddenly deposited drugs in another’s purse without a prior request for access had no “right to exclude other persons from access to [the] purse”); id. at 112 (Blackmun, J., concurring) (stating that “the right to exclude is an essential element of modern property rights” and that right “often may be a principal determinant in the establishment of a legitimate Fourth Amendment interest”). Analogously, the Court, in the context of determining what constitutes a legitimate expectation of privacy, which is necessary under current law to establish standing, has stated: “One of the main rights attaching to property is the right to exclude others, and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude.” Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978). In general, persons other than owners have standing when they can assert a sufficient interest in the place searched; ownership is not the sine qua non for sufficiency. See Minnesota v. Olson, 495 U.S. 91, 98 (1990) (citing Rakas v. Illinois, 439 U.S. 128, 141-42 (1978)). As in Katz, the person in the telephone booth has the right to exclude the government from overhearing his
right to exclude the government from searching or seizing. That right to exclude, of course, is not absolute; the government can overcome the assertion of that right if it establishes that its actions are reasonable. But the burden is on the government to justify its actions. This returns the structure of Fourth Amendment analysis to comport with the intent of the Framers: The people have the right to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. By affording citizens the ability to exclude, their security is assured. That right to be secure is clear and pristine—it is the right to exclude the government.

conversation because he has the right to exclude the uninvited ear. Katz v. United States, 389 U.S. 347, 352 (1967).

There is also no requirement that the person has the right to exclude all others from the premises. Cf. Rawlings, 448 U.S. at 119-20 (Marshall, J., dissenting) (noting that, even in the “heyday of a property rights oriented Fourth Amendment,” there was never any requirement that a person have so strong an expectation of privacy that he “may exclude all others from that place”); Rakas, 439 U.S. at 149 (holding that a person who had permission to use another’s apartment had, except as to his friend, “complete dominion and control over the apartment and could exclude others from it” and therefore had standing to challenge a search) (citing Jones v. United States, 362 U.S. 257 (1960), overruled by United States v. Salvucci, 448 U.S. 83 (1980)). For example, house guests could have such a right. See, e.g., Olson, 495 U.S. at 98-100; Rakas, 439 U.S. at 149. The Olson Court rejected “the untrammeled power to admit and exclude” as essential to Fourth Amendment protection, because, in such an event, “an adult daughter temporarily living in the home of her parents would have no legitimate expectation of privacy because her right to admit or exclude would be subject to her parents’ veto.” 495 U.S. at 99-100. Yet, the daughter, as a rightful occupant of the property, would have the right to exclude the government. It would work no change in Fourth Amendment law to find, as in other third party consent situations, that her parents’ consent to enter over her objections might justify the entry into at least the jointly occupied parts of the premises. This is only to say that her right to exclude is not absolute. See, e.g., In re Tariq A-R-Y, 701 A.2d 691, 695-96 (Md. 1997) (surveying cases upholding parental consent to search children’s effects), cert. denied, 118 S. Ct. 1105 (1998). The Fourth Amendment does not provide assurance that no search will occur unless a person consents, but only that no unreasonable search will occur. See Illinois v. Rodriguez, 497 U.S. 177, 183 (1990). Thus, the consent of a cotenant can justify a search. See id. at 183-84; see also United States v. Matlock, 415 U.S. 164, 171 n.7 (1974) (stating that a third-party consent to search premises is based on common authority over the premises and “rests . . . on mutual use of the property by persons generally having joint access or control for most purposes,” and therefore “any of the co-inhabitants has the right to permit the inspection in his own right [because] . . . others have assumed the risk that one of their number might permit the common area to be searched”).