Recessional:[1] The Ineradicable Legacy of the Warren Court

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When I began work on this essay, I had a much narrower focus in mind. *Katz v. United States*[2] sparked an on-going debate about whether the Fourth Amendment protects property or privacy. Phrasing the inquiry that way connotes that "or"[3] is exclusive—that the Fourth Amendment protects property or privacy. That implies that property law has nothing to do with privacy, but that implication is far from accurate. In focusing on *Katz* and the false dichotomy, however, I found a broader inquiry opening: to what extent the government and its officials are subordinate to the Constitution and the values it embodies.

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1. Apologies to James Michener. *See* JAMES MICHENER, RECESSIONAL (1994).

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2. 389 U.S. 347 (1967).

3. "Or" has at least two meanings. That hardly makes it unique in English, but the meanings are incompatible. (That does not make it unique either; "sanction" may mean (1) "to authorize, approve, or allow . . . ," THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1265 (J. STEIN ed. 1969), or (2) "a provision of law enacting a penalty for disobedience. . . ." *Id.*) "Or" may express alternatives in an inclusive way. *See, e.g.*, U.S. CONST. art. II, § 2 ("[N]o Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."). On the other hand, it may be restrictive, meaning one but not the other(s). *See, e.g.*, U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."). More colloquially, even a young child understands that a parent asking whether the child would prefer A or B will not accept, "Both."

Early Fourth-Amendment cases reflected privacy interests. *Boyd v. United States*[4] is well known, in part because it relied heavily on Lord Camden's opinion in *Entick v. Carrington*[5] with its emphasis on privacy.[6] *Weeks v. United States*[7] introduced the exclusionary rule and noted privacy interests, echoing *Boyd*. Justice Brandeis's dissent in *Olmstead v. United States*[8] focused intently on the Fourth Amendment's concern with privacy.

To be sure, the Court's opinions also mention property. Notably in *Olmstead*, Chief Justice Taft's majority opinion noted with approval that the government obtained the disputed evidence without committing a trespass.[9] But, Taft also cited *Hester v. United States*,[10] which found evidence admissible notwithstanding that the government's obtaining it by trespass. Trespass was clearly not a litmus test for Fourth Amendment violations.

Later cases also used language suggesting that property concepts underlay the Framers' thinking about the Fourth Amendment,[11] and Justice Scalia cited *Katz* as

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4. 116 U.S. 616 (1886). *See infra* notes 29–45 and accompanying text.
5. (1765) 95 Eng. Rep. 807. *See infra* notes 36–45 and accompanying text.
6. *Boyd*, 116 U.S. at 630. *See infra* text accompanying note 41.
7. 232 U.S. 383, 389-90 (1914).

> The history of this Amendment is given with particularity in the opinion of Mr. Justice Bradley, speaking for the court in *Boyd v. United States*. . . . As was there shown, it took its origin in the determination of the framers of the Amendments to the Federal Constitution to provide for that instrument a Bill of Rights, securing to the American people, among other things, those safeguards which had grown up in England to protect the people from unreasonable searches and seizures, such as were permitted under the general warrants issued under authority of the government, by which there had been invasions of the home and privacy of the citizens, and the seizure of their private papers in support of charges, real or imaginary, make against them.

Id.; *see infra* notes 46–48 and accompanying text.

8. 277 U.S. 438, 475, 478 (1928) (Brandeis, J., dissenting); *see infra* notes 49–50 and accompanying text.
9. *Id.* at 457.
10. 265 U.S. 57 (1924).
11. *See, e.g.*, Gouled v. United States, 255 U.S. 298, 305–06 (1921).

> The prohibition of the Fourth Amendment is against all unreasonable searches and seizures and if for a government officer to obtain entrance to a man's house or office by force or by an illegal threat or show of force, amounting to coercion, and then to search for and seize his private papers would be an unreasonable and therefore a prohibited search and seizure, as it certainly would be, it is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth instead of by force or coercion. The secutiry and privacy of the home or office and of the papers of the owner would be as much invaded and the search and *306 seizure would be as much against his will in the one case as in the other, and it must therefore be regarded as equally in violation of his constitutional rights.

Id.; *see also* Agnello v. United States, 269 U.S. 20, 32-34 (1925) (focusing on warrantless searches of private homes when such searches are not incident to lawful arrests); Amos v. United States, 255 U.S. 313, 315, 317

having "deviated from [our] exclusively property-based approach"[12] that tied "our Fourth Amendment jurisprudence . . . to common-law trespass, at least until the latter half of the 20th century."[13] Yet, two distinguished scholars have argued persuasively that the property/privacy divide to which later Courts referred rests on a serious misreading of the Court's own cases. "[N]o trespass test was used in the pre-*Katz* era. Neither the original understanding nor Supreme Court doctrine equated searches with trespass. [The later case of] *Jones* [*v. United States*[14]] purports to revise a test that did not actually exist."[15]

Nonetheless, the Court continues to discuss the dichotomy that it apparently invented. *Katz* focused on privacy, but the Court's reliance on property interests soon reasserted itself, notably in cases involving whether a defendant seeking exclusion is entitled to invoke the Fourth Amendment.[16] More recently, the Court seems to blend the two approaches.[17] So I invite the reader to go on a brief journey with me, from *Katz*'s ancestors to its progeny to the legacy of the Warren Court.

I. THE PENDULUM: PROPERTY "OR" PRIVACY

Property law protects privacy *and* property rights. Ownership of real property includes the right to exclude others, stemming from the ancient writ of trespass *quare clausum fregit*.[18] Absent actual damage, why should the right to exclude others lead to an action for a damages judgment rather than a prohibitory injunction? Consider parallel cases, in neither of which is there any physical damage to

(1921) (focusing on warrantless entry of the home); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 390 (1920) (focusing on government intrusion of defendant's offices).

12. United States v. Jones, 565 U.S. 400, 405 (2012). Justice Scalia had earlier characterized *Entick* as "express[ing] in plain terms the significance of property rights in search-and-seizure analysis. . . ." *Id.*

13. *Id.*

14. 565 U.S. 400 (2012).

15. Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 68 (2013); *see also* Christopher Slobogin, *A Defense of Privacy As the Central Value Protected by the Fourth Amendment's Prohibition on Unreasonable Searches*, 48 TEXAS TECH L.R. 143, 147, 148 (2015).

16. In some areas of the law, that idea involves "standing," but for Fourth-Amendment purposes, the Court has instructed us not to use that term. *See* United States v. Salvucci, 448 U.S. 83, 87 n.4 (1980) ("In *Rakas*, this Court discarded reliance on concepts of "standing" in determining whether a defendant is entitled to claim the protections of the exclusionary rule. The inquiry, after *Rakas*, is simply whether the defendant's rights were violated by the allegedly illegal search or seizure."); Rakas v. Illinois, 439 U.S. 128, 138-39 (1978). Ignoring its own counsel, the Court has continued to use the term. *See, e.g.*, Collins v. Virginia, 138 S. Ct. 1663, 1668 n.1 (2018); United States v. Payner, 447 U.S. 727, 731-32 (1980) (citing *Rakas* with approval but nonetheless declaring, "[R]espondent lacks standing under the Fourth Amendment to suppress. . . "). Even Justice Rehnquist, who wrote *Rakas*, later employed the term. *See, e.g.*, INS v. Delgado, 466 U.S. 210, 217 n.4 (1984) ("Although the issue was the subject of substantial discussion at oral argument, the INS does not contest that respondents have standing to bring this case."). More generally, then Professor and now Judge William Fletcher has counseled that the standing inquiry as a general matter is merely a masked discussion of whether a particular claimant state a claim for violation of that claimant's rights. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223 (1988).

17. *See, e.g.*, Florida v. Jardines, 569 U.S. 1, 5 (2013); Kyllo v. United States, 533 U.S. 27, 28 (2001).

18. BLACK'S LAW DICTIONARY 1277 (8th ed. 2004) ("Why he broke the close.").

the property. In the first case, someone walks two hundred feet across a landowner's open field. Is there an actionable trespass? Of course there is. It may not be worth pursuing for the likely nominal damages, but no one can doubt that a trespass occurred. In the second case, someone approaches a house from the street, following a two-hundred foot path up the front walk, through the hallway and kitchen, out the back door and off the property. Once again, there is a trespass, but this case would likely draw far more than nominal damages. But why? The trespass is the same, and there is no harm to either property. The difference in likely awards stems not from the ownership but from privacy.

Common law took privacy concepts quite seriously. Eavesdropping was a common-law crime in England[19] and was also an offense in America.[20] Rejection of eavesdropping exists in even stronger form today. Witness the proliferation of state[21] and federal[22] statutes criminalizing interception of electronic communications.

A. Early Fourth-Amendment Cases

The Fourth Amendment appears in United States Reports only four times in the ninety years following its ratification in 1791. In the first case,[23] counsel argued that there was no probable cause to seize counsel's client; Chief Justice Marshall's opinion for the Court did not even cite the Fourth Amendment. It mentioned probable cause only to say that the information before the court ordering the prisoners' commitment did not constitute probable cause that they had committed treason.[24]

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19. 4 WILLIAM BLACKSTONE, COMMENTARIES *168.

> Eaves-droppers, or such as listen under walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance and presentable at the court-leet; or are indictable at the sessions and punishable by find and finding sureties for the good behavior.

Id. Eavesdropping remained a common-law crime there until The Criminal Law Act of 1967, ch. 58.

20. Note, *The Right to Privacy in Nineteenth Century America*, 94 HARV. L. REV. 1892, 1896 (1981) (footnotes omitted).

> Invasions of domestic privacy that fell short of physical trespass were dealt with by the criminal law. Eavesdropping, a common law crime noted by Blackstone, was prosecuted in America on the ground that "no man has a right . . . to pry into your secrecy in your own house." Although never numerous, indictments for eavesdropping occurred throughout the nineteenth century under common law and statute.

Id.

21. *See, e.g.*, ALA. CODE § 13A-11-31 (1977); COLO. REV. STAT. § 18-9-304 (2010); N.Y. PENAL LAW § 250.05 (MCKINNEY 1988); S.C. CODE ANN. § 16-17-470 (2001).

22. *See, e.g.*, 18 U.S.C. § 2511 (2018).

23. Ex parte Bollman, 8 U.S. (4 Cranch) 75, 110 (1807).

24. *Id.* at 130, 136.

There is no discussion of property or privacy. *Livingston's Lessee v. Moore*[25] noted only that the Fourth Amendment did not apply to civil proceedings, and the third case followed suit.[26] The fourth case[27] commented that the Amendment prevented postal officials from opening mail without a warrant.[28]

Not until *Boyd v. United States*[29] was there any extended discussion of the Fourth Amendment and the values it seeks to protect. Boyd stood accused of failing to pay duties on some imported glass. Boyd complied with a judicial order to produce the invoice for the glass but objected, based on the Fourth and Fifth Amendments. A statute appeared to authorize the order. The Court first found that compelled production implicated the Fourth Amendment,[30] and then noted that it had been unable to find any comparable statute either in United States or English history.[31] It compared the statute unfavorably to "the obnoxious writs of assistance. . . ."[32] The Court distinguished seizure of Boyd's papers from seizure of stolen goods or goods on which Boyd had not paid appropriate duties.

> The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo*.[33]

Justice Bradley's opinion discussed, with obvious approval, the famous English case of John Wilkes.[34] Crown officials, under a warrant that Lord Halifax had issued, searched Wilkes's house and seized his papers to support a criminal-libel

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25. 32 U.S. (7 Pet.) 469, 539 (1833).

26. *See* Den v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 285 (1855).

27. Ex parte Jackson, 96 U.S. (6 Otto) 727, 733 (1877) (dictum).

28. The Court upheld the conviction because the government had gotten evidence against him without a Fourth-Amendment violation. *Id.* at 736–37.

29. 116 U.S. 616 (1886). The *Boyd* Court was unanimous that the statute at issue violated the Fifth Amendment, but two Justices demurred with respect to the Fourth Amendment, arguing that although the statute compelled production, it did not purport to authorize either a search or a seizure.

30. *Id.* at 528.

> It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the fourth amendment to the constitution, in all cases in which a search and seizure would be, because it is a material ingredient, and effects the sole object and purpose of search and seizure.

Id.

31. *Id.* at 622–23.

32. *Id.* at 623.

33. *Id.*

34. Wilkes v. Wood, (1763) 98 Eng. Rep. 489.

prosecution. "For this outrage he sued the perpetrators and obtained a verdict of £1,000 against Wood, one of the party who made the search, and £4,000 against Lord Halifax. . . ."[35] The English took privacy seriously.

But the English case upon which Justice Bradley primarily relied was *Entick v. Carrington*.[36] Entick's declaration clearly alleged the breadth of the government search.[37] In modern terms, the warrant authorized a general search. Lord Camden made clear his court's revulsion at what had happened.

> Papers are the owner's goods and chattels; they are his dearest property, and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and therefore it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society.[38]

Note that Lord Camden invoked both property and privacy and happened incidentally to explain why my second hypothesized case draws higher damages than

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35. *Boyd*, 116 U.S. at 626. In twenty-first-century money, those verdicts would as of 2017 have been worth £117,792.60 and £471,170.40 respectively, according to the United Kingdom's National Archives on-line inflation calculator. *See Currency* Converter, NAT'L ARCHIVES, http://www.nationalarchives.gov.uk/currency-converter/# (last visited Nov. 16, 2019) (on file with *The University of the Pacific Law Review*). In today's dollars, the two amounts roughly equal $80,123.26 and $320,492.73. *See Currency Converter*, https://www.xe.com/currencyconverter/convert/?Amount=264%2C738.80&From=GBP&To=USD (last visited May 17, 2020).

36. Entick v Carrington, [1765] 19 How. St. Tr. 1029.

37. *Entick*, at 807–08.

> [T]he plaintiff declares that the defendants on the 11th day of November in the year of our Lord 1762, at Westminster in Middlesex, with force and arms broke and entered the dwelling-house of the plaintiff in the parish of St. Dunstan Stepney, and continued there four hours without his consent and against his will, and all that time disturbed him in the peaceable possession thereof, and broke open the doors to the rooms, the locks, iron bars, &c. thereto affixed, and broke open the boxes, chests, drawers, &c. of the plaintiff in his house, and broke the locks thereto affixed, and searched and examined all the rooms, &c. in his dwelling-house, and all the boxes, &c. so broke open, and read over, pryed into, and examined all the private papers, books, &c. of the plaintiff there found, whereby the secret affairs, &C. of the plaintiff became wrongfully discovered and made public; and took and carried away 100 printed charts, 100 printed pamphlets, &e. &c. of the plaintiff there found, and other 100 charts, &c. &c. took and carried away. . . .

Id.

38. *Entick*, [1765] 19 Howell's State Trials 1029, 1066.

the first.[39]

Boyd lauded *Entick*'s signal importance both in England and in the colonies.[40]

> The principles laid down in [*Entick*] affect the very essence of constitutional liberty and security. They reach further than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employés of the sanctity of a man's home and *the privacies of life*. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of *personal security, personal liberty*, and private property, where that right has never been forfeited by his conviction of some public offense—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony, or of his private papers to be used as evidence to convict him of crime, or to forfeit his goods, is within the condemnation of that judgment.[41]

Thus, *Boyd* focused on privacy, borrowing from *Entick*, and specifically linked the Fourth and Fifth Amendments to privacy and the Framers' original intent.[42]

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39. *See supra* text accompanying notes 18–**Error! Bookmark not defined.**.

40.

> Lord Camden pronounced the judgment of the court in Michaelmas term, 1765, and the law, as expounded by him, has been regarded as settled from that time to this, and his great judgment on that occasion is considered as on of the landmarks of English liberty. It was welcomed and applauded by the lovers of liberty in the colonies as well as in the mother country. It is regarded as one of the permanent monuments of the British constitution, and is quoted as such by the English authorities on that subject down to the present time.
>
> As every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the fourth amendment to the constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures.

Boyd, 116 U.S. at 626–27.

41. *Id.* at 630 (emphasis added).

42. *Id.*

> In this regard the fourth and fifth amendments run almost into each other. Can we doubt that when the fourth and fifth amendments to the constitution of the United

But, *Boyd* differed from *Entick* in a fundamental way, involving not a search by government agents but rather a court order directing the defendant to produce a document.[43] The Court noted that "certain aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching amongst his papers, are wanting,"[44] but nonetheless held that the Fourth Amendment applied and condemned the evidence.

> [C]ompulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient, and effects the sole object and purpose of search and seizure.[45]

It would be difficult to overstate the importance of that sentiment. It has nothing to do with trespass; it focuses only on production of private papers. The protected value is not property but privacy. Equally important is the Court's refusal to limit Fourth-Amendment "searches" to those government agents performed. In *Boyd*, the government effectively used a court order to conscript Boyd to search for the invoice on the government's behalf, making him an unwilling government agent. To its lasting credit, the Court refused to accept the search-by-substitution.

The Court's next significant Fourth-Amendment case came twenty-eight years

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> States were penned and adopted, the language of Lord Camden was relied on as expressing the true doctrine on the subject of searches and seizures, and as furnishing the true *criteria* of the reasonable and "unreasonable" character of such seizures? Could the men who proposed those amendments, in the light of Lord Camden's opinion, have put their hands to a law like those of March 3, 1863, and March 2, 1867, before recited? If they could not, would they have approved the fifth section of the act of June 22, 1874, which was adopted as a substitute for the previous laws? It seems to us that the question cannot admit of a doubt. They never would have approved of them. The struggles against arbitrary power in which they had been engaged for more than 20 years would have been too deeply engraved in their memories to have allowed them to approve of such insidious disguises of the old grievance which they had so deeply abhorred.

Id.

43. *Boyd*, 116 U.S. at 618.

> The claimants, in obedience to the notice, but objecting to its validity and to the constitutionality of the law, produced the invoice; and when it was offered in evidence by the district attorney they objected to its reception on the ground that, in a suit for forfeiture, no evidence can .be compelled from the claimants themselves, and also that the statute, so far as it compels production of evidence to be used against the claimants is unconstitutional and void.

Id.

44. *Id.* at 622.

45. *Id.*

later. *Weeks v. United States*[46] introduced the exclusionary rule, and it discussed the Amendment at length. *Weeks* relied explicitly on *Boyd* and excluded evidence seized without a warrant. In doing so, the Court articulated the idea that the judiciary cannot properly receive in evidence materials seized in violation of the Fourth Amendment. "To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance of the provisions of the Constitution, intended for the protection of the people against such unauthorized action."[47] *Weeks* also noted that without an exclusionary rule, the protections of the Fourth and Fifth Amendments are illusory.[48] However, *Weeks* did not explicitly discuss whether the Fourth Amendment protects property, privacy, or both. Both concepts appear in the opinion, but the Court did not discuss them *vis-à-vis* each other.

Although *Boyd* was the Court's first (and perhaps most eloquent) invocation of privacy in connection with the Fourth Amendment, it is not alone. Justice

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46. 232 U.S. 383 (1914). The Court did mention the Fourth Amendment in 20 cases between *Boyd* and *Weeks*, but it drew only passing mention, usually with respect to its non-applicability, either with respect to the states, *see, e.g.*, Twining v. New Jersey, 211 U.S. 78 (1908); Miller v. Texas, 153 U.S. 535 (1894), or otherwise to say that it did not apply to the particular proceeding. *See, e.g.*, Baltimore & Ohio R. Co. v. ICC, 221 U.S. 612, 622 (1911) (not applicable to ICC subpoena for corporate records); United States v. Zucker, 161 U.S. 475 (1896) (not applicable to using witness's deposition against defendant). The year before *Weeks*, the Court acknowledged *Boyd*'s linking the Fourth and Fifth Amendments while declining to upset a contempt citation of corporate officials for refusing to produce corporate records on the ground that they, as individuals, could not incriminate themselves by producing the records. *See also* Bram v. United States, 168 U.S. 532 (1897); Stone v. United States, 167 U.S. 178, 187–88 (1897) (both reaffirming the *Boyd* linkage).

47. *Weeks*, 232 U.S. at 394; *see also id.* at 391–92.

> The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects, against all unreasonable searches and seizures under the guise of law. This protection reaches all alike . . . and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of its laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

Id.

48. *Id.* at 393.

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.

Id.

Brandeis spoke memorably of it in dissent in *Olmstead v. United States*,[49] characterizing it as "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the *privacy* of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment."[50] Even Justice Holmes, although denying suppression in a case despite government trespass in an "open field," recognized the privacy implications of common-law trespass.[51]

Wolf v. Colorado,[52] though declining to enforce the exclusionary rule against state governments, nonetheless noted that, "we have no hesitation in saying that were a State affirmatively to sanction such police incursion into *privacy* it would run counter to the guaranty of the Fourteenth Amendment."[53] *Mapp v. Ohio*,[54] antedating *Katz* by six years, took the logical step that *Wolf* had refused, declaring the Fourth and Fourteenth Amendments to be privacy-protection constitutional principles[55] and condemning *Wolf* in the process.[56]

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49. 277 U.S. 438 (1928), *overruled in part*, Katz v. United States, 389 U.S. 347 (1967).

50. *Id.* at 478 (Brandeis, J., dissenting) (emphasis added).

51. Hester v. United States, 265 U.S. 57, 59 (1924): "the special protection accorded by the Fourth Amendment 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. 4 BL. COMM. 223, 225, 226." That "special protection" clearly is not the special protection from trespass to land; the federal officers certainly trespassed on Hester's land. The special protection is the protection of the house and curtilage as areas in which the law recognizes and enforces a privacy interest. (We will put to one side that the pages in Blackstone's COMMENTARIES ON THE LAWS OF ENGLAND upon which Holmes relied speak only of why an open field cannot be the subject of common-law burglary—there can be no breaking and entering in an open field.)

52. 338 U.S. 25 (1949).

53. *Id.* at 28 (emphasis added).

54. 367 U.S. 643 (1961).

55. *See, e.g.*, *id.* at 654–55.

> Today we once again examine *Wolf*'s constitutional documentation of the right to privacy free from unreasonable state intrusion, and, after its dozen years on our books, are led by it to close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct. We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court.. . . .Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then just as without the *Weeks* rule the assurance against unreasonable federal searches and seizures would be "a form of words," valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in the concept of ordered liberty."

Id.

56. *See id.* at 655–56.

B. Modern Fourth-Amendment Cases

Katz is the most explicit twentieth-century articulation of privacy as the Fourth-Amendment's concern, and it has faced strong criticism for that. *Katz* involved a non-trespassory government wiretap of a telephone booth to record Katz's bookmaking conversations. Katz and the government framed their arguments in property terms.[57] The Court firmly rejected that approach, although it acknowledged at least the appearance of property-related analysis in earlier cases.

> The Government contends . . . however, that the activities of its agents in this case should not be tested by Fourth Amendment requirements, for the surveillance technique they employed involved no physical penetration of the telephone booth from which the petitioner placed his calls. It is true that the absence of such 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

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> The right to privacy, when conceded operatively enforceable against the States, was not susceptible of destruction by avulsion of the sanction upon which its protection and enjoyment had always been deemed dependent under the *Boyd*, *Weeks* and *Silverthorne* cases. Therefore, in extending the substantive protections of due process to all constitutionally unreasonable searches—state or federal—it was logically and constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon as an essential ingredient of the right newly recognized by the *Wolf* case. In short, the admission of the new constitutional right by *Wolf* could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment.

Id.

57. *Katz* stated two issues for the Court.

> A. Whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening recording device to the top of such a booth is obtained in violation of the right to privacy of the user of the booth.
>
> B. Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United States Constitution.

Katz, 389 U.S. 347, 349-50 (1957). As the Court put it,

> Because of the misleading way the issues have been formulated, the parties have attached great significance to the characterization of the telephone booth from which the petitioner placed his calls. The petitioner has strenuously argued that the booth was a "constitutionally protected area." The Government has maintained with equal vigor that it was not.

Id. at 351 (footnote omitted).

> search and seize has been discredited."[58]

The Court explicitly rejected trespass as controlling Fourth-Amendment inquiries.[59] "[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[60]

Later cases relied heavily, though not exclusively, on *Katz*'s view of privacy as the concern of the Fourth Amendment. It now seems established beyond doubt that the Fourth Amendment concerns privacy as well as property. Consider some recent Justices who have viewed the Fourth Amendment that way—hardly the "usual suspects."[61] "The curtilage area immediately surrounding a private house has long been given protection as a place where *the occupants have a reasonable and legitimate expectation of privacy that society is prepared to accept*."[62]

> "Open fields do not provide the setting for those intimate activities that the [Fourth] Amendment is intended from governmental interference or surveillance." In *Oliver*, we held that "an individual may not legitimately demand privacy for activities out of doors in fields, except in the area immediately surrounding the home."[63]

Justice Powell, concurring and dissenting, agreed with the majority that the Fourth Amendment protects privacy but disagreed with the majority's refusal to suppress.[64]

In *Rakas v. Illinois*,[65] Justice Rehnquist's majority opinion noted, "The ultimate question, therefore, is whether one's claim to privacy from government intrusion is reasonable in light of all the surrounding circumstances." Justice White's dissent in that five-to-four case took the majority to task for recognizing privacy interests but tethering them to property law. "Though professing to acknowledge

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58. *Id.* at 352–53 (citing Goldman v. United States, 316 U.S. 129, 134–36 (1942); Olmstead v. United States, 277 U.S. 438, 457, 464, 466 (1928)) (quoting Warden v. Hayden, 387 U.S. 294, 304 (1967)) (footnote omitted).

59. *Id.* at 353.

60. *Id.* at 351 (citations omitted).

61. See *Casablanca*, Warner Brothers 1942 (Captain Louis Renault: "Major Strasser has been shot; round up the usual suspects.").

62. Dow Chemical Co. v. United States, 476 U.S. 227, 235 (1986) (emphasis added) (Chief Justice Burger's opinion for the Court).

63. *Id.* at 235–36 (Chief Justice Burger's opinion for the Court) (citing Oliver v. United States, 466 U.S. 170, 179, 178 (1984)).

64. *Id.* at 240 (Powell, J., concurring in part and dissenting in part) ("The Fourth Amendment protects private citizens from arbitrary surveillance by their Government."). It is interesting that some of the most explicit acknowledgements of the Fourth Amendment's privacy aspect have come in cases *approving* searches as not having violated a reasonable expectation of privacy.

65. 439 U.S. 128, 152 (1978).

that the primary purpose of the Fourth Amendment's prohibition of unreasonable searches is the protection of privacy—not property—the Court nonetheless effectively ties the application of the Fourth Amendment and the exclusionary rule in this situation to property law concepts."[66]

In *Arizona v. Gant*,[67] the five-Justice majority could not have been clearer about the privacy rationale underlying Fourth-Amendment law.[68] The dissent vociferously opposed the majority's view of two precedents and failure to give *stare decisis* its due. But it did not protest characterizing the Fourth Amendment in privacy terms. And, in *Carpenter v. United States*[69] in 2018, Chief Justice Roberts's opinion for a five-Justice majority focused exclusively on privacy, not property, as the goal of Fourth-Amendment protection. "The 'basic purpose of this Amendment,' our cases have recognized, 'is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.'"[70]

Three dissenting Justices took issue with that characterization. Justice Kennedy argued that, "In concluding that the Government engaged in a search, the Court unhinges Fourth Amendment doctrine from the property-based concepts that have long grounded the analytic framework that pertains in these cases."[71] Justice Thomas implicitly agreed with Justice Kennedy, but argued in terms of standing.[72]

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66. *Id.* at 156 (White, J., dissenting).

67. 556 U.S. 332 (2009).

68. *Id.* at 344–45 (citations and footnote omitted).

> [T]he State seriously undervalues the privacy interests at stake. Although we have recognized that a motorist's privacy interest in his vehicle is less substantial than in his home, . . . the former interest is nevertheless important and deserving of constitutional protection. . . . It is particularly significant that *Belton* searches authorize police officers to search not just the passenger compartment but every purse, briefcase, or other container within that space. A rule that gives police the power to conduct such a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals. Indeed, the character of that threat implicates the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person's private effects.

Id.

69. 138 S. Ct. 2206 (2018).

70. *Id.* at 2213 (quoting Camara v. Municipal Court, 387 U.S. 523, 528 (1967)).

71. *Id.* at 2224 (Kennedy, J., dissenting).

72. *Id.* at 2235 (Thomas, J., dissenting).

> This case should not turn on "whether" a search occurred. . . . It should turn, instead, on *whose* property was searched. The Fourth Amendment guarantees individuals the right to be secure from unreasonable searches of "*their* persons, houses, papers, and effects." (Emphasis added.) In other words, "*each* person has the right to be secure against unreasonable searches . . . in his own person, house, papers, and effects." Minnesota v. Carter, 525 U.S. 83, 92 . . . (1998) (Scalia, J., concurring). By obtaining

Justice Gorsuch, too, was critical of *Katz* but thought the other dissenters' common-law-property approach too limited. Instead, he advocated that Fourth-Amendment protection of property should go beyond mere consideration of title.[73]

> the cell-site records of MetroPCS and Sprint, the Government did not search Carpenter's property. He did not create the records, he does not maintain them, he cannot control them, and he cannot destroy them. Neither the terms of his contracts nor any provision of law makes the records his. The records belong to MetroPCS and Sprint.

Id.

73. *Id.* at 2268–69 (Gorsuch, J., dissenting) (some citations omitted).

> First, the fact that a third party has access to or possession of your papers and effects does not necessarily eliminate your interest in them. Ever hand a private document to a friend to be returned? Toss your keys to a valet at a restaurant? Ask your neighbor to look after your dog while you travel? You would not expect the friend to share the document with others; the valet to lend your car to his buddy; or the neighbor to put Fido up for adoption. Entrusting your stuff to others is a bailment. . . . A bailee who uses the item in a different way than he's supposed to, or against the bailor's instructions, is liable for conversion. . . . This approach is quite different from *Smith* [*v. Maryland*, 442 U.S. 735 (1979)] and [United States v.] *Miller*'s [425 U.S. 435 (1976)] (counter)-intuitive approach to reasonable expectations of privacy; where those cases extinguish Fourth Amendment interests once records are given to a third party, property law may preserve them.
>
> Our Fourth Amendment jurisprudence already reflects this truth. In *Ex parte Jackson*, 96 U.S. 727 . . . (1878), this Court held that sealed letters placed in the mail are "as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles." *Id*., at 733. The reason, drawn from the Fourth Amendment's text, was that "[t]he constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to *their papers*, thus closed against inspection*, wherever they may be*." *Id*. (emphasis added). It did not matter that letters were bailed to a third party (the government, no less). The sender enjoyed the same Fourth Amendment protection as he does "when papers are subjected to search in one's own household." *Ibid*.
>
> These ancient principles may help us address modern data cases too. Just because you entrust your data—in some cases, your modern-day papers and effects—to a third party may not mean you lose any Fourth Amendment interest in its contents. Whatever may be left of Smith and Miller, few doubt that e-mail should be treated much like the traditional mail it has largely supplanted—as a bailment in which the owner retains a vital and protected legal interest. . . .
>
> Second, I doubt that complete ownership or exclusive control of property is always a necessary condition to the assertion of a Fourth Amendment right. Where houses are concerned, for example, individuals can enjoy Fourth Amendment protection without fee simple title. Both the text of the Amendment and the common law rule support that conclusion. . . .
>
> Another point seems equally true: just because you have to entrust a third party with your data doesn't necessarily mean you should lose all Fourth Amendment protections in it. Not infrequently one person comes into possession of someone else's property without the owner's consent. Think of the finder of lost goods or the policeman

II. WHENCE THE EMPHASIS ON PROPERTY LAW—THE LAW OF TRESPASS?

Justices across the spectrum have asserted that the Fourth Amendment's terms have nothing directly to do with privacy. In his *Katz* dissent,[74] Justice Black argued that conversations did not fall within any of the Amendment's terms: persons, houses, papers, and effects; that argument echoes the *Olmstead* majority. He tasked the Framers for their language specificity.[75] Justice Black has found a modern-day ally in Justice Thomas, whose *Carpenter* dissent decried *Katz* as improperly casting the Court into a policy thicket. He focused on "their" in the Fourth Amendment, argued *Carpenter* as a standing case, and noted the absence of "privacy" in the Constitution.[76]

> who impounds a car. The law recognizes that the goods and the car still belong to their true owners, for "where a person comes into lawful possession of the personal property of another, even though there is no formal agreement between the property's owner and its possessor, the possessor will become a constructive bailee when justice so requires." . . . At least some of this Court's decisions have already suggested that use of technology is functionally compelled by the demands of modern life, and in that way the fact that we store data with third parties may amount to a sort of involuntary bailment too.

Id.

74. Katz v. United States, 389 U.S. 347 (1967) (Black, J., dissenting).

75. *Id*. at 366.

> But eavesdropping (and wiretapping is nothing more than eavesdropping by telephone) was, as even the majority opinion in *Berger* [*v. New York*, 388 U.S. 41 (1967)] recognized, "an ancient practice which at common law was condemned as a nuisance. 4 BLACKSTONE, COMMENTARIES *168. In those days the eavesdropper listened by naked ear under the eaves of houses or their windows, or beyond their walls seeking out private discourse." 388 U.S., at 45. There can be no doubt that the Framers were aware of this practice, and if they had desired to outlaw or restrict the use of evidence obtained by eavesdropping, I believe that they would have used the appropriate language to do so in the Fourth Amendment. They certainly would not have left such a task to the ingenuity of language-stretching judges. No one, it seems to me, can read the debates on the Bill of Rights without reaching the conclusion that its Framers and critics well knew the meaning of the words they used, what they would be understood to mean by others, their scope and their limitations. Under these circumstances it strikes me as a charge against their scholarship, their common sense and their candor to give to the Fourth Amendment's language the eavesdropping meaning the Court imputes to it today.

Id.

76. Carpenter v. United States, 138 S. Ct. 2206, 2239 (2018) (Thomas, J., dissenting).

I have some perhaps disappointing news for Justice Thomas. "Immunity" does not appear in the Constitution either, yet Justice Thomas is an enthusiastic supporter of the immunities for Constitution-violating executive officials—immunities that the Court has invented over the past forty-plus years, beginning with Scheuer v. Rhodes, 416 U.S. 232 (1974). *See, e.g.*, Kisela v. Hughes, 138 S. Ct. 1148 (2018) (joining *per curiam* opinion); District of Columbia v. Wesby, 138 U.S. 577 (2018) (opinion for the Court); Reichle v. Howards, 566 U.S. 658 (2012) (opinion for the Court); Pearson v. Callahan, 555 U.S. 223 (2009); Groh v. Ramirez, 540 U.S. 551 (2004) (Thomas, J., dissenting); Hope v. Pelzer, 536 U.S. 730 (2002) (Thomas, J., dissenting).

On the other hand, the Framers did include one—and only one—immunity in the Constitution, though they did

Perhaps there is a reason that the Framers used the terms they did. The Crown's actions—the general warrant and the writ of assistance—that led to the Fourth Amendment were all trespassory.[77] In the late eighteenth century, privacy interests rarely if ever extended beyond the home and its contents. The Bill of Rights reflects the world the Framers knew—trespassory government searches, quartering British troops in American homes, and prosecution of a printer for seditious libel for including in his paper a political figure's criticism of the colonial governor of New York.[78]

Nonetheless, Justice Black's and Justice Thomas's arguments have a superficial appeal.[79] They accord with a well-known canon of statutory construction: *expressio unius est exclusio alterius*.[80] To understand why that is *not* an appropriate construction for the Bill of Rights requires a brief excursion into its history.

III. THE BILL OF RIGHTS—BENEFIT OR BURDEN?

When the Antifederalists proposed a bill of rights, there was great opposition. The opposition, curiously, came from the Federalists—not because they were arguing for more expansive federal power, but rather because they feared that having a bill of rights could lead to undesirable expansion of federal power.[81] Alexander Hamilton strongly opposed it:

> [B]ills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers which are not granted [to the federal government]; and on this very account, would afford a colourable pretext to claim more [powers] than were granted.[82]

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so without mentioning "immunity." *See* U.S. CONST., art. I, § 6, cl. 1 (the Speech-and-Debate Clause). Neither Justice Thomas nor any other Justice has ever paused to ask whether it is significant that they did not include any others. If ever the *expressio-unius* approach has application, surely it must be here.

77. *See generally* Kerr, *supra* note 15, at 72–73.

78. *See, e.g.*, ZECHARIAH CHAFEE JR., FREE SPEECH IN THE UNITED STATES 21 (1967).

79. But, as later-Justice Holmes instructed, "The life of the law has not been logic: it has been experience." *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1881).);

80. BLACK'S LAW DICTIONARY 620 (8th ed. 2004) ("A canon of construction holding that to express or include one thing implies the exclusion of the other[s], or of the alternative[s].").

81. In this they reflected their awareness of the Iron Law of Unintended Consequences.

82. THE FEDERALIST NO. 84, at 579 (Alexander Hamilton) (J. Cooke ed. 1961). Before making that statement, Hamilton offered a longer political-theory objection to a bill of rights.

> It has been several times truly remarked that bills of rights are, in their origin, stipulations between kings and their subjects, abridgements of prerogative in favor of privilege, reservations of rights not surrendered to the prince. Such was MAGNA CHARTA, obtained by the barons, sword in hand, from King John. Such were the subsequent confirmations of that charter by succeeding princes. Such was the Petition of Right assented to by Charles I., in the beginning of his reign. Such, also, was the

He was not alone. James Wilson, who signed the Declaration of Independence, represented Pennsylvania in the Constitutional Convention in 1787 (signing the Constitution for Pennsylvania), and was one of President Washington's first appointees to the United States Supreme Court, joined Hamilton and Madison to "oppose incorporating a specifically enumerated bill of rights into the Constitution and early in the ratification debates offered a seminal rejoinder to Antifederalist agitation for a bill of rights that other partisans for the new Constitution would liberally employ."[83] Wilson objected that enumerating reserved rights might imply (1) that without such an enumeration there would have been federal power to affect them and (2) that designating some rights would connote excluding others.[84] James Madison, ironically the principal draftsman of the Bill of Rights, initially opposed it precisely because he feared the effects of an *expressio-unius* construction—that the specification of some rights might imply the exclusion of others.[85]

> Declaration of Right presented by the Lords and Commons to the Prince of Orange in 1688, and afterwards thrown into the form of an act of parliament called the Bill of Rights. It is evident, therefore, that, according to their primitive signification, they have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing; and as they retain every thing they have no need of particular reservations. "WE, THE PEOPLE of the United States, to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America." Here is a better recognition of popular rights, than volumes of those aphorisms which make the principal figure in several of our State bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government.

Id.

83. Aaron T. Knapp, *Law's Revolutionary: James Wilson and the Birth of American Jurisprudence*, 29 JOURNAL OF LAW AND POLITICS 189, 204 (2014).

84. 1 COLLECTED WORKS OF JAMES WILSON 195 (Kermit L. Hall & Mark David Hall eds., 2007).

> [I]n a government consisting of enumerated powers, . . . a bill of rights would not only be unnecessary, but, in my humble judgment, imprudent. In all societies, there are many powers and rights which cannot be particularly enumerated. A bill of rights annexed to a constitution is *an enumeration of the powers* reserved. If we attempt an enumeration, every thing that is not enumerated is presumed to be given [to the government]. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government, and the rights of the people would be rendered incomplete.

Id.; *see also id.* at 206–07.

> [O]n the subject of the press, . . . [it] is very true . . . that this Constitution says nothing with regard to that subject, nor was it necessary; because it will be found that there is given to the general government no power whatsoever concerning it; and no law, in pursuance of the Constitution, can possibly be enacted to destroy that liberty.

Id.

85. For an excellent and particularized overview of Madison's original opposition (both on legal objections

Those concerns generated the Ninth Amendment.[86] Congress and the ratifying states intended the Ninth Amendment as an internal canon of construction for the Bill of Rights. It is a constitutional instruction to reject *expressio-unius* construction of the first eight amendments. In more modern terms, the Ninth Amendment says that some fundamental personal rights are immune from government abridgement, *including, but not limited to, those expressed in the first eight amendments*.[87]

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and some perhaps less than noble reasons for objecting), *see* Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301 (1991).

Letter from James Madison to Thomas Jefferson (Oct. 17, 1788).

> My own opinion has always been in favor of a bill of rights; provided it be so framed as not to imply powers not meant to be included in the enumeration. At the same time I have never thought the omission a material defect, nor been anxious to supply it even by subsequent amendment, for any other reason than that it is anxiously desired by others. I have favored it because I supposed it might be of use, and if properly executed could not be of disservice. I have not viewed it in an important light 1. because I conceive that in a certain degree, though not in the extent argued by Mr. Wilson, the rights in question are reserved by the manner in which the federal powers are granted. 2 because there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude.

Id.; see also II Johnathan Elliot, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 167 (1941) (statement of James Iredell in the North Carolina ratifying convention):

> [I]t would not only be useless, but dangerous, to enumerate a number of rights which are not intended to be given up; because it would be implying, in the strongest manner, that every right not included in the exception might be impaired by the government without usurpation; and it would be impossible to enumerate every one.

That is not to suggest that Iredell's view of such rights was unlimited. *See* Calder v. Bull, 3 U.S. 386, 399 (1798) (Iredell, J.); *see generally* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 54–60 (2004).

86. U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed or disparage others retained by the people.")

87. *See, e.g.*, LAURENCE H. TRIBE AND MICHAEL C. DORF, ON READING THE CONSTITUTION 54 (1991). This view of the Ninth Amendment is certainly subject to dispute. *See, e.g.*, Leslie W. Dunbar, *James Madison and the Ninth Amendment*, 42 VA. L. REV. 627, 637 n.38 (1956).

> Madison, in his Report on the Virginia Resolution, reviewed the argument that a bill of rights was not needed because the Constitution contained only enumerated powers. In a long and discursive refutation, he made no mention of the [N]inth [A]mendment. This . . . [suggests that] he had not intended the [N]inth [A]mendment for this purpose.

Id.

Professor Dunbar's view, however, overlooks the thrust of the Report. It is not a rehash of why the Bill of Rights generally was or was not necessary; it is first and foremost a remonstrance against the Alien and Sedition Acts from the John Adams's administration. Madison discussed at length only the First Amendment, arguing that the Alien and Sedition Acts demonstrated why such an amendment was critical. The only other amendment to which

Justice Black's *Katz* dissent argued that the Fourth Amendment does not mention conversations (so they cannot be subject to Fourth-Amendment seizure). Justice Thomas's *Carpenter* dissent argued that the Fourth Amendment did not concern cell-phone data. Both Justices committed precisely the error the Ninth Amendment seeks to prevent. When Justice Black argued in *Griswold* that the Constitution contains no right of privacy—although he acknowledged that some parts of the Constitution did affect privacy[88]—he committed precisely the error of interpretation that the early Federalists feared when they opposed a bill of rights.

The Ninth Amendment has not received much judicial attention over 240-plus years, and that is unfortunate. Until *Griswold v. Connecticut*[89] in 1965, the Supreme Court had mentioned it only five times, once in *Ashwander*[90] in 1936 to refuse to read it as diminishing powers expressly granted to the federal government, once in *Tennessee Electric Power Co.*[91] in 1939 to note that it creates no cause of action, and twice without discussion because a party referred to it.[92] The Hatch Act case, *United Public Workers v. Mitchell*,[93] offered only a bromide: if the Constitution grants a power to the government, then using it cannot violate the Ninth Amendment.[94]

Madison called attention was the Tenth Amendment. He did not refer at all to the Second, Third, Fourth, Fifth, Sixth, Seventh, or Eighth Amendments.

88. Griswold v. Connecticut, 381 U.S. 479, 508–09 (1965) (Black, J., dissenting).

> The Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the "privacy" of individuals. But there is not. There are, of course, guarantees in certain specific constitutional provisions which are designed in part to protect privacy at certain times and places with respect to certain activities. Such, for example, is the Fourth Amendment's guarantee against "unreasonable searches and seizures."

Id.

89. 381 U.S. 479 (1965).

90. Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 330 (1936).

91. Tennessee Elec. Power Co. v. Tennessee Valley Auth., 306 U.S. 118, 136, 143–44 (1939); *see also id.* at 147 (Butler, J., dissenting).

92. Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 781–82 (1961) (Black, J., dissenting); Slagle v. Ohio, 366 U.S. 259, 261 n.4 (1961).

93. 330 U.S. 75 (1947).

94. *Id.* at 95–96.

> The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people. Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail.

Id.

This led many to wonder whether it had any effect at all.[95] Well, in one old case of which you may have heard—*Marbury v. Madison*[96]—the Court admonished that every clause in the Constitution has meaning.[97] That simply was a recognition of another canon of statutory construction: that every word and clause of a statute has effect.[98] Professor Massey was scathing about the no-effect view: "Construing the [N]inth [A]mendment as a mere declaration of a constitutional truism, devoid of enforceable content, renders its substance nugatory and assigns to its framers an intention to engage in a purely moot exercise."[99]

There may be a dearth of judicial exposition of the Ninth Amendment, but there is a vast literature concerning it, much of it focusing on Lockean theory about the nature of government.[100] Professor Niles argues for a judicially enforceable Amendment on Locke's view of the state of nature, in which no individual has any entitlement to regulate the conduct of others. Locke thought individuals form governments to protect themselves from the unregulated conduct of others. Government properly has power only to regulate in the public interest—to prevent one individual from interfering with another's private rights—but not to regulate purely private conduct.[101]

To what rights does the Ninth Amendment refer? For that, we have to think in the context of the times. "Natural law" was the dominant theory of law in the English-speaking countries in the late eighteenth century. John Locke extolled it, and it would be difficult to overstate the influence of his theory of government[102] on the Framers. People had rights that existed independent of governments. Consider the wording of the Declaration of Independence: "that [the people] are endowed

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That does not, of course, mean that use of constitutionally granted government power cannot infringe other amendments. *See, e.g.*, United States v. Eichman, 496 U.S. 310 (1990) (holding the Flag Protection Act, 18 U.S.C. § 700 (2018), violated the First Amendment by "suppressing expression out of concern for its likely communicative impact." 496 U.S. at 317).

95. *See, e.g.*, Raoul Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1 (1980) (viewing the Ninth Amendment as a mere corollary to Article I's enumeration of the federal government's legislative jurisdiction).

96. 5 U.S. (1 Cranch) 137 (1803).

97. *Id.* at 174 ("It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.").

98. But, as Karl Llewellyn noted more than half a century ago, there are almost invariably canons that contradict each well-known canon, in this case that "If inadvertently inserted or if repugnant to the rest of the statute, they may be rejected as surplusage." Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950). That counter-canon does not apply to the Ninth Amendment; it is in no way either inadvertent or repugnant to the rest of the Constitution.

99. Calvin R. Massey, *Federalism and Fundamental Rights: The Ninth Amendment*, 38 HASTINGS L.J. 305, 316 (1987).

100. *Id.*; *see, e.g.*, THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT Randy E. Barnett ed. 1993); CALVIN R. MASSEY, SILENT RIGHTS: THE NINTH AMENDMENT AND THE CONSTITUTION'S UNENUMERATED RIGHTS (1995); Suzanna Sherry, *The Ninth Amendment: Righting an Unwritten Constitution*, 64 CHI.-KENT L. REV. 1001 (1988).

101. Mark C. Niles, *Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights*, 48 UCLA L. REV. 85 (2000).

102. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT *Second Treatise* (P. Laslett ed. 1960).

by their Creator with certain unalienable rights. . . ."[103] In Locke's view, the only legitimate governments come from the people and exist to protect their natural rights. Governments could not withdraw from the people the natural rights that came from God. Moreover, governments were *not* sovereign; the people were. Governments were merely the people's trustee, invested with limited powers subject to revocation by the people.[104]

It is true that *Erie v. Tompkins*[105] rejected natural law theory in 1938, adopting instead John Austin's view that of law as the command of the sovereign.[106] Justice Holmes favored that view,[107] and the Court adopted it in *Erie*. Seven years later, the Court said, "*Erie R. Co. v. Tompkins* did not merely overrule a venerable case. It overruled a particular way of looking at law which dominated the judicial process long after its inadequacies had been laid bare."[108]

But one cannot properly construe the Ninth Amendment under a view of law unknown to those who enacted it. What did *they* think of when they said "others retained by the people"? The Supreme Court identified some of those other rights in discussing the Fourteenth Amendment's liberty guarantee:

> While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to

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103. THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776) (emphasis added).

104. *See* Donald L. Doernberg, "*We the People": John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CAL. L. REV. 52, 60–64 (1985).

105. 304 U.S. 64 (1938).

106. JOHN AUSTIN, PROVINCE OF JURISPRUDENCE DETERMINED 121 (1861).

107. *See* Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab and Transfer Co., 276 U.S. 518, 533–34 (1928) (Holmes, J., dissenting).

> If there were such a transcendental body of [natural] law outside of any particular State but obligatory within it unless and until changed by statute, the Courts of the United States might be right in using their independent judgment as to what it was. But there is no such body of law. The fallacy and illusion that I think exist consist in supposing that there is this outside thing to be found. Law is a word used with different meanings, but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else.

Id.

108. Guaranty Trust Co. v. York, 326 U.S. 99, 101 (1945).

> enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.[109]

Pierce v. Society of Sisters[110] recognized parents' right to educate their children in private schools. *Griswold v. Connecticut*[111] held that constitutional privacy prevented a state from criminalizing using medication or devices to prevent conception,[112] but, as Justice Black later pointed out in *Katz*, "privacy" does not appear in the Constitution.[113] The Court speaks of some of these rights under the rubric of "substantive due process,"[114] but the Framers would have recognized them as "natural rights," incorporated by reference in the Ninth Amendment. The label may not

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109. Meyer v. Nebraska, 262 U.S. 390, 399 (1923). Note that the *Meyer* Court included one of the rights that the Bill of Rights explicitly shields from government influence—freedom of religion—in its more general list of what the Framers would have considered fundamental rights. More recently, Lawrence v. Texas, 539 U.S. 558, 564 (2003) (citing *Meyer*), characterized the issue as "whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment. . . ." The *Lawrence* Court sharply criticized the Court that decided Bowers v. Hardwick, 478 U.S. 186 (1986), for characterizing the issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy. . . ."

> That statement, we now conclude, discloses the Court's own failure to appreciate the extent of the liberty at stake. To say that the issue in Bowers was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act.
>
> Their penalties and purposes, though, have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.

Id.

This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects.

Id.; *see also* Stanley v. Georgia, 394 U.S. 557, 567 (1969) (finding "fundamental . . . the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.").

110. 268 U.S. 510, 535 (1925).

111. 381 U.S. 479 (1965).

112. GEN. STATS. OF CONNECTICUT § 53–32 (1958 rev.) ("Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.").

113. *See* Katz v. United States, 389 U.S. 347 (1967) (Black, J., dissenting).

114. *See generally* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW, §§ 11.1—11.5, at 461–92 (8th ed. 2010). The substantive-due-process approach has been the subject of blistering criticism. *See, e.g.*, MASSEY, *supra* note 101.

> Ignoring the Ninth Amendment problem does not make it go away. It simply travels

be all-important, but the concept is critical. It would be an unconscionable nullification to empty the Ninth Amendment of its intended content simply because of a change in nomenclature.[115]

At first glance, John Austin's view of sovereignty[116] may seem incompatible with natural rights. Properly understood, it is not. The apparent inconsistency arises from misunderstanding the Framers' view of the nature of legitimate government. For a long time, the Supreme Court has either casually assumed or vigorously asserted that government is the sovereign.[117] That does more than ignore the Constitution; it repudiates it and the political theory upon which it rests. The *people* are the sovereign—the government is the people's creation and derives its power only from "the consent of the governed."[118] The Preamble is more than lofty words; it is the ultimate expression of the locus of sovereignty—"We the People"—and an introduction to the creation of government as the people's trustee. There is no transfer of sovereignty in the Constitution, only a delegation of sharply limited power.[119] "The people, not the government, possess the absolute sovereignty."[120]

> to other parts of the Constitution, where it serves the perverse function of distorting doctrine in some other area. It is far more difficult to justify the *existence* of a substantive component of due process than it is to justify the existence of constitutional unenumerated rights protected by the Ninth Amendment. Justifying their placement in the due process clauses unnecessarily garbles our understanding of due process without doing much to advance our understanding of the substance of those elusive unenumerated rights.

Id.

115. However, Professor Massey makes a persuasive argument that natural law provides a significant structure for a society only if there is "a commonly shared set of values that are thought transcendent deviance." MASSEY, *supra* note 101, at 181. He observes also that when a society is as fractured about fundamental values as ours appears currently to be, natural law may not cease to exist, but certainly goes into hibernation. *Id.* at 181–82.

116. *See* AUSTIN *supra* note 106 and accompanying text.

117. One of the first casual references appears in M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 394–95 (1819) (emphasis added): "The branch bank in Maryland is as much an institution of the *sovereign power of the Union*, as the circuit court of Maryland." More recently, Thacker v. TVA, 139 S. Ct. 1435, 1442 (2019) (quoting FHA v. Burr, 309 U.S. 242, 244 (1940)), referred to " 'the government's immunity from suit. . . .' " *See also* Millbrook v. United States, 569 U.S. 50, 51 (2013) (referring to "Government's sovereign immunity"); Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 567 U.S. 209, 215 (2012) (same); FDIC v. Meyer, 510 U.S. 471, 475 (1994) ("Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit.").sss

118. THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

119. *See* WILSON, *supra* note 84, at 222 ("[T]he absolute sovereignty never goes from the people.") In 1800, James Madison's Report on the Virginia Resolutions reflected this basic (and oft forgotten) view: "[T]here are powers exercised by most other governments, which, in the United States, are withheld by the people both from the general government and from the state governments." IV THE DEBATES IN THE SEVERAL STATE CONVENTIONS 559 (Jonathan Elliot, ed. 2d ed. 1836), *available at* https://play.google.com/books/reader?id=KVgSAAAAYAAJ&hl=en&pg=GBS.PR1 (last visited Dec. 31, 2019)). It would be difficult to find a more concise description of the mechanism by which state and federal governments acquire their powers, and it makes clear the dominance of Locke's view of government as trustee of the people rather than their sovereign.

120. James Madison, *Report on the Virginia Resolutions*, *in* IV THE DEBATES IN THE SEVERAL STATE

Consider two possible models of government.[121] In the first, government simply exists, independent of and not beholden to the people. Government *is* the sovereign, by divine right or on some other theory. If the people have rights with which government officials cannot interfere, those rights originate in a grant from the sovereign. That was the English model that prevailed during the colonial and revolutionary period. James Wilson criticized Magna Carta precisely because it reflected that political theory.[122] King John pledged *to his subjects* to respect certain rights that the nobles wrested from him. To be sure, Magna Carta is a cornerstone of freedom in the United Kingdom, but according to Wilson, its most important characteristic is that it is a cession of rights *from* the sovereign *to* the people. Under that model, government has plenary power, subject only to limits it places on itself.

That is not the model that underlies the United States government. It could not have been, given the dominant political theory in the thirteen states.[123] In this country, the government has only the powers that the people have granted, and it may not act in any other area. That recognition has been with us since *Marbury* recognized it; *Erie R. Co. v. Tompkins*,[124] rests on it, and the Supreme Court reaffirms it every time it declares any law or government action unconstitutional. The original Constitution clearly adopts this model by *enumerating* the federal government's powers, most prominently in art. I, § 8, but also in Articles II, III, and IV. The Tenth Amendment[125] confirms it. The original Constitution's structure embodies the *expressio-unius* canon. The Constitution is a delegation of specific, limited powers *from* the sovereign people *to* our subject, the government.

The Bill of Rights is different. It still is the sovereign people speaking to the government, but the Ninth Amendment specifies that using the *expressio-unius* canon to construe the rights the first eight amendments list is inappropriate. If the people had expressed it in (my fractured) Latin, it would have read "*expressio*

CONVENTIONS, *supra* note 119, at 569.

121. Professor Barnett discuss the same sort of dichotomy, also strongly favoring the second. *See* BARNETT, *supra* note 85, at 5.

> Are all restrictions on the liberties of the people to be presumed constitutional unless an individual can convince a hierarchy of judges that the liberty is somehow "fundamental"? Or should we presume that any restriction on the rightful exercise of liberty is unconstitutional unless and until the government convinces a hierarchy of judges that such restrictions are both necessary and proper? The first of these is called "the presumption of constitutionality." While this construction has never been accepted in its entirety, the exceptions that have been created to it are revealing in the way they run afoul of the text. The second of these constructions may be called the Presumption of Liberty, which can provide a practical way to restore the lost Constitution.

Id.

122. *See* WILSON, *supra* note 84, at 193–94

123. *See* Doernberg, *supra* note 104, at 57–68.

124. 304 U.S. 64 (1938).

125. U.S. CONST. amend. X.

unius ***non*** *est exclusio alterius*." Giving the Ninth Amendment no effect—no content—does not merely ignore our government model; it repudiates it.

IV. WHAT HAS THIS TO DO WITH THE WARREN COURT?

We certainly have an open-textured Constitution.[126] The Framers made it that way, despite Jefferson's suggestion of having a constitutional convention every nineteen or twenty years,[127] because the Framers wanted the Constitution to be useful even after 1807. They expected it to grow with the times. No less an authority than Chief Justice Burger recognized that the Framers intended a living Constitution, as he said, "outlast[ing] the specific abuses which gave it birth."[128]

The Warren Court understood that. The Warren-Court "revolution"[129] was not nearly so much a revolution as a return to the spirit of the Bill of Rights and the Constitution generally. The Court understood that the Framers intended their open-textured document to be applied using reasoning by analogy, recognizing the Framers' natural-rights approach to law and well-founded fears of government overreaching. Those ideas resonated with the Warren Court. It is unfortunate that the *Griswold* Court characterized the marital privacy right that it recognized as emanating from amendments' "penumbras." Marital privacy, the right to decide whether to have children, how to raise them, and how to educate them were unquestionably within the natural right of liberty to which John Locke referred and with which the Framers were intimately (so to speak) familiar.[130] If the Bill of

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126. *See* Reval B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The De Facto Era*, 94 CAL. L. REV. 1323 (2006); Erwin Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 43 (1989).

127. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON 392, 395-96 (Julian P. Boyd & William H. Gaines, Jr., eds., 1958).

> I set out on this ground, which I suppose to be self evident, "that the earth belongs in usufruct to the living": that the dead have neither powers nor rights over it.
>
> [N]o society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation. They may manage it then, and what proceeds from it, as they please, during their usufruct. They are masters too of their own persons, and consequently may govern them as they please. But persons and property make the sum of the objects of government. The constitution and the laws of their predecessors extinguished then in their natural course with those who gave them being. This could preserve that being till it ceased to be itself, and no longer. Every constitution then, and every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force, and not of right.

Id.

128. United States v. Chadwick, 433 U.S. 1, 9 (1977).

129. *See, e.g.*, Mark Tushnet, *Observations on the New Revolution in Criminal Procedure*, 94 GEO. L.J. 1627 (2006); Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185 (1983).

130. *See also* MASSEY, *supra* note 101, at 3–4.

Rights has "penumbras," the Ninth Amendment confirms their existence and demands that we not forget them. That was a central insight of the Warren Court. That is why the Warren Court recognized First-Amendment protection of symbolic speech,[131] Justice Black to the contrary notwithstanding.[132] That is why we have cases like *Mapp*,[133] *Gideon*,[134] *Griswold*,[135] *Monroe v. Pape*,[136] and on and on. The Warren Court respected the spirit of the Bill of Rights; the Framers and the Ninth Amendment's admonition spoke to its members, though they too rarely acknowledged the latter.[137] The Ninth Amendment takes those rights out of the half shadow of which *Griswold* spoke, giving them a basis in the theory of law that dominated when the Constitution and the Bill of Rights came into being.

Today it is an open question whether the government and its officials are accountable under the Constitution.[138] To the Warren Court, that was not an open question. If there is a unifying theme in the Warren Court's decisions, it is that the Constitution *is* the supreme law of the land. The Ninth Amendment is part of that Constitution, no more subject to judicial repeal than any other provision. The Warren Court recognized the two purposes of our Constitution: to create government and—equally important—to restrain it. Part of that restraint rests on the Ninth Amendment and its underlying natural-law concepts, whether the Supreme Court acknowledges that or not. Government and its officials serve within the Constitution's bounds established, at its pleasure, and subject to its conditions. Those are conditions that We the People established and that legislators, executive officials, and judges are not at liberty to ignore or diminish. We should honor the Warren Court, because that message has been lost today.

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131. Tinker v. Des Moines Indep. Comm. Sch. Dist., 393 U.S. 503 (1969).

132. *See id.* at 515–27 (Black, J., dissenting) (on the ground that the students' suspensions were within the purview of school officials to avoid disruption in school routine).

133. Mapp v. Ohio, 367 U.S. 643 (1961).

134. Gideon v. Wainwright, 372 U.S. 335 (1963).

135. Griswold v. Connecticut, 381 U.S. 479 (1965).

136. 365 U.S. 167 (1961).

137. There is now a vast literature on how to give principled content to the Ninth Amendment, and renewed consideration of that problem is beyond the scope of this essay. *See generally, e.g.*, BARNETT, *supra* note 85; MASSEY, *supra* note 101.

138. The Court is one of the chief malefactors in this area, just as it was under the reign of Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842), *overruled by* Erie R. Co. v. Tompkins, 304 U.S. 64 (1938). *Erie* declared that the Court, in deciding and following *Swift*, had violated the Constitution for nearly a century. *Id.* at 80 (emphasis added) ("We *merely* declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states."). I take "merely" to mean that in the Court's view, at least it had not done anything really serious by invading states' rights under the Constitution.

For nearly half a century, the Court has recognized and expanded a dizzying variety of immunity doctrines that makes officials and government entities that have acted unconstitutionally entirely *un*accountable for those actions. *See, e.g.*, Ashcroft v. al-Kidd, 563 U.S. 731 (2011); Connick v. Thompson, 563 U.S. 51 (2011); Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364 (2009); Anderson v. Creighton, 483 U.S. 635 (1987); Harlow v. Fitzgerald, 457 U.S. 800 (1982); Scheuer v. Rhodes, 416 U.S. 232 (1974). And yet, "immunity" appears in the Constitution as often as "privacy," and so, at least for those who style themselves textualists, has the same claim to legitimacy. *See* Carpenter v. United States, 138 S. Ct. 2206, 2239 (2018) (Thomas, J., dissenting).