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Dangerous Dicta

David Gray*

I. Introduction

In *District of Columbia v. Heller*,¹ the Court held that individuals have a Second Amendment right to keep and bear arms apart from their associations with state militias.² Although that holding was and remains controversial, less attention has been paid to what the *Heller* Court had to say about the Fourth Amendment, which provides that:

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.³

Writing for the Court in *Heller*, Justice Scalia asserts that the phrase “right of the people” in the Fourth Amendment “unambiguously refers to individual rights, not ‘collective’ rights or rights that may only be exercised through participation in some

* Professor of Law, University of Maryland, Francis King Carey School of Law. My thanks to Judge Stephen Smith and Susan Freiwald, who were exceedingly generous with their time, expertise, and comments during a dedicated session at the 2014 Privacy Law Scholars Conference where some of these ideas were discussed. In addition, I would like to thank Miriam Baer, Danielle Citron, Jennifer Daskal, Joshua Fairfield, Stephen Henderson, Orin Kerr, Richard Myers, Brian Owsley, Margaret Hu, Christopher Slobogin, Liz Clark Rinehart, and Stephen Vladeck, each of whom provided invaluable feedback; Michael Jacko for research and editing; and Frank Lancaster for his endless support. I am also in debt to the editors of the *Washington & Lee Law Review* for organizing an amazing symposium.

1. 554 U.S. 570 (2008).

2. See *id.* at 635 (“In sum, we hold that the District’s ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense.”).

3. U.S. CONST. amend. IV.

corporate body.”⁴ The Court admits that “[i]f we look to other founding-era documents, we find that some state constitutions used the term ‘the people’ to refer to the people collectively, in contrast to ‘citizen,’ which was used to invoke individual rights.”⁵ It nevertheless maintains “that usage was not remotely uniform. . . . And, most importantly, it was clearly not the terminology used in the Federal Constitution, given the First, Fourth, and Ninth Amendments.”⁶

By any definition, the *Heller* Court’s musings about the meaning of the Fourth Amendment are dicta.⁷ The question before the Court in *Heller* had only to do with the meaning and application of the Second Amendment. There were no Fourth Amendment questions presented and the facts did not implicate any Fourth Amendment issues. Not only were the Court’s comments about the Fourth Amendment in *Heller* dicta, they were irresponsible dicta. The Court neither asked for nor received briefing on the meaning of “the right of the people” in the Fourth Amendment. The Court certainly did not offer evidence in support of its reading of the Fourth Amendment or consider in any material way contrary evidence or the potential consequences of its interpretation. It resorted instead to the easy rhetoric of clarity. Thus, the Court’s broad claims about the Fourth Amendment in *Heller* exhibit more than just a lack of judicial restraint, they display a disturbingly casual association with basic rules of textual interpretation and legal argument.

This is a shame, particularly coming through the pen of the Court’s leading textualist.⁸ It is also dangerous. That is because the security of the people guaranteed by the Fourth Amendment presently is imperiled by the rapidly expanding surveillance

4. *Heller*, 554 U.S. at 579.

5. *Id.* at 580 n.6.

6. *Id.*

7. See generally Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953 (2005).

8. See Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 3 (Amy Gutmann ed., 1997) (discussing Justice Scalia’s own textualist approach to statutory construction and how that approach works in a common-law system).

capacities of governments and their agents.⁹ Meeting challenges to security and privacy posed by these technologies will require a sustained investment in constitutional remedies capable of reclaiming and preserving that security.¹⁰ As Justice Scalia recently pointed out, although “dicta, even calculated dicta, are nothing but dicta,” “[d]icta on legal points . . . can do harm, because though they are not binding they can mislead.”¹¹ This is certainly true of the *Heller* Court’s reading of the Fourth Amendment, which threatens the ability of courts to fashion and enforce those remedies, leaving each of us and all of us more vulnerable to the kind of broad and indiscriminate surveillance that is anathema to the Fourth Amendment.¹²

This Essay takes on the Court’s dangerous dicta in *Heller*. It does so on textualist grounds. By applying well-established canons of interpretation, and considering historical evidence, it argues that rights secured by the Fourth Amendment are fundamentally collective rather than individual.¹³ This does not mean that

9. See David Gray & Danielle Citron, *The Right to Quantitative Privacy*, 98 MINN. L. REV. 62, 103–25 (2014) (“Although it has not squarely addressed the issue, existing Supreme Court doctrine exhibits considerable sympathy for the proposition that emerging technologies capable of amassing large quantities of information about individuals implicate Fourth Amendment bulwarks against a surveillance state.”).

10. See generally DAVID GRAY, *THE FOURTH AMENDMENT IN AN AGE OF SURVEILLANCE* (2016) [hereinafter *AGE OF SURVEILLANCE*] (arguing that guaranteeing the security of the people in their persons, houses, papers, and effects against threats of unreasonable search and seizure posed by contemporary surveillance methods and technologies will require courts to fashion a range of prospective constitutional remedies); David Gray, *Fourth Amendment Remedies as Rights: The Warrant Requirement*, 96 B.U. L. REV. (forthcoming 2016) [hereinafter *Warrant Requirement*] (arguing for a constitutional warrant requirement limiting law enforcement access to some surveillance technologies); David Gray & Danielle Citron, *Fourth Amendment Remedies as Rights: The Right to Quantitative Privacy* (Mar. 1, 2015) (unpublished manuscript) [hereinafter *Remedies & Quantitative Privacy*] (arguing for a constitutional right to prospective constraints on law enforcement’s access to surveillance technologies capable of facilitating broad and indiscriminate surveillance characteristic of a surveillance state) (on file with author).

11. *Ohio v. Clark*, 135 S. Ct. 2173, 2184 (2015) (Scalia, J., concurring).

12. See *supra* note 10 and accompanying text (discussing negative effects of increased government surveillance).

13. It is not entirely clear that the Court ultimately disagrees with this view. Just a few sentences after issuing its dangerous dicta, it adopts the more

individuals cannot seek Fourth Amendment protections or raise Fourth Amendment claims. Any right of the people must in some way devolve to protections for persons, after all. Rather, the point is that the Fourth Amendment targets search and seizure methods and practices, which, if left to the unfettered discretion of government agents, would leave all of us and each of us insecure in our persons, houses, papers, and effects.¹⁴ This is precisely what is at stake in governments' use of modern surveillance technologies.¹⁵

II. The Canon of Plain Meaning

The first rule of textual interpretation is that words and phrases should be read for their plain meaning.¹⁶ Barring some evidence of technical usage, words and phrases are presumed to carry their common public meaning. When determining common public meaning, dictionaries provide a useful resource. Justice Scalia has identified several dictionaries as authoritative sources for common public meaning during the founding era.¹⁷ Among them is Samuel Johnson's Dictionary of the English Language, which the *Heller* Court relies upon for founding-era definitions of "keep and bear arms,"¹⁸ and which Justice Scalia has hailed as

defensible view that "the people . . . unambiguously refers to all members of the political community, not an unspecified subset." *Dist. of Columbia v. Heller*, 554 U.S. 570, 580 (2008).

14. See Gray & Citron, *supra* note 9, at 102 (arguing that unlimited access to broad surveillance power with low costs associated with use by law enforcement violates reasonable expectations of privacy).

15. See *id.* at 106, 112–13 (arguing that the quantity of data collected by new technologies, like drone surveillance, present novel and unique implications for the right to privacy).

16. See *Heller*, 554 U.S. at 576 (beginning the analysis with the text of the Second Amendment); ANTONIN SCALIA & BRYAN GARNER, *READING LAW* 16, 30 (2012) (emphasizing the importance of the plain meaning of text in statutory interpretation). See generally NORMAN SINGER & SHAMBIE SINGER, *SUTHERLAND STATUTORY CONSTRUCTION*, Vol.2A, 160–61 (7th ed., 2012). See also Scalia, *supra* note 8, at 15 (recognizing the authority of Sutherland).

17. See SCALIA & GARNER, *supra* note 16, at 419–24 (listing several dictionaries).

18. *Heller*, 554 U.S. at 581 (relying on the 1773 edition of Samuel Johnson's dictionary to interpret the text of the Second Amendment).

among “the most useful and authoritative [dictionaries] for the English Language generally and for the law.”¹⁹

According to the tenth edition of Samuel Johnson’s Dictionary of the English Language, published in 1792, “people” refers to “a nation” or “those who compose a community,” whereas “person” refers to an “[i]ndividual or particular man or woman.”²⁰ As a matter of plain meaning, then, we should read the Fourth Amendment as referring to a right of “the nation” or “those who compose the community” rather than a discrete right of each “individual or particular man or woman.”

Pressed, the *Heller* Court might argue that “people” is ambiguous, and may mean either “a nation” or “men or persons in general,”²¹ as in the phrase “when people say one thing, they do not mean something else.”²² Exploiting this ambiguity, the Court might contend that the best reading of the text is that it protects the rights of people, generally, which is to say “persons,” to be free from unreasonable search and seizure.

This line of response is fatally flawed. The mere possibility of an ambiguity does not by itself compromise plain meaning.²³ The ambiguity must be plausible in light of other intrinsic and extrinsic evidence. Moreover, even where there is a plausible alternative interpretation of a word or phrase, suggesting a real ambiguity, that raises rather than resolving questions. Thus, the Court would be unwarranted in concluding that the text of the Fourth Amendment *clearly* does not refer to the nation as a whole or the people comprising the community collectively simply because it *could* mean people in general. It would, instead, need to refer to some source of evidence to resolve the potential ambiguity. As subsequent sections show, all available evidence suggests that the text would have been read and understood in 1791 to mean what it says: that the right to be secure from unreasonable search and seizure guaranteed by the Fourth Amendment is a collective right of the people.

19. SCALIA & GARNER, *supra* note 16, at 419.

20. SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE (10th ed., 1792).

21. *Id.*

22. SINGER & SINGER, *supra* note 16, at 425–26.

23. SCALIA & GARNER, *supra* note 16, at 33–41.

III. Noscitur a Sociis

Closely associated with plain meaning is the interpretive canon *noscitur a sociis*, or “a word is known by the company it keeps.”²⁴ This reflects the basic rule of all semantic systems that meaning is in part a function of context. “Lead” means one thing in the sentence “William Wallace will lead us to victory!” and something quite different in the sentence “Isaac Newton was obsessed with the possibility of turning lead into gold.” To the extent there is any ambiguity in the word “people,” we might therefore find some guidance by looking to semantic context.

In defense of its claim that the Fourth Amendment “unambiguously refers to individual rights, not collective rights,” the Court might seek to exploit the fact that “people” may sometimes refer to a nation and sometimes to “men, or persons in general.”²⁵ This effort might gain some traction if the text of the Fourth Amendment read, “The right of *people* to be secure” It does not, however. It instead reads, “The right of *the people* to be secure” Following the canon *noscitur a sociis*, we ought not to ignore the presence of that definite article or the modifying force it has on the meaning of “people.”

“The” meant in 1792 what it means now. It is “[t]he article noting a particular thing.”²⁶ Modified by “the,” it makes neither semantic nor syntactic sense to read “people” in the Fourth Amendment as referring to unidentified persons generally. The better reading, as a matter of plain meaning and *noscitur a sociis*, is that “the people” refers to a particular nation or community as a whole. In this case, that nation or community is the people of the United States of America.²⁷ This has important implications. The *Heller* Court contends that “right of the people” in the Fourth Amendment “unambiguously refers to individual rights, not

24. See *id.* at 195 (discussing the canon of *noscitur a sociis*, in which one determines the meaning of a word by the words it is used in conjunction with); Scalia, *supra* note 8, at 26 (same).

25. JOHNSON, *supra* note 20.

26. *Id.*

27. Compare U.S. CONST. pmb1. (“We the People of the United States, in order to form a more perfect union.”), with U.S. CONST. art. I, § 2 (“The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . .”).

‘collective’ rights or rights that may only be exercised through participation in some corporate body.”²⁸ If the right to be secure under the Fourth Amendment was a right “of people” rather than a right “of the people,” then there might be good textualist grounds for this proposition. It is not, however. It therefore follows that, to claim Fourth Amendment protections, a litigant must be a member of “the people” in good standing²⁹ and can only exercise Fourth Amendment rights through and by virtue of that membership.³⁰

It is worth a moment of pause here to consider one potential objection to all this close semantic and syntactic analysis. One might argue that those who drafted the Fourth Amendment were not thinking about these matters and were in fact rather sloppy during the drafting process.³¹ Accordingly, the argument might go, it would be folly to read the text too closely because that close reading may either imagine intentions that are not there or ultimately defeat the intentions of the drafters by privileging technicalities.³² Perhaps based on extrinsic evidence, such as legislative history, one might further argue that the drafters did not intend for the text to mean what it says, and that the interpretation more faithful to their purposes would read “the people” as referring to each individual person, subject, or citizen rather than the American nation or community as a whole. For at least two reasons, this argument must be rejected.

28. *Dist. of Columbia v. Heller*, 554 U.S. 570, 579 (2008).

29. *See Samson v. California*, 547 U.S. 843, 846 (2006) (allowing suspicionless searches of parolees); *Hudson v. Palmer*, 468 U.S. 517, 525–26 (1984) (allowing routine searches of prisoners’ cells).

30. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (“[T]he people protected by the Fourth Amendment . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.”). On this point, the *Heller* Court seems inclined to agree. *See Heller*, 554 U.S. at 579–81 (defining “people” as all members of a political community, rather than an unspecified subset).

31. *See* STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 85–86 (2006) (suggesting that laws sometimes contain vague or ambiguous language for a range of reasons, including inattention).

32. *See* WILLIAM CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* 602–719, 729 (2009) (raising the possibility that one might read intentions into a text that were not contemplated by the author); BREYER, *supra* note 31, at 98–101 (arguing that “an interpretation that undercuts the statute’s objectives tends to undercut the constitutional objective”).

First, it requires a shift of interpretive theories from textualism to intentionalism.³³ As Justice Scalia has argued quite persuasively, intentionalism is a highly suspect enterprise that sets few, if any, constraints on interpreters while compromising fundamental democratic principles.³⁴ The legislative record for any statute or constitution is bound to contain a range of often conflicting views reflecting the diversity of opinions among those who participated in the legislative process.³⁵ Pursuit of legislative intent therefore presents judges with an opportunity to “choose their friends,” selectively highlighting legislators’ statements that favor the judge’s own views while discounting those which do not.³⁶ More fundamentally, the sources constituting a legislative record, such as floor debates, committee reports, testimony, and statements by legislators, are not subject to congressional vote, presidential signature, or, in this case, ratification by the states.³⁷ They therefore cannot claim anything like the democratic legitimacy necessary to rule a nation of free persons.³⁸ For these and other reasons, Justice Scalia has argued that intentionalism is antidemocratic, and that judges who pursue legislative intent threaten to reduce us to the rule of men, not laws.³⁹ Whether or not one agrees with Justice Scalia on this score, it would surely be odd to defend an opinion he wrote using methods anathema to his character as a scholar and jurist.

33. See Scalia, *supra* note 8, at 16, 23 (criticizing interpretive paradigms that aim to determine subjective legislative intent).

34. See *id.* at 16–23 (“[I]t is simply incompatible with democratic government—or indeed, even with fair government—to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated.”).

35. See *id.* at 29, 36 (criticizing the use of legislative history in statutory interpretation).

36. See *id.* at 36 (“As Judge Harold Leventhal used to say, the trick is to look over the heads of the crowd and pick out your friends. The variety and specificity of result that legislative history can achieve is unparalleled.”).

37. See *id.* at 32–36 (highlighting the anti-democratic implications of relying on statements not ratified by legislative bodies).

38. See *id.* at 9, 21–22 (“It is simply not compatible with democratic theory that laws mean whatever they ought to mean, and that unelected judges decide what that is.”).

39. See *id.* at 22, 25 (arguing that formalism and a government of laws, rather than men, are inextricably linked).

Second, to argue that those who read and wrote the Fourth Amendment in 1792 did not mean what they wrote, but rather meant the exact opposite, would require compelling extrinsic evidence. The *Heller* Court does not offer any such evidence. Furthermore, as is set forth below, the historical context in which the Fourth Amendment was drafted and ratified supports the view that it means what it says, securing rights that are first and foremost held collectively by the people.

IV. Expressio Unius Est Exclusio Alterius

Another important canon of interpretation advises that the expression of one thing implies the exclusion of the alternative. As the editors of the leading treatise on statutory interpretation have put the point, “when people say one thing, they do not mean something else.”⁴⁰ The Fourth Amendment describes a “right of the people”⁴¹ not a right of “people” or a right of “each person.” As an intrinsic matter, that expression, which secures a right for the people as a whole, excludes alternatives such as “persons,” “citizens,” or “subjects,” which would secure rights for individuals. Moreover, relevant extrinsic evidence reinforces this reading of the Fourth Amendment.

The Fourth Amendment was neither drafted nor ratified in a vacuum. Rights against general warrants and other abuses of search and seizure powers were already guaranteed to the citizens of the states by their state constitutions.⁴² Among these, two are particularly important: the Pennsylvania Declaration of Rights, which provided that “the people have a right to hold themselves, their houses, papers, and possessions free from search and seizure,”⁴³ and the Massachusetts Bill of Rights, which provided

40. SINGER & SINGER, *supra* note 16, at 426.

41. U.S. CONST. amend. IV.

42. See SINGER & SINGER, *supra* note 16, at 561–73 (pointing out that drafters are presumed to know the relevant existing law). Although the Court does not acknowledge or address this evidence directly, Justice Scalia admits the relevance of evidence from founding-era state constitutions to the project of interpreting the Constitution. See *Dist. of Columbia v. Heller*, 554 U.S. 570, 580 n.6 (comparing language in the Second Amendment to that in contemporaneous state constitutions).

43. PA. DEC. RTS, art. X (1776).

that “[e]very subject has a right to be secure from all unreasonable searches and seizures.”⁴⁴ As William Cuddihy reports, the final text of the Fourth Amendment reflects a decision to adopt the Pennsylvania language rather than the language from Massachusetts.⁴⁵ As a matter of *expressio unius*, this choice should guide our understanding of the text.⁴⁶

Selection of “the people” rather than “every subject” in the final text of the Fourth Amendment is particularly important in light of the role that John Adams played in founding-era approaches to search and seizure rights. Adams is widely regarded as the intellectual architect of the Fourth Amendment.⁴⁷ His work on search and seizure for the Massachusetts constitution later served as a blueprint for the Fourth Amendment.⁴⁸ Despite his influence on the overall structure and content of the Fourth Amendment, the drafters ultimately chose to use “the people” rather than Adams’s “every subject.”⁴⁹

At the risk of piling on, there is one more source of historical data supporting the proposition that the phrase “the people” in the Fourth Amendment was chosen to the exclusion of alternatives

44. MA. DEC. RTS, art. XIV (1780). The New Hampshire Constitution followed the Massachusetts model. *See* N.H. CONST., art. XIX (1784) (“Every subject hath a right to be secure from all unreasonable searches and seizures of his person, his houses, his papers, and all his possessions.”).

45. CUDDIHY, *supra* note 32, at 729.

46. SINGER & SINGER, *supra* note 16, at 4, 25–26, 429, 446; *cf.* *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265–66 (1990) (assigning significance to choices made by the drafters to use “the people,” “person,” and “accused”); SCALIA & GARNER, *supra* note 16, at 256 (acknowledging the canon of interpretation under which “[i]f the legislature amends or reenacts a provision . . . a significant change in language is presumed to entail a change in meaning”).

47. *See* Thomas R. Clancy, *The Framers’ Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979, 979–80 (2011) (“Most of the language and structure of the Fourth Amendment was primarily the work of one man, John Adams.”).

48. *See* *United States v. Boyd*, 116 U.S. 616, 625 (1886) (linking early American concerns over searches and seizures to conduct by British colonial government agents prior to the Revolution); TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 43 (1969) (“[T]he framers’ primary purpose was to prohibit the oppressive use of warrants, and they were not at all concerned about searches without warrants. They took for granted that arrested persons could be searched without a search warrant, and nothing gave them cause for worry about warrantless searches.”).

49. CUDDIHY, *supra* note 32, at 729.

such as “every subject.” The Constitution sent to the states for ratification in 1787 did not include the Bill of Rights. This was a primary concern during the ratification debates, leading several states to issue reservations with their votes.⁵⁰ Among these were New York, Virginia, and North Carolina, each of which recommended that the Constitution be amended to protect, *inter alia*, the right of “every freeman . . . to be secure from all unreasonable searches and seizures.”⁵¹ Despite these suggestions, the final text secures the right of “the people.”

Although the *Heller* Court does not acknowledge or address this evidence directly, the majority suggests a potential response in a footnote. There, it acknowledges that founding-era state constitutions sometimes used “the people” to refer to collective entities and “citizens” or some similar term to “invoke individual rights,” but suggests that there was insufficient uniformity, thus barring any clear conclusions.⁵² This is a helpful point, so far as it goes. It just does not go very far—or at least does not go where the Court might hope.

The *Heller* Court’s reference to state constitutions is helpful insofar as it ratifies the use of founding-era documents to inform our understanding of original public meaning attributed to words and phrases in the Constitution. It does not, however, provide any assistance in support of the Court’s claim that “the people” in the Fourth Amendment “unambiguously” refers to individual, not collective, rights. At best, such inconsistency would show ambiguity, not an absence of ambiguity. It is more likely, however, that these differences do not reflect any ambiguity at all but, instead, reflect differences of opinion.

50. See *A Maryland Farmer*, no. 1 (1788) (objecting to the federal constitution on the grounds that it contained no bill of rights, thereby denying citizens the ability to “plead and produce Locke, Sydney, or Montesquieu as authority” in defense of “natural right”).

51. See generally Ratification Statement from New York (1788); Ratification Statement from Virginia (1788); Ratification Statement from North Carolina (1788).

52. See *Dist. of Columbia v. Heller*, 554 U.S. 570, 580 n. 6 (2008) (citing N. C. DEC. RTS §XIV (1776); MD. DEC. RTS § XVIII (1776); VT. DEC. RTS ch. 1, § XI (1777); PA. DEC. RTS § XII (1776)) (“If we look to other founding-era documents, we find that some state constitutions used the term “the people” to refer to the people collectively, in contrast to “citizen,” which was used to invoke individual rights.”).

The states may have had different views on whether, say, the right to trial by jury in suits regarding property was a right of “the parties”⁵³ or “the people,”⁵⁴ but that shows a substantive difference of opinion, not semantic inconsistency. One such difference in opinion was between states such as Pennsylvania and Vermont, which regarded search and seizure protections as rights “of the people,” and states like Massachusetts and New Hampshire, which viewed them as rights of “every subject.”⁵⁵ The Fourth Amendment selects among these competing views. Far from showing ambiguity, that selection suggests clarity in terms of then-contemporary understanding of who held Fourth Amendment rights in the first instance: the people.

V. *The Whole Text* & In Pari Materia

The “whole text” canon holds that texts should be read holistically, preserving consistency in overall meaning and in the use of particular words and phrases.⁵⁶ The closely related rule of *in pari materia* provides that legal texts should be interpreted in ways that preserve consistency among closely related laws and constitutional provisions dealing with the same subject matter.⁵⁷ Based on these canons, we might seek to resolve any ambiguity in the phrase “the people” as it is used in the Fourth Amendment by referring to how “the people” is used elsewhere in the Bill of Rights,

53. PA. CONST. art. XI (1776).

54. N.C. CONST. art. XIV (1776).

55. PA. CONST. art. XI (1776); VT. CONST. art. XI (1777); MASS. CONST. art. XIV (1780); N.H. CONST. art. XIX (1784).

56. See SINGER & SINGER, *supra* note 16, at 204 (“A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section to produce a harmonious whole.”); SCALIA & GARNER, *supra* note 16, at 167–68 (describing the whole-text canon as calling upon “the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts”).

57. See SINGER & SINGER, *supra* note 16, at 234–38 (“When one section of an act deals with a subject in general terms and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible.”); SCALIA & GARNER, *supra* note 16, at 252 (“So, if possible, [a word or phrase] should no more be interpreted to clash with the rest of that corpus than it should be interpreted to clash with other provisions of the same law.”).

the Constitution, and contemporary legal texts. As we shall see, this exercise leads to the same results produced by application of prior canons: an understanding of the Fourth Amendment as protecting a collective right of the people.

The word “people” appears nine times in the Constitution, and always as part of the phrase “the people”: in the Preamble (“We the People of the United States”); Article I, Section 2 (“The House of Representatives shall be composed of Members chosen every second Year by the People of the several States”); Amendment I (“Congress shall make no law . . . prohibiting . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”); Amendment II (“[T]he right of the people to keep and bear Arms, shall not be infringed.”); Amendment IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated”); Amendment IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”); Amendment X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”); Amendment XVII (“The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof . . . the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election”).

As the *Heller* Court admits, in all of these instances “the people” “unambiguously refers to all members of the political community, not an unspecified subset.”⁵⁸ It further allows that, as used in the Preamble, Article I, and Amendment X, “the people” “arguably refer[s] to ‘the people’ acting collectively.”⁵⁹ Contrary to the canon of *in pari materia*, however, the Court maintains that all remaining instances of “the people” refer to “individual right[s],” not collective rights.⁶⁰ The Court does so on grounds of a proposed distinction between constitutional provisions that “deal with the exercise or reservation of *powers*,” where “the people” means what it says, and provisions dealing with *rights*, where “the people”

58. *Dist. of Columbia v. Heller*, 554 U.S. 570, 580 (2008).

59. *Id.* at 579.

60. *Id.*

actually means individuals.⁶¹ For several reasons, this effort fails to persuade.

Foremost, there is no obvious distinction between powers and rights in the constitutional context. When the Constitution says that the people have the power to elect members of the House, it means that the people have the right to elect their Representatives.⁶² Likewise, when it reserves to the people powers not delegated to the federal government, it means that the people have the exclusive right to legislate and regulate in those areas. Reciprocally, when the Constitution guarantees the right of the people to assemble, to keep and bear arms, or to be secure in their persons, houses, papers, and effects, it reserves to the people powers to act on those rights.⁶³ Given this relationship between powers and rights in the Constitution, it is unclear what, if any, mileage the *Heller* Court can get from claiming that, as it appears in the Constitution, “the people” is used in reference to powers in the Preamble, Article I, and Amendments IX and XVII, but rights in Amendments I, II, and IV.

The *Heller* Court might seek to preserve its proposed distinction between rights and powers by suggesting that this alternative view indulges two fallacies: the naturalistic fallacy and the moralistic fallacy. The naturalistic fallacy maintains, falsely, that “is implies ought.”⁶⁴ For example, the fact that many children live in poverty does not mean that they *should* live in poverty. So too, the Court might argue that when Article I says that the people have the power to elect their representatives this does not imply that they *should* have that power. The moralistic fallacy claims, again falsely, that “ought implies is.”⁶⁵ For example, if one asserts that all people have a right to bodily security, it does not follow that all persons are *actually* safe or that they have the *ability* to

61. See *id.* at 579–80 (“Nowhere else in the Constitution does a ‘right’ attributed to ‘the people’ refer to anything other than an individual right.”).

62. U.S. CONST., art. I, § 2; see also JOHNSON, *supra* note 20 (noting that “power” may mean “[g]overnment; right of governing.”).

63. See JOHNSON, *supra* note 20 (noting that “right” means “power, prerogative, immunity, privilege”).

64. See Owen Jones, *Sex, Culture, and the Biology of Rape: Toward Explanation and Prevention*, 87 CAL. L. REV. 827, 894 (1999) (explaining the flaws inherent in the naturalistic fallacy).

65. See *id.* at 894–95 (explaining the moralistic fallacy).

keep themselves safe from physical threats. So too, the Court might argue that when the First Amendment states that the people have a right to assemble, this does not imply that they do, in fact, have the *ability* to assemble. On pains of either or both the naturalist fallacy and moralist fallacy, the Court might therefore claim that we must recognize a real distinction between “powers” and “rights” granted to “the people” by the Constitution.

The problem with this line of argument is that it indulges a third fallacy: equivocation.⁶⁶ The word “power” has multiple meanings. It can be used descriptively, as when we say that humans have the power or “ability” to reason.⁶⁷ Alternatively, it can be used normatively, such as when we say that the state has the power or “right of governing.”⁶⁸ The *Heller* Court is perfectly correct that when “power” is used descriptively, there is a sharp distinction between powers and rights. The naturalist and moralist fallacies capture that distinction. When “power” is used normatively, however, there is little, if any, distance between powers and rights—powers assume rights and vice versa.

If the Constitution used “power” descriptively, then the *Heller* Court would have good grounds for maintaining a distinction between instances where “the people” is used in reference to powers versus instances where “the people” is used in reference to rights. That is just not how the Constitution uses “power.” The Constitution sets forth the de jure foundations of a republican democracy.⁶⁹ As such, it does not describe and report; it prescribes and ascribes. When Article I vests “legislative Powers” in Congress, it does not merely observe the fact that Congress has the ability to pass laws, it establishes Congress and grants to Congress the right to govern by legislation. When Article II vests the “Power to grant Reprieves and Pardons” with the President, it does not

66. See EDWARD DAMER, *ATTACKING FAULTY REASONING: A PRACTICAL GUIDE TO FALLACY-FREE ARGUMENTS* 121 (2009) (arguing that walking a perceived middle ground between two opposed philosophies risks arbitrary decision making on the part of the decision maker).

67. See JOHNSON, *supra* note 20 (noting that “power” may mean “[a]bility, force, [or] reach”).

68. See *id.* (noting that “power” may mean “Government; right of governing”).

69. See BREYER, *supra* note 31, at 21–34 (explaining the nature and ideological evolution of American representative democracy).

merely report the ability of presidents to draft and sign papers; it grants to presidents the right to grant pardons. Thus, on pains of equivocation, the Court does not appear to have good grounds for distinguishing between reservations of powers and ascriptions of rights to “the people” within the borders of the Constitution.

Absent some other grounds to distinguish amongst the Constitution’s use of “the people,” the canon of *in pari materia* provides further evidence that the Fourth Amendment should be read as protecting collective rights. Consider the use of “the people” in Article I, § 2, which provides, “The House of Representatives shall be composed of Members chosen every second Year by the People of the several States” It would be absurd to read “the people” in this context as meaning “individual persons.” Doing so would afford each of us the right and power to select our own representatives. The better interpretation recognizes a collective right to select representatives. That is, after all, the whole point of a representative democracy. This does not mean that Article I, § 2, has no bearing on individual rights. It surely does. The right of the people to select their representatives implies the rights of constituent members to participate in the selection process.

The *Heller* Court does not contest this reading of Article I. Neither does it contest the fact that “the people” in the Preamble and the Tenth Amendment refers to the people collectively. Given this, the canon of *in pari materia* demands that we also read “the people” in the Fourth Amendment as referring to the people collectively. As in the Article I context, this does not mean that the Fourth Amendment offers no succor or protection to individuals. The right of the people to be secure from unreasonable searches and seizures implies the rights of constituent members to claim protection just as surely as the right of the people to select their representatives entails an individual right to vote.⁷⁰

70. See SCALIA & GARNER, *supra* note 16, at 129–31 (citing the canon of interpretation that the plural includes the singular); see also *Camara v. Mun. Ct. of City and Cnty. of S.F.*, 387 U.S. 523, 527 (1967) (“The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials. The Fourth Amendment thus gives concrete expression to a right of the people which is ‘basic to a free society.’”); cf. *Dist. of Columbia v. Heller*, 554 U.S. 570, 635–36 (2008) (Stevens, J., dissenting) (arguing that “the people” in the Second Amendment describes a collective right, but “[s]urely it protects a right that can be enforced by individuals”).

The link suggested here between Article I, the First Amendment, and the Fourth Amendment may seem odd to the contemporary eye. For our founders, however, there was a clear conceptual connection among these rights that was reinforced by experience. The founding generation was influenced deeply by the political philosophy of John Locke.⁷¹ That influence is obvious in a number of founding-era documents, including the Declaration of Independence and the Constitution, which wrestle with fundamental and timeless political challenges, and in the process, instantiate a people who claim some rights for themselves as “one Body Politick”⁷² and other rights for individual members of that whole.⁷³

This pattern of allocating some rights to “the people” and other rights to individuals is evident in founding-era state constitutions. Take, for example, the Pennsylvania Declaration of Rights, which recognizes the critical role of both collective interests and individual rights in the establishment of a just government.⁷⁴ In

71. Donald Doernberg, “*We the People*”: John Locke, *Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 CAL. L. REV. 52, 57–66 (1985) (“It would be difficult to overstate John Locke’s influence on the American Revolution and the people who created the government that followed it.”); *see also* The Proceedings Relative to Calling the Convention of 1776 and 1790 the Minutes of the Convention that Formed the Present Constitution of Pennsylvania, 55 (1776) [hereinafter Pennsylvania Proceedings] (asserting that legitimate governmental authority is “derived from, and founded on the authority of the people only”); A Maryland Farmer, no. 1 (1788) (objecting to the federal constitution on the grounds that it contained no bill of rights, thereby denying citizens the ability to “plead and produce Locke, Sydney, or Montesquieu as authority” in defense of “natural right”).

72. Doernberg, *supra* note 71, at 59–60 (quoting John Locke, *Second Treatise of Government*, Sec. 95); *see also* *United States v. Cruikshank*, 92 U.S. 542, 549–50 (1875) (arguing that a government that exists by consent of members of the political community that has created it may exist, simultaneously, as both a government of “the States in their political capacity” as well as a government of the people themselves); Doernberg, *supra* note 71, at 62–66 (describing how the Framers of the Constitution relied upon the work of John Locke in understanding the interrelationships between citizens, the citizenry, and the state and pointing out the primacy of “the people” as a “collective body” in both Locke’s political philosophy and the constitutional framework of government).

73. *See, e.g.*, U.S. CONST., art. III, § 3 (explaining the rights of those charged with treason); *id.* amend. III (establishing protection against the government compelling the quartering of soldiers); *id.* amend. V (creating the grand jury procedure and guaranteeing due process); *id.* amend. VI (providing criminal trial rights).

74. *See* Pennsylvania Proceedings, *supra* note 71, at 55. (“[A]ll government

keeping with that view, the Pennsylvania Declaration allocates some rights to individuals⁷⁵ and others to the people as a whole.⁷⁶ There is a clear pattern to their choices.⁷⁷ Rights assigned to individuals—such as the right to freedom of worship, the right to own property, and the right to fair criminal process—secure freedoms necessary to projects of ethical development and individual engagements with the state. By contrast, rights secured for the people—such as the right to hold elections, the right to free speech, and the right to assemble—comprise basic political rights essential to collective projects of self-governance.⁷⁸ This reflects

ought to be instituted and supported for the security and protection of the community as such, and to enable the individuals who compose it, to enjoy their natural rights . . .”).

75. See, e.g., PA. CONST. art. I (1776) (“[A]ll men are born equally free and independent . . .”); *id.* art. II (“[A]ll men have a natural and unalienable right to worship Almighty [God], according to the dictates of their own consciences and understanding . . .”); *id.* art. VIII (“[E]very member of society hath a right to be protected in the enjoyment of life, liberty and property . . . no part of a man’s property can be justly taken from him or applied to public uses, without his own consent or that of his legal representatives . . .”); *id.* art. IX (“[I]n all prosecutions for criminal offences, a man hath a right to be heard by himself and his council . . .”); *id.* art. XI (“[I]n controversies respecting property, and in suites between man and man, the parties have a right to trial by jury . . .”); *id.* art. XV (“[A]ll men have a natural inherent right to emigrate from one state to another that will receive them . . .”).

76. See, e.g., PA. CONST. art. III (1776) (“[T]he people of this state have the sole, exclusive and inherent right of governing and regulating the internal police of the same.”); *id.* art. V (“[T]he community hath an indubitable, unalienable and indefeasible right to reform, alter or abolish government, in such manner as shall be by that community judges most conducive to the public weal.”); *id.* art. VI (“[T]he people have a right, at such periods as they may think proper, to reduce their public officers to a private station, and supply the vacancies by certain and regular elections.”); *id.* art. XIII (“[T]he people have a right to freedom of speech, and of writing and publishing their sentiments: therefore the freedom of the press ought not to be restrained.”); *id.* art. XVI (“[T]he people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances by address, petition or remonstrance.”).

77. That this choice should be afforded significance when interpreting the text is a matter of *in pari materia*. See SCALIA & GARNER, *supra* note 16, at 252–55 (explaining the concept of *in pari materia* and relating it to a series of decisions in which statutes were interpreted using the contextual meanings of related statutes).

78. This is a critical point missed by the majority in *Heller*, where the majority draws a distinction between uses of “the people” in the Preamble, Article I, and Article X, which “deal with the exercise or reservation of powers” and the First, Second, and Fourth Amendments, which deal with “rights.” See Dist. of

eighteenth-century understandings of fundamental political concepts such as “commonwealth,” “democracy,” and “republican,” as defined in relation to “the people.”⁷⁹

The U.S. Constitution follows this same pattern, resting Fourth Amendment rights with “the people” rather than “all men” or “every member of society.” This choice bespeaks an understanding that security from unreasonable search and seizure is linked to collective projects of governance and politics.⁸⁰ This may seem counterintuitive to the modern mind. As the next section points out, however, this view accurately reflects eighteenth-century experiences with search and seizure.

VI. *The Mischief to Be Addressed*

Although most textualists prefer intrinsic canons,⁸¹ which limit the range of relevant evidence to the text itself, courts often apply a limited range of extrinsic canons, which allow for the consideration of historical and contextual evidence.⁸² Among these is consideration of the mischief that a statute, regulation, or constitutional provision is meant to address.⁸³ Evidence revealing

Columbia v. Heller, 554 U.S. 570, 579–80 (2008) (“Those provisions arguably refer to ‘the people’ acting collectively—but they deal with the exercise or reservation of powers, not rights. Nowhere else in the Constitution does a ‘right’ attributed to ‘the people’ refer to anything other than an individual right.”).

79. See JOHNSON, *supra* note 20 (defining “commonwealth” as “the general body of the people,” “democracy” as “a form of government . . . in which the sovereign power is lodged with the people,” and “nationalness” as “[r]eference to the people in general,” and “republican” as “[p]lacing the government in the people”); cf. Scalia, *supra* note 3, at 39 (recognizing the political dimension of “the people” as sovereign).

80. See Alexander Reinert, *Public Interest(s) and Fourth Amendment Enforcement*, 2010 U. ILL. L. REV. 1461, 1486 (2010) (“In this context, the move to the specific warrants required by the Fourth Amendment was a radical response to the English and colonial experience with general warrants, and the concern that they could be used abusively by the government to suppress pluralist political and religious discourse.”).

81. See SINGER & SINGER, *supra* note 16, at 284–85 (“[I]ntrinsic aids generally are the first resource to which courts turn to construe an ambiguous statute.”).

82. See *id.* at 545–47 (“[C]ourts may also consider sources beyond the printed page. These sources from outside a statute’s text are known as ‘extrinsic’ aids to interpretation.”).

83. See *id.* at 461–66 (“All of these iterations of the rule about a word’s or

the mischief addressed by the Fourth Amendment reinforces the view that it aims to protect collective rights linked to projects of collective self-governance.

Like many provisions of the Bill of Rights, the Fourth Amendment was motivated by our forebears' experiences with abuses of power.⁸⁴ The Fourth Amendment's principal *bête noir* was the general warrant.⁸⁵ By 1791, the common law had rejected general warrants.⁸⁶ Among the primary reasons English courts gave for this common law prohibition was the effect of general warrants on collective security.⁸⁷ These courts reasoned that nobody could feel secure in their persons, houses, papers, or effects if forced to live under a regime where executive agents had the authority to engage in programs of broad and indiscriminate

phrase's meaning are the same in substance, reflect the idea that legislative intent is the ultimate interpretive touchstone, and should encourage conscious and deliberate judgment.”).

84. See TAYLOR, *supra* note 48, at 19 (arguing that the original understanding of the constitution can be found in the “pages of history the abuses against which the fourth amendment was particularly directed”).

85. See *United States v. Riley*, 134 S. Ct. 2473, 2494 (explaining that opposition to general warrants in the colonial era was one of the driving forces behind the Fourth Amendment); *United States v. Boyd*, 116 U.S. 616, 624–27 (claiming that the debate over general warrants “was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country”); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 601 (1999) (“The historical record, however, reveals that the Framers focused their concerns and complaints rather precisely on searches of houses under general warrants.”).

86. See *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931) (“[The second clause of the Fourth Amendment] emphasizes the purpose to protect against all general searches. Since before the creation of our government, such searches have been deemed obnoxious to fundamental principles of liberty.”). See generally CUDDIHY, *supra* note 49, at 439–40, 446–52; WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 342 (Robert Malcom Kerr, ed. 1965) (1769). See also Davies, *supra* note 85, at 655 (“Although there had been a long period in which general warrants had been allowed at common law, common-law treatises clearly disapproved of such warrants as a doctrinal matter (even if such warrants had not been entirely eliminated in practice) by the mid-eighteenth century . . .”).

87. See *Boyd v. United States*, 116 U.S. 616, 630 (1886) (“The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court . . . ; they apply to all invasions . . . sanctity of a man’s home and the privacies of life.”); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 366 (1974) (identifying the indiscriminate quality of general warrants as the principle reason for opposition in the colonial era).

search, limited only by their own unfettered discretion.⁸⁸ Thus, in the General Warrants cases,⁸⁹ which are widely recognized as signal events in the history of the Fourth Amendment,⁹⁰ Lord Camden notes that, if a government can grant “discretionary power . . . to messengers to search wherever their suspicions may chance to fall . . . it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject.”⁹¹ Concerns for political liberty played a particularly important role in that assessment. After all, the plaintiffs in the General Warrants cases were dissident pamphleteers who were targeted by the King’s agents for their criticisms of George III and his policies.⁹²

Reflecting on this history, Tony Amsterdam has noted that the mischief targeted by the Fourth Amendment “was general, it was the creation of an administration of public justice that authorized and supported indiscriminate searching and seizing.”⁹³ In light of this general threat, he concludes that “the phraseology of the

88. See *Osborn v. United States*, 385 U.S. 323, 329 n.7 (1966) (arguing that the “indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments, and imposes a heavier responsibility on this Court in its supervision of the fairness of procedures”); *Johnson v. United States*, 333 U.S. 10, 17 (1948) (“An officer gaining access to private living quarters under color of his office and of the law . . . must then have some valid basis in law for the intrusion. Any other rule would undermine ‘the right of the people to be secure in their persons, houses, papers and effects . . .’”). See generally Gray & Citron, *supra* note 9, at 73–83 (arguing that broad and indiscriminate data collection threatens to disrupt the balance between government power and individuals’ privacy).

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

90. See *Berger v. New York*, 388 U.S. 41, 49 (1967) (outlining the impact of general warrants on the creation and jurisprudential development of the Fourth Amendment); *Boyd*, 116 U.S. at 626–27 (same); TAYLOR, *supra* note 48, at 19, 26, 38 (same); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 772 (1994) (same).

91. *Wilkes*, 98 Eng. Rep. at 489; see also *Entick v. Carrington*, 19 Howell’s State Trials 1029 (1765) (“[W]e can safely say there is no law in this country to justify the defendants in what they have done; if there was, it would destroy all the comforts of society.”); TAYLOR, *supra* note 48, at 33–35 (recounting how members of Parliament and other elites felt threatened by the use of general warrants in the *Wilkes* case); Doernberg, *supra* note 71, at 57–58 (noting that “most eighteenth-century liberal doctrines can be traced to Locke and his concept that community power resides in the majority”).

92. TAYLOR, *supra* note 48, at 29–30.

93. Amsterdam, *supra* note 87, at 367.

amendment, akin to that of the first and second amendments and the ninth, [was not] accidental.”⁹⁴ Bill Stuntz has reached a similar conclusion, pointing out that:

Indeed, the real harm [illegal] searches cause, the harm that matters most to society as a whole, is the diminished sense of security that neighbors and friends may feel when they learn of the police misconduct. Totalitarian governments do not cow their citizens by regularly ransacking all their homes; the threat is usually enough. At their worst, illegal searches can represent such threats, sending a signal to the community that people who displease the authorities, whether or not they commit crimes, can expect unpleasant treatment.⁹⁵

So too has the Supreme Court, which noted in the *Keith* case that:

Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power. History abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies.⁹⁶

Those founding-era concerns have carried through to the modern era.⁹⁷ Thus, Justice Jackson advises in *Johnson v. United States*⁹⁸ that “[t]he right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance.”⁹⁹ More recently, Justice Sotomayor noted the

94. *Id.* at 367.

95. William Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 902 (1991).

96. *United States v. Dist. Court*, 407 U.S. 297, 313–14 (1972).

97. *See Berger v. New York*, 388 U.S. 41, 53 (1967) (“The security of one’s privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society.”).

98. 333 U.S. 10 (1948).

99. *Id.* at 14; *see also Brinegar v. United States*, 338 U.S. 160, 180–81 (1949) (“Courts can protect the innocent against such invasions only indirectly and through the medium of excluding evidence obtained against those who frequently are guilty So a search against Brinegar’s care must be regarded as a search of the care of Everyman.”); *Camara*, 387 U.S. at 528 (“The basic purpose of [the Fourth] Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.”); *Weeks v. United States*, 232 U.S. 383, 391–92 (1914) (stating that the Fourth Amendment’s protection “reaches all alike, whether

close link between the Fourth Amendment and democratic liberty, pointing out that granting government agents unfettered access to contemporary surveillance technologies threatens to “alter the relationship between citizen and government in a way that is inimical to democratic society.”¹⁰⁰ Collective interests have also played an important role in the Court’s exclusionary rule jurisprudence,¹⁰¹ which focuses on securing the general right of the people by generally deterring law enforcement officers from engaging in unreasonable searches and seizures.¹⁰²

These historical and contemporary sources show that the objects of concern for those who wrote, passed, and ratified the Fourth Amendment reflect the scope and purpose of the text itself. The mischief they sought to combat was the licensing of practices and policies, such as general warrants, that posed a general threat to the security of the people. It is no surprise, then, that the final text guarantees a collective right of the people.

accused of crime or not, and the duty of giving it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws”).

100. *United States v. Jones*, 132 S. Ct. at 945, 956 (2012) (Sotomayor, J., concurring).

101. See Donald Doernberg, “*Right of the People*”: *Reconciling Collective and Individual Interests Under the Fourth Amendment*, 58 N.Y.U. L. REV. 259, 273, 278–80 (1983) (“The Court has substantially abandoned the judicial integrity theme and has instructed that the exclusionary rule exists not to vindicate personal rights of the victim of an unlawful search and seizure but rather to protect the collective interest of society in deterring fourth amendment violations.”).

102. See *Brinegar*, 338 U.S. at 181 (Jackson, J., dissenting) (arguing that the purpose of the exclusionary rule should be to extend protection against the threat to the general liberties of the people posed by the central government’s agencies); David Gray, *A Spectacular Non-Sequitur*, 50 AM. CRIM. L. REV. 1, 29–30 (2013) (assessing and criticizing the degree to which the exclusionary rule is framed in terms of deterring government agents from invading citizens’ privacy); David Gray, Meagan Cooper & David McAloon, *The Supreme Court’s Contemporary Silver Platter Doctrine*, 91 TEX. L. REV. 7, 8 (2012) (stating that the exclusionary rule was historically “designed to nullify violations, to prevent the government from benefitting by its wrongdoing, and to preserve the moral integrity of the courts and the government as constitutional torchbearers”); Doernberg, *supra* note 71, at 105 (“In the fourth amendment area, the Supreme Court has been less forthright about recognizing collective interests, but it has nevertheless done so in cases considering application of the exclusionary rule.”).

VII. Conclusion

The majority in *District of Columbia v. Heller* asserts that “[t]he phrase ‘right of the people’ in the [Fourth Amendment] unambiguously refers to individual rights, not collective rights.”¹⁰³ As this essay has shown, this is simply false. By its language, and understood in its original context, the Fourth Amendment recognizes and protects rights held by “the people”¹⁰⁴ against the government.¹⁰⁵ This does prejudice the rights of individuals. As a conceptual matter, any right of the people is also a right of each person.¹⁰⁶ All of us and each of us therefore have a right to be free from unreasonable search and seizure. Reciprocally, whenever a member of “the people” challenges a governmental search or seizure, she stands not only for herself, but for “the people” as a whole.¹⁰⁷

Taking seriously the collective dimensions of Fourth Amendment rights has important implications for Fourth Amendment doctrine, including the warrant requirement, the exclusionary rule, and standing.¹⁰⁸ It also suggests ways that the Fourth Amendment can meet twenty-first century challenges to privacy presented by the increasing use of surveillance and data aggregation technologies.¹⁰⁹ The true danger in the *Heller* Court’s

103. *Heller*, 554 U.S. at 579.

104. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990).

105. *See Doernberg, supra* note 101, at 260 (“The two phrases, ‘the right of the people,’ and ‘to be secure,’ . . . imply that the amendment is a broad limitation on government; freedom from unreasonable searches is a constitutionally mandated social state.”).

106. *Supra* note 70.

107. *See Alexander Reinert, Public Interest(s) and Fourth Amendment Enforcement*, 2010 U. ILL. L. REV. 1461, 1487–91 (2010) (arguing that the effect of an individual unlawful seizure can have collective effects, such as decreasing community trust in the justice system and civic participation); Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1263–72 (1982) (arguing that the deterrent effect of the exclusionary rules protects both criminals and the innocent by removing the incentive to make searches without warrants or probable cause).

108. *See generally* GRAY, AGE OF SURVEILLANCE, *supra* note 10; Gray, *Warrant Clause*, *supra* note 10; Gray & Citron, *Remedies & Quantitative Privacy*, *supra* note 10.

109. *See generally* GRAY, AGE OF SURVEILLANCE, *supra* note 10 (arguing that guaranteeing the security of the people in their persons, houses, papers, and effects against threats of unreasonable search and seizure posed by contemporary

dicta is that it cuts off these conversations, threatening to hobble the Fourth Amendment when we, the people, need it most.

surveillance methods and technologies will require courts to fashion a range of prospective constitutional remedies); Gray & Citron, *Remedies & Quantitative Privacy*, *supra* note 10 (arguing for a constitutional right to prospective constraints on law enforcement's access to surveillance technologies capable of facilitating broad and indiscriminate surveillance characteristic of a surveillance state).