




2015

Justice Scalia's Fourth Amendment: Text, Context, Clarity, and Occasional Faint-Hearted Originalism

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Recommended Citation

Timothy C. MacDonnell, Justice Scalia's Fourth Amendment: Text, Context, Clarity, and Occasional Faint-Hearted Originalism, 3 Va. J. Crim. L. 175 (2015).

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**JUSTICE SCALIA'S FOURTH AMENDMENT:
TEXT, CONTEXT, CLARITY, AND OCCASIONAL FAINT-HEARTED
ORIGINALISM**

*Timothy C. MacDonnell**

ABSTRACT

Since joining the United States Supreme Court in 1986, Justice Scalia has been a prominent voice on the Fourth Amendment, having written twenty majority opinions, twelve concurrences, and six dissents on the topic. Under his pen, the Court has altered its test for determining when the Fourth Amendment should apply; provided a vision to address technology's encroachment on privacy; and articulated the standard for determining whether government officials are entitled to qualified immunity in civil suits involving alleged Fourth Amendment violations. In most of Justice Scalia's opinions, he has championed an originalist/textualist theory of constitutional interpretation. Based on that theory, he has advocated that the text and context of the Fourth Amendment should govern how the Court interprets most questions of search and seizure law. His Fourth Amendment opinions have also included an emphasis on clear, bright-line rules that can be applied broadly to Fourth Amendment questions. However, there are Fourth Amendment opinions in which Justice Scalia has strayed from his originalist/textualist commitments, particularly in the areas of the special needs doctrine and qualified immunity. This article asserts that Justice Scalia's non-originalist approach in these spheres threatens the

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cohesiveness of his Fourth Amendment jurisprudence, and could, if not corrected, unbalance the interpretation of the Fourth Amendment in favor of law enforcement interests.

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INTRODUCTION

The pressure on law enforcement agencies to stem the flow of illegal drugs and prevent future terror attacks, amidst advances in technology, conspires to create increasingly complex Fourth Amendment questions. Can the government collect and hold its citizens' emails, text messages, or internet search histories without a warrant? Can the government order all public school children to undergo random drug screening? Can the government require hospitals to record every newborn's DNA? The answer to these questions—and innumerable others—will not truly be known until a case comes before the Supreme Court, and the Court makes a ruling, a ruling likely to be impacted substantially by the thinking of Justice Antonin Scalia.

The Fourth Amendment to the United States Constitution protects the “right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures”¹ and requires that no warrant 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.”² Founders like John Adams believed that the principles embodied in the Fourth Amendment were central to the American Revolution.³ Although it was not until *Ex parte Jackson* in 1878 that the Supreme Court decided its first substantive Fourth Amendment case,⁴ by the early 1900s, the pace of Fourth Amendment litigation had

¹ U.S. CONST. amend. IV.

² *Id.*

³ See *Boyd v. United States*, 116 U.S. 616, 625 (1886) (quoting Adams regarding the debates about writs of assistance: “then and there . . . was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born”); Thomas K. Clancy, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979, 1004–05 (2011).

⁴ See generally *Ex parte Jackson*, 96 U.S. 727 (1878).

accelerated significantly.⁵ That pace increased with Prohibition,⁶ and then exploded after the Supreme Court's decision in *Mapp v. Ohio*,⁷ which extended the Fourth Amendment's protections to all state proceedings.⁸ In the last ten years, not a term has passed without the Supreme Court deciding at least one case involving the Fourth Amendment.⁹ In 2013, the Court decided six.¹⁰

Decisions involving the Fourth Amendment have the power to affect the everyday lives of all U.S. citizens, not just criminal suspects and defendants.¹¹ Yet, what the Fourth Amendment means today and what it protects is often unclear. Some have argued that, in a practical sense, the Fourth Amendment means whatever five justices on the Supreme Court say it means.¹² As lower courts, law enforcement officials, attorneys, and

⁵ The Supreme Court decided in excess of 22 cases involving or discussing the Fourth Amendment between 1900 and 1915.

⁶ The Supreme Court decided in excess of 18 cases involving the Fourth Amendment between 1924–1934.

⁷ 367 U.S. 643 (1961); see also George E. Dix, *Subjective "Intent" as a Component of Fourth Amendment Reasonableness*, 76 MISS. L.J. 373, 379 (2006).

⁸ *Mapp*, 367 U.S. at 655.

⁹ In 2010, the Court only decided one case which significantly involved the Fourth Amendment. See *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010).

¹⁰ *Stanton v. Sims*, 134 S. Ct. 3 (2013); *Maryland v. King*, 133 S. Ct. 1958 (2013); *Missouri v. McNeely*, 133 S. Ct. 1552 (2013); *Florida v. Jardines*, 133 S. Ct. 1409 (2013); *Florida v. Harris*, 133 S. Ct. 1050 (2013); *Bailey v. United States*, 133 S. Ct. 1031 (2013). It could be argued that *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013) was also decided on Fourth Amendment grounds, but it seems more accurately described as a standing case.

¹¹ Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 758 (1994) [hereinafter Amar, *First Principles*].

¹² Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 852 (1989) [hereinafter Scalia, *Originalism*] ("That is, I suppose, the sort of behavior Chief Justice Hughes was referring to when he said the Constitution is what the judges say it is."). In

citizens try to anticipate how the Court will answer such questions, understanding how the justices on the Court analyze the Fourth Amendment is critical. Indeed, Justice Antonin Scalia has been particularly prominent in most major Fourth Amendment cases decided by the Supreme Court over the last two and a half decades.

Given the significance of Justice Scalia's thinking and writing regarding the Fourth Amendment, this article undertakes the critical task of examining Justice Scalia's vision of the Fourth Amendment, mapping its contours, and demonstrating how that vision has affected the Court's Fourth Amendment jurisprudence. Part I of the article discusses Justice Scalia's Fourth Amendment jurisprudence. This section will examine his originalist theory of constitutional interpretation, and how he has applied that theory to the Fourth Amendment.¹³ It will conclude that text, context, and clarity are the touchstones of the majority of Justice Scalia's Fourth Amendment opinions. Part II examines Fourth Amendment opinions by Justice Scalia in which he has strayed from originalism and how that change in approach has impacted the cohesiveness of his theory of the Fourth Amendment. Part III explores how Justice Scalia has influenced the Court's Fourth Amendment jurisprudence, focusing on those areas where Justice Scalia has written opinions that have expanded or contracted Fourth Amendment protections, or where opinions by Justice Scalia can

County of Sacramento v. Lewis, 523 U.S. 833, 860 (1998), Justice Scalia observed that "[t]oday's opinion gives the lie to those cynics who claim that changes in this Court's jurisprudence are attributable to changes in the Court's membership. It proves that changes are attributable to nothing but the passage of time." See also Amar, *First Principles*, *supra* note 11, at 758.

¹³ It is important to note at the outset of this article the terms "originalism," "originalist," "textualism," or "textualist" are meant to have a limited meaning. Within this article these terms refer specifically to Justice Scalia's theory of originalism or textualism. This article is not intended to evaluate whether Justice Scalia's vision of originalism/textualism would meet whatever standard other originalist/textualists believe appropriate to those terms. This article is intended to examine Justice Scalia's version of originalism/textualism in the context of the Fourth Amendment, and then measure the Justice's Fourth Amendment opinions against his own theory.

be credited with substantively altering the Court's interpretation of the Fourth Amendment.

I. TEXT, CONTEXT, AND CLARITY

Justice Scalia has described himself as both a textualist and an originalist. Based on his description of these two terms, originalists are merely a subcategory of textualists (i.e., the textualist engages in originalism when interpreting the constitution). Justice Scalia has explained what it means to be “a textualist in good standing”¹⁴ in books¹⁵ and interviews.¹⁶ The textualist seeks to give the words of a law their “objective meaning.”¹⁷ To achieve that end, the textualist “begins and ends with what the text says and fairly implies.”¹⁸ Put differently, “the text is the law, and it is the text that must be observed.”¹⁹

However, Justice Scalia has also explained that “the good textualist is not a literalist.”²⁰ Because words are often capable of multiple meanings, the textualist seeks a “fair reading” of the words.²¹ Central to this endeavor is understanding the “context” of a law.²² In *Reading Law*, Justice Scalia wrote: “[t]his critical word *context* embraces not just textual

¹⁴ ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23 (1997) [hereinafter *Scalia, Interpretation*].

¹⁵ *Id.*; see also ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 16 (2012) [hereinafter *Scalia, Reading*].

¹⁶ Interview by Piers Morgan with Antonin Scalia, Assoc. Justice of the Supreme Court of the United States (CNN television broadcast Jul. 18, 2012), available at <http://transcripts.cnn.com/TRANSCRIPTS/120718/pmt.01.html>.

¹⁷ Scalia, *Reading*, *supra* note 15, at 30.

¹⁸ *Id.* at 16.

¹⁹ Scalia, *Interpretation*, *supra* note 14, at 22.

²⁰ *Id.* at 24.

²¹ Scalia, *Reading*, *supra* note 15, at 33.

²² Scalia, *Interpretation*, *supra* note 14, at 37 (“In textual interpretation, context is everything.”).

purpose but also (1) a word's historical associations acquired from recurrent patterns of past usage, and (2) a word's immediate syntactic setting—that is, the words that surround it in a specific utterance.”²³ Thus, textualism/originalism contains two pillars: text and context.

There are unique challenges when textualism is applied to constitutional interpretation. As Justice Scalia explained in his book *A Matter of Interpretation*: “[t]he problem [of applying textualism to constitutional interpretation] is distinctive, not because special principles of interpretation apply, but because the usual principles are being applied to an unusual text.”²⁴ Because the document being interpreted is a constitution, judges cannot “expect nit-picking detail;”²⁵ instead, words and phrases should be given “an expansive rather than narrow interpretation—though not an interpretation that the language will not bear.”²⁶

Supreme Court cases interpreting the Fourth Amendment illustrate this distinctive problem. In one of Justice Scalia's early Fourth Amendment opinions, he observed that, “[w]hile there are some absolutes in Fourth Amendment law, as soon as those have been left behind . . . the question comes down to whether a particular search has been ‘reasonable.’”²⁷ In a later opinion, he commented that the reasonableness determination often requires the Court to “slosh our way through [a] . . . fact bound morass.”²⁸ The danger of a fact-intensive jurisprudence is that it can result in “an ad hoc, case-by-case definition of Fourth Amendment

²³ Scalia, *Reading*, *supra* note 15, at 33.

²⁴ Scalia, *Interpretation*, *supra* note 14, at 37.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 681 (1989).

²⁸ *Scott v. Harris*, 550 U.S. 372, 383 (2007).

standards.”²⁹ To address this danger, when possible, Justice Scalia has advocated for “bright-line” rules to enhance the clarity of the Court’s Fourth Amendment jurisprudence.³⁰

Text, context, and clarity are the driving forces in Justice Scalia’s interpretation of the Fourth Amendment. This section will take each of these topics in turn, using cases to illustrate Justice Scalia’s emphasis on these interpretive touchstones. It is important to note that few of Justice Scalia’s Fourth Amendment opinions can be described as being resolved solely on the basis of one of the above categories. Stare decisis also plays a role in many of Justice Scalia’s Fourth Amendment opinions.³¹ Finally, given the nature of the textual approach—text plus context, coupled with the challenge of creating a coherent jurisprudence—many of Justice Scalia’s Fourth Amendment opinions are resolved based on several or all of the above factors. For the purpose of analysis, this section will focus on some of those decisions, or portions of decisions, where one analytical basis is clearly illustrated.

A. TEXT

In *Reading Law*, Justice Scalia and his co-author identify a number of “fundamental principles” and “canons of interpretation.”³² These

²⁹ O’Connor v. Ortega, 480 U.S. 709, 730 (1987) (quoting Oliver v. United States, 466 U.S. 170, 181 (1984)).

³⁰ See, e.g., *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (“The Fourth Amendment draws ‘a firm line at the entrance to the house’ . . . That line, we think, must be not only firm but also bright.”).

³¹ Scalia, *Reading*, *supra* note 15, at 411–12. Justice Scalia has explained that at times, originalism should bow to stare decisis. Scalia, *Originalism*, *supra* note 12, at 861 (“I can be much more brief in describing what seems to me the second most serious objection to originalism: In its undiluted form, at least, it is medicine that seems too strong to swallow. Thus, almost every originalist would adulterate it with the doctrine of stare decisis.”).

³² Scalia, *Reading*, *supra* note 15, at 51.

principles and canons are “presumptions about what an intelligently produced text conveys.”³³ The “Supremacy of Text” Principle, the “Ordinary-Meaning” Canon and “Omitted-Case” Canon are particularly significant when discussing Justice Scalia’s emphasis on text in interpreting the Fourth Amendment.

The “Supremacy of Text” Principle holds that “[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.”³⁴ The explanation of the “Ordinary-Meaning” Canon begins with the following quote from Chief Justice Marshall: “The enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.”³⁵ This Canon of interpretation is, according to Justice Scalia, “the most fundamental semantic rule of interpretation.”³⁶ The “Omitted-Case Canon” states that “[n]othing is to be added to what the text states or reasonably implies.”³⁷

Although not mentioned by name, the above Principle and Canons appear to be important to several of Justice Scalia’s Fourth Amendment opinions. Discussed below are three majority opinions by Justice Scalia that illustrate his application of the Principle and Canons described above.

1. *ARIZONA V. HICKS*—“A SEARCH IS A SEARCH”³⁸

Arizona v. Hicks was Justice Scalia’s first majority opinion in a case dealing with the Fourth Amendment. In it, Justice Scalia ruled that

³³ *Id.*

³⁴ *Id.* at 56.

³⁵ *Id.* at 69.

³⁶ *Id.*

³⁷ *Id.* at 93.

³⁸ *Arizona v. Hicks*, 480 U.S. 321, 325 (1987).

when a police officer physically moves items in an individual's home in order to secure information, the officer is conducting a search within the meaning of the Fourth Amendment.³⁹ Although Justice Scalia's opinion in *Hicks* illustrates several aspects of his Fourth Amendment jurisprudence, the focus of this discussion is on his unwillingness to give the text of the Fourth Amendment a meaning which he believes it cannot bear.

In *Hicks*, police entered the defendant's apartment based on exigent circumstances.⁴⁰ A bullet had been fired through the floor of Hicks's apartment, injuring an individual in the apartment below.⁴¹ Police entered the defendant's apartment to search for other potential victims, the shooter, and the gun that injured the victim.⁴² Once inside the apartment, police found several guns, and two sets of expensive stereo equipment that seemed out of place in an otherwise "squalid" apartment.⁴³ One of the police officers noticed the equipment and suspected it was stolen.⁴⁴ He recorded the serial numbers of the stereo components, which required him to move some of the equipment.⁴⁵ The serial numbers matched the numbers of two stereos that had been reported stolen to police.⁴⁶ Hicks was arrested and charged with robbery.⁴⁷ At trial, Hicks brought a motion to suppress the evidence secured based on the officer's examination,

³⁹ *Id.*

⁴⁰ *Id.* at 323.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Hicks*, 480 U.S. at 323.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 323–24.

claiming the police had violated the Fourth Amendment.⁴⁸ The motion was granted by the trial court and the Court of Appeals of Arizona.⁴⁹ The State appealed the rulings to the United States Supreme Court, which granted certiorari and affirmed the decision to suppress the evidence.⁵⁰

At the outset, it was accepted as a given that police had exigent circumstances to make their initial entry into Hicks' apartment.⁵¹ Based on those exigencies, the majority and dissents agreed that it was proper for police to look for the shooter, guns, and other victims.⁵² Further, based on the "plain view" doctrine, all the justices agreed the police could have seized any items they saw during their "exigent circumstances" search if there was probable cause to believe the items were contraband.⁵³ In its brief to the Court, the State conceded that police did not have probable cause to seize the stereo equipment.⁵⁴ Instead, they claimed the police officers' actions constituted neither a search nor a seizure within the meaning of the Amendment.⁵⁵

One of the central questions to be resolved was whether the police had conducted a "search" beyond that which was permitted by the exigent

⁴⁸ *Id.* at 324.

⁴⁹ *Id.*

⁵⁰ *Hicks*, 480 U.S. at 329.

⁵¹ *Id.* at 324.

⁵² *Id.* at 325, 331, 334. The opinion included two dissents, one authored by Justice Powell and one by Justice O'Connor.

⁵³ *Id.* at 326, 330–31. In his dissent, Justice Powell suggests that something less than probable cause should be permitted when police seize items that are immediately apparent to be evidence. *Id.* at 335.

⁵⁴ Brief for Petitioner at 18–19, *Arizona v. Hicks*, 480 U.S. 321 (1987) (No. 85-1027).

⁵⁵ *Hicks*, 480 U.S. at 324.

circumstances.⁵⁶ Justice Scalia concluded they had. In answering this question, Justice Scalia acknowledged that the police were permitted to visually examine the stereo, noting that “[m]erely inspecting those parts of the turntable that came into view during the latter search would not have constituted an independent search, because it would have produced no additional invasion of respondent’s privacy interest.”⁵⁷ However, he went on to explain that “taking action, unrelated to the objectives of the authorized intrusion, which exposed to view concealed portions of the apartment or its contents, did produce a new invasion of respondent’s privacy.”⁵⁸ Justice Powell—joined by Chief Justice Rehnquist and Justice O’Connor—dissented, claiming that moving “a suspicious object in plain view results in a minimal invasion of privacy.”⁵⁹ According to Justice Powell’s dissent, the majority opinion, “trivialize[d] the Fourth Amendment”⁶⁰ by drawing a distinction between looking at an item and moving it a few inches. Further, Justice Powell claimed the majority opinion “could deter conscientious police officers from lawfully obtaining evidence necessary to convict guilty persons.”⁶¹

Justice Scalia’s response regarding the distinction between looking and moving was short and direct, noting: “A search is a search, even if it happens to disclose nothing but the bottom of a turntable.”⁶² Regarding the decision’s impact on law enforcement, Justice Scalia wrote that “there is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy

⁵⁶ *Id.* at 324–25.

⁵⁷ *Id.* at 325.

⁵⁸ *Id.*

⁵⁹ *Id.* at 331 (Powell, J., dissenting).

⁶⁰ *Id.* at 333.

⁶¹ *Hicks*, 480 U.S. at 333 (Powell, J., dissenting).

⁶² *Id.* at 325 (majority opinion).

of us all.”⁶³

Justice Scalia’s opinion in *Hicks* is short but powerful. He does not explicitly discuss principles or canons of constitutional interpretation, but the principle of textual supremacy and the canon of ordinary meaning are clearly at work.⁶⁴ Justice Scalia’s denial of a reasonable suspicion exception to the exigent circumstances and plain view doctrines is based on the ordinary meaning of the word “search” in the Fourth Amendment. The *Hicks* decision also demonstrates one of the appealing aspects of a text-based approach of interpretation—its simplicity. The phrase “a search is a search” seems at once obvious, satisfying, and complete.

2. *CALIFORNIA V. HODARI D.*—A FLEEING SUSPECT CANNOT BE SAID TO HAVE BEEN SEIZED

Four years after *Hicks*, Justice Scalia authored the majority opinion in *California v. Hodari D.*,⁶⁵ another opinion that turned primarily on text-based reasoning. In *Hodari*, two police officers were patrolling a high crime neighborhood at night.⁶⁶ As their unmarked vehicle rounded a corner, the officers spotted a group of four or five young men huddled around a parked car.⁶⁷ When the young men saw the unmarked police car, they ran.⁶⁸ One of the officers got out of his car and pursued Hodari and another young man.⁶⁹ The officer took a shortcut and quickly closed in on

⁶³ *Id.* at 329.

⁶⁴ At the end of his Majority opinion, Justice Scalia states “we chose to adhere to the textual and traditional standard of probable cause.” *Id.*

⁶⁵ 499 U.S. 621 (1991).

⁶⁶ *Id.* at 622.

⁶⁷ *Id.*

⁶⁸ *Id.* at 622–23.

⁶⁹ *Id.* at 623.

the two men.⁷⁰ Hodari, seeing that he was about to be apprehended, tossed a small, rock-shaped object away.⁷¹ The officer tackled Hodari and put him in handcuffs.⁷² A search of Hodari revealed that he was carrying \$130.00 and a pager.⁷³ A search of the area where Hodari threw the rock-shaped object produced a quantity of crack cocaine.⁷⁴ In the trial before a juvenile court, Hodari sought to suppress the evidence as the product of an unlawful seizure.⁷⁵ Although the trial court denied the motion, the California Court of Appeals ruled the evidence should have been suppressed.⁷⁶ The Supreme Court granted certiorari and reversed the appellate court's decision.

The central question was whether Hodari was seized, within the meaning of the Fourth Amendment, when he threw the cocaine away.⁷⁷ The defendant argued that the Court's ruling in *United States v. Mendenhall*⁷⁸ supported the conclusion that he was seized.⁷⁹ In *Mendenhall*, the Court ruled "a person has been 'seized,' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave."⁸⁰

⁷⁰ *Id.*

⁷¹ *Hodari*, 499 U.S. at 623.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Hodari*, 499 U.S. at 623.

⁷⁸ 446 U.S. 544 (1980).

⁷⁹ *Hodari*, 499 U.S. at 627.

⁸⁰ *Mendenhall*, 446 U.S. at 554.

Justice Scalia, writing for the majority, found the test from *Mendenhall* inapplicable to the facts in *Hodari*. He wrote that *Mendenhall* established what was necessary for a seizure, but not what was sufficient. Although Justice Scalia referenced the common law of arrest, at the heart of this holding was his conclusion that “[t]he language of the Fourth Amendment . . . cannot sustain respondent’s contention.”⁸¹ He pointed out the apparent contradiction of *Hodari*’s argument, concluding the word seizure “does not remotely apply . . . to the prospect of a policeman yelling ‘Stop, in the name of the law!’ at a fleeing form that continues to flee. That is no seizure.”⁸²

The dissent argued that the majority had departed from a quarter century of Supreme Court precedent, claiming Justice Scalia’s opinion conflicted with prior holdings in *Katz v. United States* and *Terry v. Ohio*.⁸³ The dissent further asserted that a seizure was achieved from the moment the officer engaged in a show of force and *Hodari* understood he was not free to leave.⁸⁴ Also, the dissent pointed out that, had the officer tackled *Hodari* before he threw the cocaine away, the evidence would unquestionably be suppressed.⁸⁵ Given that the objective of the exclusionary rule is to deter police misconduct, the officer in this case should not benefit from *Hodari*’s election to run or throw the evidence away before he was tackled.⁸⁶ The dissent concluded by stating the majority should be “more sensitive to the purposes of the Fourth Amendment.”⁸⁷

⁸¹ *Hodari*, 499 U.S. at 626.

⁸² *Id.*

⁸³ *Id.* at 632–37 (Stevens, J., dissenting).

⁸⁴ *Id.*

⁸⁵ *Id.* at 630–31.

⁸⁶ *Id.* at 646.

⁸⁷ *Hodari*, 499 U.S. at 648 (Stevens, J., dissenting).

The dissent's argument in *Hodari* highlights a common theme in Justice Scalia's Fourth Amendment opinions. This theme relates to the relationship between the text of the Constitution and the Court-made tests designed to implement the Constitution's text. Justice Scalia has stated repeatedly that the Constitution should be interpreted consistently with the original meaning of its text. To give structure and predictability to its jurisprudence, the Court has created tests for implementing the Constitution's text. However, several of Justice Scalia's opinions, including *Hodari*, make clear his belief that a strict hierarchy exists between test and text. Constitutional tests are valuable only as long as they are effective at implementing the text of the Constitution. Once the logical application of a Court-made test outpaces the text it is meant to implement, the test must yield to the actual words of the Amendment.

3. *UNITED STATES V. GRUBBS*—THE PARTICULARITY CLAUSE
APPLIES PARTICULARLY

Justice Scalia's majority opinion in *United States v. Grubbs*⁸⁸ illustrates the "Omitted Case" Canon of interpretation (i.e., "a matter not covered is to be treated as not covered").⁸⁹ In *Grubbs*, postal inspectors discovered that the defendant was attempting to purchase a child pornography videotape.⁹⁰ The inspectors arranged to deliver the video to Grubbs' home.⁹¹ Prior to the delivery, an inspector secured an "anticipatory warrant" to search Grubbs' home after he received the tape.⁹² The affidavit supporting the warrant stated, in part, that "[e]xecution of this search warrant will not occur unless and until the

⁸⁸ 547 U.S. 90 (2006).

⁸⁹ Scalia, *Reading*, *supra* note 15, at 93.

⁹⁰ *Grubbs*, 547 U.S. at 92.

⁹¹ *Id.*

⁹² *Id.*

parcel has been received by a person(s) and has been physically taken into the residence.”⁹³ The magistrate issued the warrant but failed to include the triggering event.⁹⁴ Among other things, Grubbs challenged the warrant for its failure to state with particularity the triggering event for the warrant.⁹⁵ The Court of Appeals for the Ninth Circuit agreed, stating that “the particularity requirement of the Fourth Amendment applies with full force to the conditions precedent to an anticipatory search warrant.”⁹⁶ The Supreme Court granted certiorari, and reversed.

In rejecting the Ninth Circuit’s decision, Justice Scalia noted that the “[t]he Fourth Amendment . . . does not set forth some general ‘particularity requirement.’ It specifies only two matters that must be ‘particularly describe[d]’ in the warrant: ‘the place to be searched’ and ‘the person or things to be seized.’”⁹⁷

As this quote shows, Justice Scalia’s position on the text of the Fourth Amendment could be described as “it is what it is. No more, no less.” The Fourth Amendment does not protect all privacy,⁹⁸ but only privacy in those areas or things enumerated by the Amendment.⁹⁹ When a case involves the areas of protection described in the Amendment, Justice Scalia has rejected attempts to conclude the Fourth Amendment does not

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 93.

⁹⁶ *United States v. Grubbs*, 377 F.3d 1072, 1077 (9th Cir. 2004).

⁹⁷ *Grubbs*, 547 U.S. at 97.

⁹⁸ See *NASA v. Nelson*, 131 S. Ct. 746, 765 (2011) (Scalia, J., concurring) (arguing that a federal constitutional right to informational privacy does not exist); *Carter v. Minnesota*, 525 U.S. 83, 97–98 (1998).

⁹⁹ See Scalia, *Reading*, *supra* note 15, at 93.

apply.¹⁰⁰ Conversely, when a case seeks to expand Fourth Amendment protection beyond the text of the Amendment, Justice Scalia has rejected attempts to enlarge the Amendment's protections.

In reviewing Justice Scalia's application of textualism to the Fourth Amendment, his arguments are often at their most convincing when they spring from a direct reading of the text of the Amendment. This approach has led Justice Scalia to challenge theories of Fourth Amendment interpretation that assert that some searches are not searches; individuals can be considered seized while they are still running from police; locations that are not described in the Fourth Amendment are protected; and, that those that are described are unprotected.

B. CONTEXT—THE WARRANT PRESUMPTION, PROBABLE CAUSE HEARINGS, AND PROPERTY

The second pillar to Justice Scalia's textualist/originalist philosophy is the belief that the context of the Fourth Amendment is necessary to "how the text of the Constitution was originally understood."¹⁰¹ When reviewing the Fourth Amendment's context, Justice Scalia has relied on: (1) pre-Revolutionary War British cases;¹⁰² (2) the

¹⁰⁰ *Maryland v. King*, 133 S. Ct. 1958, 1982 (2013) (Scalia, J., dissenting); *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013); *United States v. Jones*, 132 S. Ct. 945, 950 (2012); *Kyllo v. United States*, 533 U.S. 27, 31–33 (2001); *Arizona v. Hicks*, 480 U.S. 321, 328 (1987).

¹⁰¹ Scalia, *Interpretation*, *supra* note 14, at 38.

¹⁰² *Entick v. Carrington*, 95 Eng. Rep. 807 (K.B. 1765). Justice Scalia has cited *Entick* in six of his Fourth Amendment opinions to illustrate the context of the Fourth Amendment. See *Florida v. Jardines*, 133 S. Ct. 1409, 1415 (2013); *United States v. Jones*, 132 S. Ct. 945, 949 (2012); *Thornton v. United States*, 541 U.S. 615, 631 (2004); *Kyllo v. United States*, 533 U.S. 27, 32 (2001); *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989); *Anderson v. Creighton*, 483 U.S. 635, 644 (1987). However, in *Anderson* Justice Scalia cites *Entick* but does not rely on it. See 483 U.S. at 644. Additionally, Justice Scalia cites *Semayne's Case*, 77 Eng. Rep. 194 (K.B. 1604) in *Minnesota v. Carter*, 525 U.S. 83, 94 (1998) to support the broad declaration that a man's home is his

common law in effect before, during, and after the passage of the Fourth Amendment;¹⁰³ (3) state constitutions in existence before the federal constitution;¹⁰⁴ (4) Blackstone's treatise on the English common law;¹⁰⁵ and, (5) the work of a few well-respected scholars.¹⁰⁶ Justice Scalia has relied heavily on contextual analysis when addressing whether the Fourth Amendment contains a warrant presumption, as well as timing issues surrounding post-arrest probable cause hearings. Context has also played a substantial role in Justice Scalia's analysis of the relationship between the Fourth Amendment and property/trespass rights.

1. WARRANT PRESUMPTION

Justice Scalia is among those members of the Court who believe that the Fourth Amendment does not contain a warrant presumption (i.e., the requirement that, absent a recognized exception, all government

castle. Further, *Huckle v. Money*, 95 Eng. Rep. 768 (K. B. 1763) was cited in *California v. Acevedo*, 500 U.S. 565, 581 (1991) to support the proposition that civil damages for trespass was the primary remedy for illegal searches conducted by government officials in the 1760s.

¹⁰³ *County of Riverside v. McLaughlin*, 500 U.S. 44, 71 (1991) (Scalia, J., dissenting) (relying on the Commentaries of Justice Story, which claim the Fourth Amendment "is little more than the affirmation of a great constitutional doctrine of the common law").

¹⁰⁴ *Minnesota v. Carter*, 525 U.S. 83, 92–94 (1998); *Maryland v. King*, 133 S. Ct. 1958, 1981 (2013).

¹⁰⁵ *Jardines*, 133 S. Ct. at 1415; *Carter*, 525 U.S. at 94; *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995); *McLaughlin*, 500 U.S. at 61; *California v. Acevedo*, 500 U.S. 565, 581 (1991) (Scalia, J., concurring).

¹⁰⁶ Although Justice Scalia cites a number of scholars in his Fourth Amendment opinions, the ones that seem to have the greatest influence on his broad view of the Fourth Amendment are Professor Akhil Reed Amar and Professor Telford Taylor. Scalia cites to Amar's work in *Virginia v. Moore*, 553 U.S. 164, 70 (2008) and *Acevedo*, 500 U.S. at 581–83. He cites to Taylor's work in *Moore*, 553 U.S. at 169, *Acevedo*, 500 U.S. at 582, and *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989).

searches under the Fourth Amendment must take place pursuant to a warrant to be considered reasonable).¹⁰⁷ Although he has often concluded a particular warrantless search was unconstitutional, the absence of a warrant does not *per se* create a constitutional violation. Rather, the absence of a warrant is included in Justice Scalia's Fourth Amendment reasonableness analysis. One concurring opinion in particular, *California v. Acevedo*,¹⁰⁸ reflects Justice Scalia's views on the warrant presumption and why he believes the context of the Fourth Amendment supports his position.

In *Acevedo*, police intercepted a Federal Express package that contained marijuana.¹⁰⁹ They made arrangements to allow the package to be picked up at the post office and to follow whoever received the

¹⁰⁷ At the outset of this discussion, some background regarding the history of the warrant presumption is necessary. From 1878 to the mid-twentieth century, the Supreme Court's jurisprudence has arguably included a warrant presumption. See *Ex parte Jackson*, 96 U.S. 727 (1878). This doctrine accepts that the first clause and second clause of the Fourth Amendment are related. The first clause protects individuals from unreasonable searches and seizures; the second clause explains what is necessary for a search or seizure to be reasonable (i.e., a warrant based on probable cause which describes with particularity the place to be searched and the person or things to be seized). See *Ybarra v. Illinois*, 444 U.S. 85, 100–02 (1979) (Rehnquist, J., dissenting) (discussing the relationship between two clauses of the Fourth Amendment). In 1950, the first substantial cracks in the warrant presumption doctrine developed in a case called *United States v. Rabinowitz*, 339 U.S. 56, 60 (1950). In *Rabinowitz*, the majority ruled that the first and second clauses were independent. *Id.* at 65–66. Thus, a warrantless search or seizure could be reasonable and thereby constitutional. Since *Rabinowitz*, the Court has vacillated on the question. Today, the Court continues to issue opinions that state there is a warrant presumption, but that presumption includes a substantial number of exceptions to the rule. See *Riley v. California*, 134 S. Ct. 2473, 2482 (2014); see also THOMAS M. CLANCY, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION* 471–73 (2008); THOMAS N. MCINNIS, *THE EVOLUTION OF THE FOURTH AMENDMENT* 119–80 (2009).

¹⁰⁸ 500 U.S. 565 (1991).

¹⁰⁹ *Id.* at 567.

drugs.¹¹⁰ Mr. Jamie Daza picked up the package and went home.¹¹¹ Police followed Daza and staked out his apartment.¹¹² They observed Acevedo go into Daza's apartment and then leave with a brown paper bag approximately the same size as one of the marijuana packages that had been delivered.¹¹³ Acevedo put the package in the trunk of his car and began to drive away.¹¹⁴ Police stopped the car, opened the trunk, and found the marijuana.¹¹⁵ Acevedo was charged with possession of marijuana with the intent to distribute.¹¹⁶ Acevedo's motion to suppress the marijuana was denied. The California Court of Appeals overruled the trial court, concluding the evidence should have been suppressed.¹¹⁷ The California Supreme Court refused to hear the case, but the United States Supreme Court granted certiorari and ultimately reversed.¹¹⁸

The majority opinion focused on clarifying and simplifying the Court's automobile exception. Prior to *Acevedo*, police could conduct a warrantless search on a car, provided they had probable cause.¹¹⁹ Such a

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Acevedo*, 500 U.S. at 567.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 568.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 570. The case required the Court to resolve the apparent conflict between its holding in *United States v. Ross*, 456 U.S. 798 (1982) and *Arkansas v. Sanders*, 442 U.S. 753 (1979). In discussing the holding in *Ross*, the *Acevedo* Court stated, in part that, "if probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *Id.* at 570.

search included examining closed containers (e.g., a bag in the trunk) in the vehicle provided there was probable cause related to the vehicle.¹²⁰ *Acevedo* presented a more nuanced question—can police search a package in the car without a warrant if they only have probable cause to believe the *package*, and not the vehicle more generally, contains contraband? The majority found they could, and clarified the automobile exception.¹²¹ In arriving at this conclusion, the majority was careful to ensure its opinion was limited to the automobile exception. In a nod to originalism, the majority wrote:

[C]ontemporaneously with the adoption of the Fourth Amendment, the First Congress, and, later, the Second and Fourth Congresses, distinguished between the need for a warrant to search for contraband concealed in ‘a dwelling house or similar place’ and the need for a warrant to search for contraband concealed in a moveable vessel.¹²²

Justice Scalia concurred with the majority opinion but took the occasion to argue against a broad warrant presumption. In his concurrence, Justice Scalia referenced both historical and scholarly material. He began, as one would expect, with the text of the Fourth Amendment, noting that it “does not by its terms require a prior warrant for searches and seizures; it merely prohibits searches and seizures that are ‘unreasonable.’”¹²³ He then went on to state that the Fourth Amendment’s discussion of warrants “is by way of limitation upon their issuance rather than requirement of their use.”¹²⁴ Next, he cited to the scholarship Professor Akhil Amar, Judge

¹²⁰ *Acevedo*, 500 U.S. at 571–73.

¹²¹ *Id.* at 580.

¹²² *Id.* at 569.

¹²³ *Id.* at 581 (Scalia, J., concurring).

¹²⁴ *Id.*

Richard Posner, and Professor Telford Taylor.¹²⁵ Justice Scalia used the work of these authors to support three assertions regarding the Founders' original understanding of the warrant requirement.¹²⁶ First, when the Fourth Amendment was enacted, the recourse available to a citizen for an unreasonable search and seizure was to sue the agents who had conducted the search or seizure for a trespass.¹²⁷ Second, an officer armed with a warrant issued by an independent magistrate would be immune from suit.¹²⁸ Third, the warrant clause was intended to limit when a warrant could be issued, for fear that magistrates would issue warrants immunizing government agents based on little or no evidence.¹²⁹ Thus, as Professor Amar described it, "[j]udges and warrants are the heavies, not the heroes."¹³⁰

After arguing that the text, history, and context of the Fourth Amendment did not support a warrant presumption, Justice Scalia softened, stating "I have no difficulty with the proposition that [the reasonableness requirement of the first clause] . . . includes the requirement of a warrant, where the common law required a warrant."¹³¹ He suggested "changes in surrounding legal rules . . . may make a warrant indispensable to reasonableness where it once was not."¹³² He concluded, however, by rejecting the idea of a "'general rule' that a warrant is always

¹²⁵ *Id.* at 581–82.

¹²⁶ *Acevedo*, 500 U.S. at 581–82.

¹²⁷ *Id.*

¹²⁸ *Id.* at 581.

¹²⁹ *Id.* at 581–82.

¹³⁰ Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1179 (1991) [hereinafter Amar, *Bill of Rights*].

¹³¹ *Acevedo*, 500 U.S. at 583.

¹³² *Id.*

required.”¹³³ In fact, Justice Scalia ended his concurrence by arguing that the ability to conduct a warrantless search of a closed container should not depend on the automobile exception at all.¹³⁴ Rather, a warrant should be unnecessary to search a closed container once the container is outside of a privately-owned building, if there is probable cause to believe the container has contraband in it.¹³⁵

Since *Acevedo*, Justice Scalia has not written substantively on the warrant presumption, but, in *Groh v. Ramirez*, he joined in a dissent written by Justice Thomas.¹³⁶ *Groh* dealt with a suit brought under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) and Section 1983 against government officers for the unconstitutional search of a home.¹³⁷ The majority concluded that the search warrant in the case was so defective that the agents had, in effect, conducted a warrantless search of a home.¹³⁸ Based on the effective absence of a warrant, the majority ruled the officers were not entitled to qualified immunity.¹³⁹

Justice Thomas dissented, claiming the search was not unconstitutional, and even if it were, the officers should have been granted qualified immunity.¹⁴⁰ Regarding the warrant presumption, Justice Thomas appeared even more dubious than Justice Scalia, writing that “the [Fourth] Amendment’s history . . . is clear as to the Amendment’s principal target (general warrants), but not as clear with respect to when

¹³³ *Id.* at 583–84.

¹³⁴ *Id.* at 584–85.

¹³⁵ *Id.*

¹³⁶ *Groh v. Ramirez*, 540 U.S. 551, 571 (2004) (Thomas, J., dissenting).

¹³⁷ *Id.* at 555 (majority opinion).

¹³⁸ *Id.* at 558.

¹³⁹ *Id.* at 563.

¹⁴⁰ *Id.* at 573 (Thomas, J., dissenting).

warrants were required, if ever.”¹⁴¹ Although it is not clear how much weight to ascribe to Justice Scalia’s decision to join Justice Thomas’s dissent, he clearly has not warmed to the idea that the Fourth Amendment includes a warrant presumption.

2. POST-ARREST PROBABLE CAUSE HEARINGS

The next context-based opinion discussed in this section is Justice Scalia’s dissent in the *County of Riverside v. McLaughlin*.¹⁴² This opinion illustrates Justice Scalia’s general position that the Fourth Amendment should, at a minimum, protect as much today as it did in 1791. In *McLaughlin*, Justice Scalia relied on legal treatises published between 1769 and 1837, along with case law from the nineteenth and twentieth century, to determine what the Fourth Amendment protected in 1791.¹⁴³

The *McLaughlin* case was a class action brought under Section 1983 challenging the probable cause hearing procedure employed by the County of Riverside Jail.¹⁴⁴ In that county, individuals arrested without a warrant were entitled to a probable cause hearing within 48 hours of being arrested, not including weekends and holidays.¹⁴⁵ Thus, based on this policy, an individual could be held without a hearing or warrant for as long as seven days (depending on when they were arrested).¹⁴⁶ The Supreme Court had to decide how long the government could delay between arresting an individual without a warrant and conducting a probable cause hearing. The majority in *McLaughlin* held 48 hours was the maximum time an individual arrested without a warrant could be held

¹⁴¹ *Id.* at 572.

¹⁴² 500 U.S. 44 (1991).

¹⁴³ *Id.* at 60–63.

¹⁴⁴ *Id.* at 47.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* (“Over the Thanksgiving holiday, a 7-day delay is possible.”).

without a magistrate's hearing, regardless of weekends and holidays.¹⁴⁷

In answering the central question, the majority believed the Court had to clarify an earlier decision, *Gerstein v. Pugh*.¹⁴⁸ *Gerstein* held that an individual could be arrested without a warrant, but that he/she must be "promptly"¹⁴⁹ brought before a magistrate after the arrest for "a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty."¹⁵⁰ The majority concluded that the *Gerstein* decision rested on a "'practical compromise' between the rights of individuals and the realities of law enforcement."¹⁵¹ Among the factors that the majority considered were delays created by combining pretrial events (e.g., arraignments and probable cause hearings), and "the everyday problems of processing suspects through an overly burdened criminal justice system."¹⁵² According to the majority, "prompt" meant at least within 48 hours, absent "a bona fide emergency or other extraordinary circumstance."¹⁵³ Justice Scalia dissented.

Justice Scalia's dissent began with a broad statement of dissatisfaction with the Court's constitutional jurisprudence.¹⁵⁴ According to him, the Court "alternately creates rights that the Constitution does not contain and denies rights that it does."¹⁵⁵ He stated: "I dissent from

¹⁴⁷ *Id.* at 56.

¹⁴⁸ *McLaughlin*, 500 U.S. at 47, 56, 67–68.

¹⁴⁹ *Gerstein v. Pugh*, 420 U.S. 103, 125 (1975).

¹⁵⁰ *Id.*

¹⁵¹ *McLaughlin*, 500 U.S. at 53 (quoting *Gerstein*, 420 U.S. at 113).

¹⁵² *Id.* at 55.

¹⁵³ *Id.* at 57.

¹⁵⁴ *Id.* at 60 (Scalia, J., dissenting).

¹⁵⁵ *Id.*

today's decision, which eliminates a very old right indeed."¹⁵⁶ The "old right" to which Justice Scalia was referring was the right of an individual arrested without a warrant to be brought before a magistrate as soon as an arresting officer "reasonably can."¹⁵⁷

Justice Scalia's main objection to the majority's opinion was its balancing test. He again stated:

There is assuredly room for such an approach in resolving novel questions of search and seizure under the 'reasonableness' standard that the Fourth Amendment sets forth. But not, I think, in resolving those questions on which a clear answer already existed in 1791 and has been generally adhered to by the traditions of our society ever since.¹⁵⁸

To support his position, he cited cases from 1825 to 1909 that all, in essence, supported the requirement that an officer must bring an individual arrested without a warrant to a magistrate "as soon as he reasonably can."¹⁵⁹ Additionally, Justice Scalia cited cases and commentary from 1860 to 1964 that supported his argument that the only basis for a reasonable delay is the time needed to secure a prisoner in confinement and reach a magistrate.¹⁶⁰ Finally, Justice Scalia concluded:

[A]bsent extraordinary circumstances, it is an 'unreasonable seizure' within the meaning of the Fourth Amendment for the police, having arrested a suspect without a warrant, to delay a determination of probable

¹⁵⁶ *Id.*

¹⁵⁷ *McLaughlin*, 500 U.S. at 61 (citing Blackstone and several other nineteenth century English authorities substantiating an individual's right to be brought before a magistrate as soon as is reasonably possible after an arrest).

¹⁵⁸ *Id.* at 60.

¹⁵⁹ *Id.* at 61.

¹⁶⁰ *Id.* at 61–62.

cause for the arrest either (1) for reasons unrelated to arrangement of the probable-cause determination or completion of the steps incident to arrest, or (2) beyond 24 hours after the arrest.¹⁶¹

The majority accused Justice Scalia of citing several statements from the early 1800s that provided no greater guidance than the *Gerstein* promptness requirement.¹⁶² However, that critique does not seem entirely correct. The majority opinion clearly accepts delay in securing a post-arrest hearing that goes beyond the steps necessary to secure a magistrate. Justice Scalia relies on cases that at least imply that a police officer who makes an arrest without the benefit of a warrant is required to bring their prisoner directly to a magistrate for a probable cause hearing.¹⁶³

Critics could argue that the *McLaughlin* dissent is much ado about nothing. Ultimately Justice Scalia has written a sharp dissent over a difference of twenty-four hours. However, as is often the case, there is more at stake than one additional day in jail. The focus of Justice Scalia's argument was the majority's use of a balancing test to resolve a question that had a simple answer based in the contextual origins of the Fourth Amendment. Further, Justice Scalia asserted that "[i]t was the purpose of the Fourth Amendment to put this matter beyond time, place, and judicial predilection, incorporating the traditional common-law guarantees against unlawful arrest."¹⁶⁴

3. THE FOURTH AMENDMENT AND PROPERTY

One of the dominant themes apparent in Justice Scalia's Fourth Amendment opinions is the context-based connection between Fourth

¹⁶¹ *Id.* at 70.

¹⁶² *See id.* at 54–55 (majority opinion) (calling Justice Scalia's 24-hour requirement an "inflexible standard").

¹⁶³ *McLaughlin*, 500 U.S. at 61–62.

¹⁶⁴ *Id.* at 66 (Scalia, J., dissenting).

Amendment privacy guarantees and property. Justice Scalia has repeatedly advocated that the Court should use—or return to—a property/trespass-based test for determining whether the Fourth Amendment applies in a given situation. Such a test would ask whether government agents committed a trespass on an area protected by the Fourth Amendment. If a trespass occurred, then the Fourth Amendment would apply and the Court would have to resolve whether the agents' actions were reasonable.¹⁶⁵ Justice Scalia has advocated this position in his opinions—in one form or another—since 1987.¹⁶⁶

Justice Scalia has cited and relied upon a 1765 case from Britain—*Entick v. Carrington*—in several Fourth Amendment opinions to support his argument that the Court should adopt a property-based test for determining whether the Fourth Amendment applies in a given situation. Justice Scalia cited *Entick* favorably in five opinions,¹⁶⁷ including four of his majority opinions.¹⁶⁸ In three of the five opinions where Justice Scalia cited *Entick*, he did so to argue that the context of the Fourth Amendment, as illustrated by *Entick*, supported a property/trespass test for determining Fourth Amendment application.¹⁶⁹

¹⁶⁵ *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013); *United States v. Jones*, 132 S. Ct. 945, 949–50 (2012); *Kyllo v. United States*, 533 U.S. 27, 31–32 (2001).

¹⁶⁶ *O'Connor v. Ortega*, 480 U.S. 709, 731 (1987) (Scalia, J., concurring) (“Where, for example, a fireman enters a private dwelling in response to an alarm, we do not ask whether the occupant has a reasonable expectation of privacy . . . vis-à-vis firemen, but rather whether—given the fact that the Fourth Amendment covers private dwellings—intrusion for the purpose of extinguishing a fire is reasonable.”).

¹⁶⁷ *Jardines*, 133 S. Ct. at 1415; *Jones*, 132 S. Ct. at 949; *Thornton v. United States*, 541 U.S. 615, 631 (2004); *Kyllo*, 533 U.S. at 31–32; *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989). *But see* *Anderson v. Creighton*, 483 U.S. 635, 644 (1987) (Justice Scalia refusing to apply *Entick* to a question of civil liability).

¹⁶⁸ *Jardines*, 133 S. Ct. at 1415; *Jones*, 132 S. Ct. at 949; *Kyllo*, 533 U.S. at 31; *Brower*, 489 U.S. at 596.

¹⁶⁹ *Jardines*, 133 S. Ct. at 1415; *Jones*, 132 S. Ct. at 949; *Kyllo*, 533 U.S. at 31.

Entick was one of several cases from Britain that grew out of the publication of pamphlets critical of the British government in the early 1760s. Perhaps the most well-known of these pamphlets was of the North Briton No. 45, published by John Wilkes in 1763.¹⁷⁰ However, before Wilkes published his pamphlet, John Entick had published material critical of the British government. In response, the British Secretary of State issued general warrants authorizing the search and arrest of anyone involved in creating these documents.¹⁷¹ After individuals were arrested and their homes searched, several law suits were initiated against the agents who carried out the searches. In the first two cases, *Huckle v. Money*¹⁷² and *Wilkes v. Wood*,¹⁷³ the victims of the arrests and searches won their civil suits. *Entick* was the next major case. In *Entick*, the presiding judge, Lord Camden, wrote:

The great end, for which men entered into society, was to secure their property No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil.¹⁷⁴

The Supreme Court has cited *Entick* repeatedly. For example, as early as 1886, *Entick* was cited in *Boyd v. United States*.¹⁷⁵ *Boyd* was one of the first major Fourth Amendment cases decided by the Supreme Court,

¹⁷⁰ CLANCY, *supra* note 107, at 36; LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 159–62 (1999).

¹⁷¹ ARTHUR CASH, JOHN WILKES: THE SCANDALOUS FATHER OF CIVIL LIBERTY 99 (2006); MCINNIS, *supra* note 107, at 16.

¹⁷² 95 Eng. Rep. 768 (K.B. 1763).

¹⁷³ 98 Eng. Rep. 489 (K.B.1763).

¹⁷⁴ *Entick v. Carrington*, 19 How. St. Tr. 1029, 1066 (C.B. 1765).

¹⁷⁵ *Boyd v. United States*, 116 U.S. 616, 626 (1886).

and the *Entick* case featured prominently in the decision. The *Boyd* Court stated:

[A]s every American statesmen, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom [referring to the *Entick* case], 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.¹⁷⁶

Justice Scalia has relied on *Boyd*'s declarations regarding the importance of the *Entick* case and Lord Camden's references to property and trespass in *Entick* itself to argue that the Fourth Amendment, at a minimum, was meant to protect the personal privacy of the body and privacy in property.¹⁷⁷

C. CLARITY—HOMES, CARS, AND INTENT

The third touchstone in Justice Scalia's Fourth Amendment jurisprudence does not spring from originalism/textualism, but instead from pragmatism. Since joining the Court, Justice Scalia has advocated for clear, easy-to-apply rules for searches and seizures.¹⁷⁸ The need for clarity

¹⁷⁶ *Id.* at 626–27.

¹⁷⁷ *United States v. Jones*, 132 S. Ct. 945, 949 (2012).

¹⁷⁸ *See, e.g., Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (“The contours of [a right violated by a government official] must be sufficiently clear that a reasonable official would understand that he is violating that right.”); *O'Connor v. Ortega*, 480 U.S. 709, 730 (1987) (arguing in dissent that the majority's rule “produces rather than eliminates uncertainty”); *Arizona v. Hicks*, 480 U.S. 321, 328 (1987) (noting Justice Scalia's unwillingness “to send police and judges into a new thicket of Fourth Amendment law, to seek a creature of uncertain description that is neither a ‘plain view’ inspection nor yet a ‘full-blown search’”).

from the Court seems especially important since aspects of the Fourth Amendment are so vague. The question of what is a reasonable search or seizure is open to significant differences of opinion. Even textualists disagree over what a “reasonable” search or seizure is.

Justice Scalia's emphasis on clarity has, in part, led him to object to the *Katz* “reasonable expectation of privacy” test because of his belief that it is “notoriously unhelpful.”¹⁷⁹ Furthermore, the need for clear, easy-to-understand rules is why Justice Scalia has objected to a case-by-case, factually-intensive definition of the Fourth Amendment.¹⁸⁰ The cases that best illustrate this drive for clarity tend to deal with three areas: the home, automobiles, and the role of a police officer's subjective intent in Fourth Amendment interpretation.

1. THE HOME

Justice Scalia has written several significant Fourth Amendment decisions dealing with the home. *Arizona v. Hicks*, *Kyllo v. United States*, and *Florida v. Jardines* were important decisions bolstering privacy in the home.¹⁸¹ Yet, not all of Justice Scalia's cases involving the home have increased its protection. In cases like *Griffin v. Wisconsin*, *Illinois v. Rodriguez*, *Hudson v. Michigan*, and *Georgia v. Randolph*, Justice Scalia concluded that the intrusions on privacy in the home were not enough to carry the day in favor of the homeowner.¹⁸² In each of the above decisions, Justice Scalia sought to craft a general rule that was clear and easily applied in future similar situations.

In his effort to enhance the clarity of the Court's Fourth

¹⁷⁹ *Minnesota v. Carter*, 525 U.S. 83, 97 (1998).

¹⁸⁰ *O'Connor*, 480 U.S. at 730.

¹⁸¹ See *infra*, notes 183–190.

¹⁸² *Hudson v. Michigan*, 547 U.S. 586 (2006); *Georgia v. Randolph*, 547 U.S. 103 (2006) (Scalia, J., dissenting); *Illinois v. Rodriguez*, 497 U.S. 177 (1990); *Griffin v. Wisconsin*, 483 U.S. 868 (1987).

Amendment jurisprudence, Justice Scalia has repeatedly rejected attempts to tinker with the definition of a search, particularly in the context of the home. For example, in *Hicks* (previously discussed in Section I, Part A), the dissenting justices arguably sought to expand the plain view doctrine. Justice Scalia rejected this proposal and chose instead to reinforce and clarify the limitations on plain view.¹⁸³ Rather than accepting the invitation of the dissenting justices to call the officer's actions something other than a search, Justice Scalia stated simply that "a search is a search"¹⁸⁴ and, when conducted in a home—absent a warrant, probable cause, or other exception—it is unconstitutional.¹⁸⁵ Justice Scalia noted that to adopt the proposal in Justice O'Connor's dissent would "send police and judges into a new thicket of Fourth Amendment law, to seek a creature of uncertain description that is neither a 'plain view' inspection nor yet a 'full-blown search.'"¹⁸⁶

In *Kyllo*, the government and the dissenting justices believed police should be allowed to search the exterior of a home with a passive heat sensor.¹⁸⁷ Once again, writing for the majority, Justice Scalia said no. He wrote that the "the Fourth Amendment draws a firm line at the entrance to the house. . . . That line, we think, must be not only firm but also bright."¹⁸⁸ Justice Scalia rejected the invitation to draw a distinction between intimate and non-intimate facts, noting that "[i]n the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes."¹⁸⁹

¹⁸³ *Arizona v. Hicks*, 480 U.S. 321, 328 (1987).

¹⁸⁴ *Id.* at 325.

¹⁸⁵ *Id.* at 328.

¹⁸⁶ *Id.* at 328–29.

¹⁸⁷ *Kyllo v. United States*, 533 U.S. 27, 41 (2001) (Stevens, J., dissenting).

¹⁸⁸ *Id.* at 40 (majority opinion) (internal citations omitted).

¹⁸⁹ *Id.* at 37.

Finally, in *Jardines*, we see Justice Scalia rejecting the claim that bringing a narcotics dog on to an individual's porch to sniff for drugs is not a "search." Justice Scalia stated that "[t]he [Fourth] Amendment establishes a simple baseline, one that for much of our history formed the exclusive basis for its protection: When 'the Government obtains information by physically intruding' on persons, houses, papers, or effects, 'a "search" within the original meaning of the Fourth Amendment has 'undoubtedly occurred.'"¹⁹⁰

In addition to tightening and clarifying Fourth Amendment protection of the home from warrantless searches, Justice Scalia has written several opinions that reduce or remove the adverse consequences of errors made by police. Rather than enhancing Fourth Amendment protection of the home, which Justice Scalia has described as "first among equals,"¹⁹¹ these cases reduce, or potentially reduce, protection by creating a buffer zone between law enforcement errors and adverse results. Included in these cases are *Anderson v. Creighton*, *Illinois v. Rodriguez*, and *Hudson v. Michigan*.¹⁹² In each of these cases, police committed errors that infringed on individual's privacy in their home, and in each case Justice Scalia argued for either no adverse consequences or limited ones.

In *Anderson*, FBI agents believed an escaped felon was hiding in Creighton's home.¹⁹³ Without a warrant, agents entered the home and discovered they were wrong.¹⁹⁴ The Creightons sued Agent Anderson of the FBI for violating their Fourth Amendment rights.¹⁹⁵ The question

¹⁹⁰ *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) (internal citations omitted).

¹⁹¹ *Id.*

¹⁹² *Hudson v. Michigan*, 547 U.S. 586 (2006); *Illinois v. Rodriguez*, 497 U.S. 177 (1990); *Anderson v. Creighton*, 483 U.S. 635 (1987).

¹⁹³ *Anderson*, 483 U.S. at 637.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

ultimately before the Supreme Court was whether Agent Anderson was entitled to qualified immunity “if he could establish as a matter of law that a reasonable officer could have believed the search to be lawful[?]”¹⁹⁶ Justice Scalia, writing for the majority, answered yes.¹⁹⁷

In *Rodriguez*, police officers entered the defendant’s home without a warrant, based on permission they received from Rodriguez’s girlfriend.¹⁹⁸ It was unclear whether police knew that the defendant’s girlfriend no longer lived with Rodriguez and so did not have authority to consent to the police entry into Rodriguez’s home.¹⁹⁹ Justice Scalia ruled that under the circumstances, the officer’s actions may have been reasonable even if incorrect and remanded the case for the trial court to resolve the question.²⁰⁰ He wrote that “[w]hat [Mr. Rodriguez] is assured by the Fourth Amendment . . . is not that no government search of his house will occur unless he consents; but that no such search will occur that is ‘unreasonable.’”²⁰¹

In *Hudson*, police armed with a search warrant announced their presence at Hudson’s home, but only waited three to five seconds before entering the home.²⁰² The State agreed that the entry violated the “knock-and-announce” rule under the Fourth Amendment.²⁰³ Justice Scalia, writing for the majority, found that, despite law enforcement’s violation of

¹⁹⁶ *Id.* at 638.

¹⁹⁷ *Id.* at 646 (“We . . . decline to make an exception to the general rule of qualified immunity for cases involving allegedly unlawful warrantless searches of innocent third parties’ homes in search of fugitives.”).

¹⁹⁸ *Illinois v. Rodriguez*, 497 U.S. 177, 180 (1990).

¹⁹⁹ *Id.* at 189.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 183.

²⁰² *Hudson v. Michigan*, 547 U.S. 586, 588 (2006).

²⁰³ *Id.* at 590.

the “ancient” right embodied in the knock and announce rule, exclusion was an inappropriate remedy.²⁰⁴ In his opinion, Justice Scalia repeatedly referred to excluding evidence as a “massive remedy” which carried too high a social cost.²⁰⁵ Justice Scalia did not argue, however, that no remedy was proper in *Hudson*, pointing out that a civil action would be available for violations of the knock and announce rule.²⁰⁶ In each decision—*Anderson*, *Rodriguez*, and *Hudson*—Justice Scalia attempts to create rules that give law enforcement the freedom to make certain mistakes, reasonable or otherwise, with limited or no adverse effects.

When first reviewing Justice Scalia's Fourth Amendment jurisprudence involving the home, it can appear confusing. In some cases he seems the champion of Fourth Amendment privacy in the home. In *Kyllo*, *Hicks*, and *Jardines*, police had reason to suspect illegal activity in the defendants' homes. Each defendant considered in those cases—Mr. Kyllo, Mr. Hicks, and Mr. Jardines—*was* engaged in illegal activity. Further, the intrusion in each case was limited, with police committing no physical intrusion whatsoever in *Kyllo*. Despite these facts, Justice Scalia concluded a Fourth Amendment violation occurred. Then consider *Anderson*, *Rodriguez*, and *Hudson*. In *Anderson*, police entered a home, at night, without a warrant, and they were wrong. In *Rodriguez*, they entered a home without a warrant based on incorrect information. In *Hudson* all the parties agreed the police had violated the Fourth Amendment. Yet in these three cases, Justice Scalia ruled in favor of law enforcement.

The apparent contradiction of these cases can be explained by the common thread of clarity they share. *Hicks*, *Kyllo*, and *Jardines* clarify that a search is a search. If the place being searched is a home, police must have obtained a warrant or acted reasonably in believing an exception to the warrant requirement existed. *Anderson*, *Rodriguez*, and *Hudson* clarify

²⁰⁴ *Id.* at 594–95.

²⁰⁵ *Id.* at 595, 599.

²⁰⁶ *Id.* at 596–98 (discussing the deterrent value of civil suits against law enforcement agents).

that police can make reasonable mistakes with limited or no adverse effect.

2. AUTOMOBILES

The Supreme Court's automobile exception has existed since the Court decided *Carroll v. United States* in 1925.²⁰⁷ Chief Justice Taft, writing for the majority, declared, for a variety of reasons, that when police have probable cause to believe evidence of a crime may be found in an individual's vehicle, they may search the vehicle without a warrant.²⁰⁸ Since *Carroll*, the Court has had to resolve scores of Fourth Amendment cases involving automobiles. These cases have required the Court to answer diverse questions, such as: can police search luggage in a car without a warrant;²⁰⁹ can police search passengers and passenger property when they have probable cause to believe the driver has evidence of a crime;²¹⁰ and can police search a vehicle based on nothing more than the fact that they arrested the vehicle's driver while he was driving the car?²¹¹

In several cases involving automobiles and the Fourth Amendment, Justice Scalia has written that the history and context of the Fourth Amendment are unclear on how the Founders would have resolved these questions.²¹² Based on the absence of a clear original meaning in these situations, Justice Scalia has advocated that the Court should "apply traditional standards of reasonableness."²¹³

²⁰⁷ 267 U.S. 132 (1925).

²⁰⁸ *Id.* at 150–61.

²⁰⁹ *California v. Acevedo*, 500 U.S. 565 (1991).

²¹⁰ *Wyoming v. Houghton*, 526 U.S. 295 (1999).

²¹¹ *Arizona v. Gant*, 556 U.S. 332, 351 (2009) (Scalia, J., concurring).

²¹² *See id.*; *Thornton v. United States*, 541 U.S. 615, 629–31 (2004) (Scalia, J., concurring).

²¹³ *Gant*, 556 U.S. at 351.

In applying traditional standards of reasonableness to automobiles, Justice Scalia has advocated for clear rules, but also broad ones. Justice Scalia has written at least four opinions involving the warrantless search of an automobile, and in three of the four opinions he has argued the search was constitutional.²¹⁴ Further, in several cases, he has advocated for a permissive search rule, so long as there is probable cause that a crime has occurred. For example, in *Wyoming v. Houghton*, he wrote the majority opinion, which built upon a prior rule from *Ross*.²¹⁵ The *Ross* rule permitted the police to conduct a warrantless search of a suspect's entire vehicle—including closed containers—if they had probable cause to believe there was contraband in the vehicle.²¹⁶ *Houghton* expanded the rule to include passengers' closed containers.²¹⁷ Similarly, in his concurrence in *Arizona v. Gant*, Justice Scalia argued that when police arrest a suspect who is the driver of a vehicle, they should be able to conduct a warrantless search of the vehicle for evidence related to the crime that provided the basis of the arrest.²¹⁸ Although the officer must have some basis to believe he will find evidence of that particular crime, Justice Scalia does not suggest there must be probable cause to believe evidence of the suspected crime is in the car. All that appears to be

²¹⁴ In *Gant*, Justice Scalia concurred that the search was unreasonable. *Id.* at 352–54. In three other cases, he concluded the searches were reasonable. *Thornton*, 541 U.S. at 625; *Houghton*, 526 U.S. at 306–07; *Acevedo*, 500 U.S. at 581–85.

²¹⁵ *Houghton*, 526 U.S. at 295, 301–02. Justice Scalia advocated the same position in *Thornton*, 541 U.S. at 624 (Scalia, J., concurring).

²¹⁶ *United States v. Ross*, 456 U.S. 798, 825 (1982).

²¹⁷ *Houghton*, 526 U.S. at 302 (“When there is probable cause to search for contraband in a car, it is reasonable for police officers—like customs officials in the Founding era—to examine packages and containers without a showing of individualized probable cause for each one.”).

²¹⁸ *Arizona v. Gant*, 556 U.S. 332, 353 (2009) (Scalia, J., concurring) (“I would hold that a vehicle search incident to arrest is ipso facto ‘reasonable’ only when the object of the search is evidence of the crime for which the arrest was made, or of another crime that the officer has probable cause to believe occurred.”).

necessary is that the officer limit the search to evidence of the crime that is the basis for the arrest and that the officer be reasonable.²¹⁹ Part of Justice Scalia's argument for the rule is that it is necessary to give police guidance to avoid having officers game the automobile exception in a way that would create greater danger when arresting suspects who are in vehicles.²²⁰

3. PRETEXT

The third group of cases where Justice Scalia's preference for clear, easily applied rules is apparent are those dealing with so-called pretext searches or seizures. With the exception of the special needs and administrative search doctrines, Justice Scalia has argued that a police officer's intent is irrelevant to whether a search or seizure is unreasonable.²²¹ Arguably, Justice Scalia's preference has a textual basis. Reasonableness in the law is often measured objectively. However, in the context of the Fourth Amendment, an equally strong argument could be made that an officer's subjective intent is relevant to whether a government official has misused his power, and thereby been unreasonable.²²² Based on several opinions discussed *infra*, it seems that one of Justice Scalia's reasons for not considering an officer's subjective intent is that such inquiries would be complex, difficult to administer, and would potentially force officers to either manipulate circumstances or

²¹⁹ *Id.*

²²⁰ *Id.* (suggesting that the majority's standard "fails to provide the needed guidance to arresting officers and also leaves much room for manipulation, inviting officers to leave the scene unsecured . . . in order to conduct a vehicle search").

²²¹ *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011) (upholding the detention of a suspect as a material witness even though the Attorney General may have actually suspected him of criminal acts).

²²² *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989) (citing *Byars v. United States*, 273 U.S. 28, 33 (1927)) ("[T]he Fourth Amendment addresses 'misuse of power' . . . not the accidental effects of otherwise lawful government conduct.").

testimony to ensure proper motives for searches or seizures.²²³

In several cases, Justice Scalia has asserted that “an arresting officer’s state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause.”²²⁴ Thus, when a police officer has an objectively reasonable basis to search or seize a person, place, or thing, the “real” reason the officer conducted the search or seizure is not relevant. According to Justice Scalia, “[t]his approach recognizes that the Fourth Amendment regulates conduct rather than thoughts,” and “promotes evenhanded, uniform enforcement of the law.”²²⁵ Applying this line of reasoning in *Whren v. United States*, Justice Scalia, writing for the majority, concluded that when police witness a driver committing a traffic violation, the police may stop the vehicle, even if the underlying or true motive for the stop is to investigate a drug offense.²²⁶ Fifteen years later, in *Ashcroft v. al-Kidd*, Justice Scalia concluded the government could use material witness warrants to hold individuals—assuming the government met the standard necessary for such a warrant—even if the real reason for the detention was that the government suspected the “witnesses” were involved in terrorism.²²⁷

According to Justice Scalia, the subjective intent of the officer is primarily relevant during administrative searches and under the special needs doctrine.²²⁸ The reason for these exceptions to the general rule is that the administrative search and special needs doctrines authorize searches and seizures without a warrant or probable cause.²²⁹ Thus, they

²²³ See cases cited *infra*, notes 226, 227, 231.

²²⁴ *Devenpeck v. Alford*, 543 U.S. 146, 153–55 (2004).

²²⁵ *Al-Kidd*, 131 S. Ct. at 2080.

²²⁶ *Whren v. United States*, 517 U.S. 806, 813 (1996).

²²⁷ *Al-Kidd*, 131 S. Ct. at 2085.

²²⁸ *Id.* at 2080.

²²⁹ *Id.* at 2080–81.

must be limited to a primarily non-law enforcement purpose.²³⁰

One additional circumstance in which Justice Scalia has considered the subjective intent of a police officer is described in *Florida v. Jardines*.²³¹ Justice Scalia's opinion in *Jardines* reveals some of the challenges that are created when considering an officer's subjective intent in the context of an alleged Fourth Amendment violation.

In *Jardines*, police received an anonymous tip that the defendant was growing marijuana in his home.²³² Based on that tip, a police officer walked a narcotics dog up to the front door of Jardines' home, and directed the dog to sniff.²³³ The dog alerted to the presence of drugs, and police used that information to secure a warrant.²³⁴ When the warrant was executed, police found a quantity of drugs.²³⁵ The government argued that the police officer, like all members of the public, was permitted to walk up to Jardines' front door.²³⁶ Furthermore, they argued that it was irrelevant that the officer's purpose was to gather evidence to support a search warrant because, under *Whren* and *al-Kidd*, the officer's subjective intent did not matter.²³⁷ Justice Scalia disagreed.

Writing for the Court, Justice Scalia concluded that the officer's subjective intent was relevant to whether the police had committed a

²³⁰ *Id.*

²³¹ *Florida v. Jardines*, 133 S. Ct. 1409, 1415–17 (2013).

²³² *Id.* at 1413.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ See Brief of Respondent on the Merits at 38, *Florida v. Jardines*, 133 S. Ct. 1409 (2013) (No. SC08-2101) (citing Florida case law for the proposition that “it is clear that one does not harbor an expectation of privacy . . . where a salesman or visitor may appear at any time”).

²³⁷ *Jardines*, 133 S. Ct. at 1416.

trespass when the dog sniff occurred.²³⁸ According to Justice Scalia, the officer's license to approach Jardines' front door was limited physically—the officer could only follow the path to the front door—and was also limited by the officer's purpose.²³⁹ So, presumably, an officer selling tickets to the Policeman's Ball could approach the front door, but an officer approaching with a narcotics dog hoping to find incriminating evidence could not.

Although the *Jardines* case answers one question, it raises others. Based on *Jardines*, we know that in most circumstances an officer cannot bring a dog to the front door of a home to sniff for drugs.²⁴⁰ But can the officer himself go to the front door and sniff? Can an officer go to a suspect's front door hoping to see something incriminating when the door is opened? Does this decision mean homeowners have greater privacy than apartment dwellers? What if a police officer wore a drug detection device at all times as standard-issue equipment? Would that avoid the *Jardines* problem? Does *Jardines* have broader application into other areas of the Fourth Amendment, like the third party doctrine?²⁴¹ *Jardines* reveals the problem of using subjective intent as a factor in determining whether a Fourth Amendment violation has occurred. Courts will have to delve into the intentions of officers and engage in credibility determinations that will result in more complex and prolonged motions practice.

²³⁸ See *id.* at 1416–17 (stating that the reasonability of the officer's search “depends upon whether the officers had an implied license to enter the porch, which in turn depends upon the purpose for which they entered”).

²³⁹ *Id.* at 1415–16.

²⁴⁰ *Id.* at 1417–18.

²⁴¹ The third party doctrine refers to that line of cases associated with *Smith v. Maryland*, 442 U.S. 735 (1979) and *United States v. Miller*, 425 U.S. 435 (1976). This doctrine holds that individuals do not possess a reasonable expectation of privacy in information voluntarily shared with others. *Jardines* may provide a caveat to such a doctrine, where individuals retain a degree of privacy over information shared by giving a limited license to those with whom they share the information.

Justice Scalia's written opinions, books, and interviews all reflect his firm belief that the originalist/textualist approach is the proper way to analyze our Constitution. Based on his constitutional philosophy and pragmatic emphasis on bright-line rules, Justice Scalia's Fourth Amendment rests on three interpretive pillars. For most opinions, there is also a prioritization consistent with the Principles and Canons discussed at the beginning of this section. This order of priority places text first, context second, and clarity third.

II. FAINT-HEARTED ORIGINALISM²⁴²

Although Justice Scalia has written many Fourth Amendment opinions in which he relies on originalism as the foundation for his position, there are some cases where the text and context of the Fourth Amendment appear to be a lower priority. In particular, Justice Scalia's position on the special needs doctrine, as well as his opinions on the standard for qualified immunity in civil cases arising from violations of the Fourth Amendment, stray from the path that Justice Scalia has described as originalism. Some of these opinions may reflect Justice Scalia's belief that *stare decisis*, rather than originalism, should sometimes carry the day, or alternatively, a belief that applying originalism in some circumstances would be too disruptive to the country and law enforcement.²⁴³

Regardless of the reason, Justice Scalia's willingness to switch

²⁴² In a lecture Justice Scalia stated, "I hasten to confess that in a crunch I may prove a faint-hearted originalist," referring to whether he would uphold a law that permitted public flogging. The lecture was later made part of a law review symposium issue. Scalia, *Originalism*, *supra* note 12, at 864. In a recent New York Magazine interview Justice Scalia stated, "I described myself as that a long time ago. I repudiate that." Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG., Oct. 6, 2013, at 1, available at <http://nymag.com/news/features/antonin-scalia-2013-10/>.

²⁴³ See Scalia, *Reading*, *supra* note 15, at 411–13 (identifying circumstances under which *stare decisis* can trump an originalist approach); see also Scalia, *Originalism*, *supra* note 12, at 861.

theoretical horses when deciding search and seizure cases affects the predictability of his future Fourth Amendment opinions. Furthermore, Justice Scalia's willingness to deviate from originalism when addressing civil liability for Fourth Amendment violations threatens the cohesiveness of his broader theory of the Fourth Amendment. As discussed *infra*, section I.B.1, Justice Scalia accepted in *Acevedo* that the threat of civil liability for trespass was an important founding era method of deterring police from violating the rights protected under the Fourth Amendment. When law enforcement acted without a warrant, they potentially faced significant financial liability. In some situations, police faced strict liability for their violations.²⁴⁴ Justice Scalia has rejected that context-based system of deterrence in favor of a standard that presumes qualified immunity for violating the Fourth Amendment. Below is a discussion of several of Justice Scalia's opinions regarding the special needs doctrine and civil liability. The cases involving special needs show him vacillating between originalism and, for lack of a better description, pragmatism. The cases involving civil liability demonstrate a continuing non-originalist approach.

A. SPECIAL NEEDS

The special needs and administrative search doctrines grew out of two cases in the 1950s and 60s: *Frank v. Maryland*²⁴⁵ and *Camara v. Municipal Court*.²⁴⁶ From these two cases came the administrative search doctrine.²⁴⁷ This doctrine generally holds that the government does not

²⁴⁴ See *Andersen v. Creighton*, 483 U.S. 635, 644 (1987) (acknowledging that "officers conducting such searches were strictly liable at English common law if the fugitive was not present").

²⁴⁵ 359 U.S. 360 (1959).

²⁴⁶ 387 U.S. 523 (1967).

²⁴⁷ Steven R. Probst, *Ferguson v. City of Charleston: Slowly Returning the "Special Needs" Doctrine to its Roots*, 36 VAL. U. L. REV. 285, 290–91 (2001).

have to adhere to the usual standards of the Fourth Amendment when conducting a search under a regulatory scheme, so long as they adhere to “reasonable legislative or administrative standards.”²⁴⁸ From that doctrine arguably came the “special needs” doctrine, which permits warrantless, suspicion-less searches where “special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impractical.”²⁴⁹

Justice Scalia has written six opinions regarding the special needs doctrine.²⁵⁰ In four of the opinions, he argued in favor of applying the exception,²⁵¹ in two, he argued against it.²⁵² Looking at all six opinions together, there appears to be some conflict. Absent in most of Justice Scalia’s opinions in favor of applying the exception is a substantial discussion of the original meaning of the Fourth Amendment. However, in

²⁴⁸ *Camara*, 387 U.S. at 538; *see also* *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987).

²⁴⁹ *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985); *see also* *McINNIS*, *supra* note 107, at 119–72 (suggesting that the “administrative search” and “special needs” doctrines can be viewed as growing out of a broader evolution in the Supreme Court’s Fourth Amendment jurisprudence which now uses “a general test of reasonableness”).

²⁵⁰ *Maryland v. King*, 133 S. Ct. 1958 (2013); *Ferguson v. City of Charleston*, 532 U.S. 67 (2001); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656 (1989); *Griffin v. Wisconsin*, 483 U.S. 868 (1987); *O’Connor v. Ortega*, 480 U.S. 709 (1987). With respect to *Maryland v. King*, Justice Kennedy, who authored the majority opinion in *King*, might argue the case involves more than just the “special needs” doctrine. In his opinion, Justice Kennedy cites cases which permitted certain warrantless police booking procedures and cases dealing with traditional reasonableness balancing. *King*, 133 S. Ct. at 1970–71. Further, in *Ferguson*, Justice Scalia’s dissent begins with his assertion that the “special needs” doctrine is not relevant to the case. However, he then goes on to argue that, if it were applied in the case, it would sustain the alleged warrantless search. *See* 532 U.S. at 98.

²⁵¹ *Ferguson*, 532 U.S. at 92–104; *Vernonia*, 515 U.S. at 665–66; *Griffin*, 483 U.S. at 872–73; *O’Connor*, 480 U.S. at 730–32.

²⁵² *King*, 133 S. Ct. at 1981–90; *Von Raab*, 489 U.S. at 680–87.

his latest opinion, where he opposed the application of the special needs doctrine, Justice Scalia focused on originalism to explain why the search was unconstitutional.²⁵³ Even Justice Scalia's assessment of the intrusiveness of the same investigative technique (urinalysis) seems to change significantly depending on whether he believes special needs exist or not.

A common thread among the cases where Justice Scalia supported applying the special needs doctrine is the presence of a special need and a unique relationship between the government and the affected individual. Justice Scalia has written opinions in favor of the special needs doctrine when: (1) the government searches a probationer's home²⁵⁴ or a government employee's office;²⁵⁵ (2) tests the urine of a pregnant woman suspected of using cocaine;²⁵⁶ and, (3) when a public school conducts mandatory drug testing for students involved in extracurricular school activities.²⁵⁷ In each circumstance, there is something more than just a governmental need. In two of his opinions, dealing with probationers and school children, Justice Scalia emphasized the guardian relationship between the government and the individual being searched.²⁵⁸

One case in particular illustrates how Justice Scalia has arguably deviated from an originalist approach to the Fourth Amendment when

²⁵³ *King*, 133 S. Ct. at 1980–81 (Scalia, J., dissenting) (comparing standard procedure of collecting DNA from suspects in custody to “general warrants” forbidden by state constitutions at the nation’s founding).

²⁵⁴ *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987).

²⁵⁵ *O'Connor v. Ortega*, 480 U.S. 709, 710–11 (1987).

²⁵⁶ *Ferguson*, 532 U.S. at 70.

²⁵⁷ *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995).

²⁵⁸ *Id.* at 665 (dealing with school children); *Griffin*, 483 U.S. at 876 (dealing with probationers).

applying the special needs doctrine.²⁵⁹ In *Vernonia School District 47 J v. Acton*, Justice Scalia authored the majority opinion supporting the Vernonia School District's requirement that junior high and high school students engaged in extracurricular sports undergo random urinalysis drug testing.²⁶⁰ In this opinion, Justice Scalia elected not to apply an originalist approach. Instead, he embraced the *Katz* reasonable expectation of privacy test (which he criticizes in later opinions), and arrived at a conclusion different from his earlier opinion regarding the intrusiveness of urinalysis.

Although Justice Scalia began his opinion in *Vernonia* by discussing the traditional status of children and their rights in relation to their teachers, he did not apply this original understanding to the case.²⁶¹ In his discussion Justice Scalia noted that in the eighteenth century, the teacher/student relationship was "the very prototype of" *in loco parentis*.²⁶² Thus, teachers had a responsibility not just to teach their charges, but also to be their guardians. Based on that relationship, absent a parental restriction, a teacher could require a child to undergo a drug screening. However, as Justice Scalia's quote from Blackstone suggests, the power associated with *in loco parentis* is derivative; thus, a parent should be permitted to limit it.²⁶³ Yet, Justice Scalia concluded, this was not the case. Justice Scalia stated that "while denying that the State's power over schoolchildren is formally no more than the delegated power of their parents . . . the nature of that power is custodial and tutelary."²⁶⁴

Next—perhaps ironically—Justice Scalia engaged in thorough

²⁵⁹ For a forceful argument that Justice Scalia has not violated originalism in *Vernonia*, see Lawrence Rosenthal, *Originalism in Practice*, 87 IND. L. REV. 1183, 1200 (2012).

²⁶⁰ *Vernonia*, 515 U.S. at 665–66.

²⁶¹ *Id.* at 655.

²⁶² *Id.* at 654–55.

²⁶³ *Id.* at 655.

²⁶⁴ *Id.*

Katz analysis of whether the students had a legitimate expectation of privacy.²⁶⁵ This discussion is interesting for at least two reasons. First, in a prior decision—*O'Connor v. Ortega*—Justice Scalia indirectly questioned the validity of the *Katz* test.²⁶⁶ He later published a strong critique of the *Katz* test in *Minnesota v. Carter*.²⁶⁷ Nevertheless, in *Vernonia*, Justice Scalia applied the *Katz* test without criticism. Justice Scalia also determined the type of test involved in *Vernonia*,—urinalysis—was minimally intrusive, despite having held that urinalysis tests were intrusive in an earlier Supreme Court decision.²⁶⁸

In *National Treasury Employees' Union v. Von Raab*, Justice Scalia described the urinalysis test as “a type of search particularly destructive of privacy and offensive to personal dignity.”²⁶⁹ However, six years later, in the context of children in the seventh grade and up, he concluded the same type of testing was only a “negligible” intrusion on privacy.²⁷⁰ To arrive at this conclusion, Justice Scalia pointed out the manner in which students provided the urine sample and all the ways that school children, and particularly student athletes, must sacrifice privacy. Regarding the manner in which the sample was produced, male students stood at a urinal while an adult stood 12-15 feet behind the student, observing and/or listening.²⁷¹ Female students were allowed to use a

²⁶⁵ *Vernonia*, 515 U.S. at 654–58 (discussing a student's expectation of privacy in the school setting).

²⁶⁶ *O'Connor v. Ortega*, 480 U.S. 709, 731 (1987).

²⁶⁷ *Minnesota v. Carter*, 525 U.S. 83, 91–92 (1998).

²⁶⁸ Compare *Vernonia*, 515 U.S. at 665, with *Nat'l Treasury Emps Union v. Von Raab*, 489 U.S. 656, 680 (1989).

²⁶⁹ 489 U.S. at 680.

²⁷⁰ *Vernonia*, 515 U.S. at 658.

²⁷¹ *Id.* at 650.

closed bathroom stall with an observer listening on the outside.²⁷² Regarding privacy, Justice Scalia commented that student athletes have to undergo physical examinations and immunizations and that they use communal locker rooms and often public showers.²⁷³ It is not clear, however, why the potential indignities necessary to being a member of school athletic team should make submitting to a random urinalysis any less destructive to a student's sense of personal privacy and dignity. Arguably, a child, often more self-conscious about the excretory function, would suffer more harm than an adult.

Finally, the *Vernonia* case included a dissent where Justice O'Connor used originalism to explain why the majority opinion contravenes the original meaning of the Fourth Amendment. Citing the text of the Fourth Amendment, its context, and the scholarship of W. Cuddihy and others regarding the original meaning of the Fourth Amendment, Justice O'Connor presented an argument that the majority opinion was inconsistent with the original meaning of the Fourth Amendment.²⁷⁴ Relying heavily on Cuddihy's work, Justice O'Connor reminded the majority that the great evil the Fourth Amendment was understood to most directly defeat was "general searches."²⁷⁵ Justice O'Connor also cited The Collection Act of July 31, 1789 as evidence that the Fourth Amendment was intended to prevent suspicion-less searches.²⁷⁶ Finally, putting the originalist argument at least partially aside, Justice O'Connor argued that the majority in *Vernonia* was making the same

²⁷² *Id.* Notably, this procedure was arguably more intrusive to male students than the procedure objected to by Justice Scalia in *Von Raab*, 489 U.S. at 672 n. 2, where "[t]here [was] no direct observation of the act of urination, as the employee may provide a specimen in the privacy of a stall."

²⁷³ *See id.* at 657 (detailing conditions in the school's athletic facilities).

²⁷⁴ *Id.* at 669.

²⁷⁵ *Id.* at 669 (O'Connor, J., dissenting).

²⁷⁶ *Vernonia*, 515 U.S. at 670–71.

mistake Justice Scalia accused the majority of in *Von Raab*—that is, permitting the application of the special needs exception in the absence of a showing of need.²⁷⁷

In the two cases where Justice Scalia opposed applying the doctrine, his objection was based on the absence of a special need beyond law enforcement. In *Von Raab*, Justice Scalia opposed requiring customs agents to undergo random mandatory urinalysis.²⁷⁸ He distinguished the case of customs agents from the *Skinner* case involving railway workers. Justice Scalia argued the record in the railroad case supported the need to test railway workers involved in accidents given the high rate of alcohol and drug abuse among railway employees.²⁷⁹ The record in *Von Raab*, on the other hand, revealed that customs agents had a very low rate of drug use.²⁸⁰ Thus, in *Von Raab*, not only was there no special need, there was no need at all.

In *King*, Justice Scalia's most recent Fourth Amendment opinion, he argued that taking DNA from arrestees served no special need beyond law enforcement purposes. Justice Scalia's dissent in *King* reads much like Justice O'Connor's dissent in *Vernonia*. His opinion began with a definitive and comprehensive statement regarding Fourth Amendment protections:

[T]he Fourth Amendment forbids searching a person for evidence of a crime when there is no basis for believing the person is guilty of the crime or is in possession of incriminating evidence. That prohibition is categorical and without exception; it lies at the very heart of the Fourth

²⁷⁷ *Id.* at 684.

²⁷⁸ See *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 665, 680 (1989) (describing policy at issue).

²⁷⁹ *Id.* at 680 (Scalia, J., dissenting).

²⁸⁰ *Id.* at 681–82.

Amendment.²⁸¹

Next, he cited and discussed several founding era sources—these sources included the Virginia and Maryland Declaration of Rights, comments by prominent antifederalists like Patrick Henry, the pre-adoption draft of the Fourth Amendment, and finally the Amendment itself—to support the position that the principle object of the Fourth Amendment was to curb the use of general warrants, and thus, searches without individualized suspicion.²⁸² Although Justice Scalia acknowledged the special needs doctrine had created an exception to this core rule of the Fourth Amendment, he emphasized that the Court had never permitted this rule to apply when the government’s purpose was principally law enforcement.²⁸³ Justice Scalia then went point-by-point, explaining why the majority’s conclusion—that DNA searches fulfilled the non-law enforcement need of identifying arrestees—was unconvincing.²⁸⁴

Although Justice Scalia’s enthusiasm for the special needs doctrine has always been limited, *King* appears to indicate it is decreasing. In earlier opinions, Justice Scalia has been amenable to the government using the special needs doctrine to achieve more than one goal and not particularly critical of how the government identified its “primary” purpose.²⁸⁵ *King* shows that, at a minimum, Justice Scalia is less tolerant of the practice today than in past decisions.

B. CIVIL LIABILITY

Justice Scalia has written several opinions involving questions of

²⁸¹ *Maryland v. King*, 133 S. Ct. 1958, 1980 (2013).

²⁸² *Id.* at 1981.

²⁸³ *Id.* at 1982.

²⁸⁴ *Id.* at 1982–86.

²⁸⁵ *Ferguson v. City of Charleston*, 532 U.S. 67, 98–104 (2001).

civil liability for Fourth Amendment violations, but *Anderson v. Creighton*²⁸⁶ was his most important and most relevant to originalism. The facts of *Anderson* were briefly discussed in Section I.C.1, but they bear elaboration.

Agent Anderson was a member of the FBI investigating a bank robbery.²⁸⁷ He and other officers believed that the man who robbed the bank was hiding in the Creightons' home.²⁸⁸ The suspected bank robber was Mr. Creighton's brother-in-law.²⁸⁹ According to the plaintiffs, Agent Anderson and several other officers, armed with shotguns, entered the Creighton's home at night, without a warrant, and discovered that they were wrong.²⁹⁰ The Creighton home was the third house they had entered without a warrant that day in search of the suspected bank robber.²⁹¹ The Creightons sued Agent Anderson, who moved for summary judgment, claiming he was entitled to qualified immunity. Agent Anderson's motion was granted at the trial level and then denied by the U.S. Court of Appeals for the Eighth Circuit.²⁹² The Eighth Circuit held that Agent Anderson was not entitled to summary judgment. The Circuit Court based its opinion on the Supreme Court case of *Harlow v. Fitzgerald*.²⁹³ *Harlow* established that government agents were entitled to qualified immunity from civil liability for violations of the Constitution if their actions met the

²⁸⁶ *Anderson v. Creighton*, 483 U.S. 635 (1987).

²⁸⁷ *Id.* at 637.

²⁸⁸ *Id.*

²⁸⁹ *Creighton v. St. Paul*, 766 F.2d 1269, 1271 (8th Cir. 1985).

²⁹⁰ *Id.* at 1270–71.

²⁹¹ *Id.* at 1271.

²⁹² *Id.* at 1271–72, 1277.

²⁹³ *Id.* at 1277 (citing *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)).

“objective legal reasonableness” standard.²⁹⁴ The Eighth Circuit concluded, in essence, that if Agent Anderson violated the Fourth Amendment by failing to secure a warrant and acting without adequate exigent circumstance, then it was already established that he had been objectively unreasonable.²⁹⁵ The Supreme Court granted certiorari and reversed the Circuit Court opinion.²⁹⁶

Justice Scalia, writing for the majority, found that the logic applied by the Eighth Circuit would “convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability.”²⁹⁷ Instead, Justice Scalia wrote that “[t]he relevant question in this case is . . . whether a reasonable officer could have believed Anderson’s warrantless search to be lawful, in light of clearly established law and the information the searching officer possessed.”²⁹⁸

The remainder of Justice Scalia’s *Anderson* decision involved his response to several arguments made by the Creightons. Two of those responses are significant to this discussion. First, Justice Scalia responded to the argument that, because qualified immunity is only meant to shield objectively reasonable conduct, government agents that violate the Fourth Amendment cannot qualify for immunity because their behavior involved objectively unreasonable conduct.²⁹⁹ Justice Scalia summarized the argument saying, “[i]t is not possible . . . to say one ‘reasonably’ acted unreasonably.”³⁰⁰ In answering this argument, Justice Scalia wrote that the “surface appeal” of this argument stems from the fact that the Fourth

²⁹⁴ *Harlow*, 457 U.S. at 819.

²⁹⁵ *See Creighton*, 766 F.2d at 1277.

²⁹⁶ *Anderson v. Creighton*, 483 U.S. 635, 646 (1987).

²⁹⁷ *Id.* at 639.

²⁹⁸ *Id.* at 641.

²⁹⁹ *Id.* at 643.

³⁰⁰ *Id.*

Amendment's protections have been "expressed in terms of 'unreasonable' searches and seizures."³⁰¹ He asserted that "[h]ad an equally serviceable term, such as 'undue' searches and seizures been employed, what might be termed the 'reasonably unreasonable' argument against application of *Harlow* to the Fourth Amendment would not be available."³⁰² Reading further, it becomes clear that Justice Scalia's position was that the Creightons would gain no advantage in their claim simply because the test from *Harlow* used the word reasonableness.³⁰³

The above position however seems at least superficially inconsistent with the Principles and Canons that govern so much of Justice Scalia's other Fourth Amendment opinions. Although it would be inaccurate to suggest that Justice Scalia was truly proposing substitute language for the Fourth Amendment, even discussing equally serviceable terms for the Constitution would seem far from his usual textualist/originalist approach. It would have been better for Justice Scalia to only speculate about how the *Harlow* decision might have been worded differently than to propose substitutions to the Fourth Amendment.

The Creightons also argued that, based on the common law in effect at the time the Fourth Amendment was adopted, Agent Anderson should not be entitled to qualified immunity. According to this argument, "no immunity should be provided to police officers who conduct unlawful warrantless searches of innocent third parties' homes" because "officers conducting such searches were strictly liable at English common law if the fugitive was not present."³⁰⁴ In response to this originalist argument, Justice Scalia stated that "[the Supreme Court] ha[s] never suggested that the precise contours of official immunity can and should be slavishly

³⁰¹ *Id.*

³⁰² *Anderson*, 483 U.S. at 643.

³⁰³ *Id.*

³⁰⁴ *Id.* at 644.

derived from the often arcane rules of the common law.”³⁰⁵

This response, again, does not seem consistent with Justice Scalia’s usual originalist approach. In fact, he seemed almost to dismiss core tenants of originalism in *Anderson*. He described the common law in effect at the time of the Bill of Rights as “often arcane”³⁰⁶ and “musty.”³⁰⁷ At the heart of this rejection of text and context was Justice Scalia’s conclusion that to apply originalism in *Anderson* would introduce into the doctrine of qualified immunity an unacceptable degree of complexity. In the concluding paragraphs of the opinion, he explained:

The general rule of qualified immunity is intended to provide government officials with the ability ‘reasonably [to] anticipate when their conduct may give rise to liability for damages.’ That security would be utterly defeated if officials were unable to determine whether they were protected by the rule without entangling themselves in the vagaries of the English and American common law.³⁰⁸

Justice Scalia’s position regarding the standard for qualified immunity in civil liability cases has not changed since *Anderson*. As recently as 2011, in *Ashcroft v. al-Kidd*,³⁰⁹ he relied on the standard announced in *Anderson*. Unlike his position on the special needs doctrine, Justice Scalia’s non-originalist approach regarding civil liability and qualified immunity appears to remain intact.

Justice Scalia has stated repeatedly that, from time to time, the originalist must bow to other concerns, and this seems true. As early as 1989, Justice Scalia observed that, if a state chose to institute public

³⁰⁵ *Id.* at 645.

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Anderson*, 483 U.S. at 646 (citing *Davis v. Scherer*, 468 U.S. 183, 195 (1984) (substitutions in original)).

³⁰⁹ 131 S. Ct. 2074, 2083 (2011).

lashing or branding, even if such a punishment did not violate the original meaning of the Constitution, originalists on the Court might vote to strike the law down.³¹⁰ Since 1989, Justice Scalia has changed his position on flogging but not on whether an originalist will sometimes bow to other concerns.³¹¹ In *Reading Law*, Justice Scalia notes his belief that stare decisis could provide the basis for an originalist to not apply the Constitution's original meaning.³¹² However, he has also observed that, depending on the reason the originalist accepts a nonoriginalist approach, it could result in "no [real] difference between the faint-hearted originalist and the moderate nonoriginalist."³¹³ The danger of Justice Scalia's nonoriginalist approach to the special needs doctrine and civil liability goes beyond mere inconsistency. As discussed in greater detail in Part III, Justice Scalia's position on civil liability, coupled with his views on the exclusionary rule, threatens to unbalance his vision of the Fourth Amendment in favor of law enforcement concerns.

III. JUSTICE SCALIA'S INFLUENCE ON THE COURT'S FOURTH AMENDMENT JURISPRUDENCE: *JONES*, *KYLLO*, AND *ANDERSON*

In the twenty-eight years Justice Scalia has been on the Court, he has written dozens of opinions involving the Fourth Amendment. Many of his majority opinions have significantly altered the Court's Fourth Amendment jurisprudence. Some of these decisions have impacted a particular sub-category of Fourth Amendment law—such as *Griffin*'s effect on the Fourth Amendment rights of probationers.³¹⁴ Other opinions

³¹⁰ Scalia, *Originalism*, *supra* note 12, at 861. Justice Scalia has since changed his position on a law permitting public flogging, stating that he would think the law bad but would not rule it unconstitutional. See Senior, *supra* note 242, at 1.

³¹¹ See Senior, *supra* note 242, at 1.

³¹² Scalia, *Reading*, *supra* note 15, at 411–13.

³¹³ Scalia, *Originalism*, *supra* note 12, at 862.

³¹⁴ *Griffin v. Wisconsin*, 483 U.S. 868, 872–73 (1987) (finding that warrantless

and lines of opinion have affected the Court's Fourth Amendment jurisprudence more profoundly, altering the test for determining when the Fourth Amendment applies or how violations will be addressed.

Drawing the distinction between an opinion that has had a significant impact and one that has not is difficult. This discussion will necessarily focus on Justice Scalia's majority opinions, but of course, the effect of dissenting or concurring opinions over time can be dramatic, as demonstrated by Justice Harlan's concurrence in *Katz*. Further, some majority opinions can seem dramatic at first, but over time, lose their impact. With these limitations in mind, this section will discuss three areas where Justice Scalia can fairly be attributed with altering the course of the Court's Fourth Amendment law: (1) the Court's test for determining if the Fourth Amendment should apply; (2) how the Court should address technology's capacity to shrink privacy; and (3) how the Court should deter the government from violating the Fourth Amendment.

**A. KATZ, KYLLO AND JONES: THE EVOLUTION OF THE COURT'S
TEST FOR EVALUATING THE PRESENCE OF A FOURTH
AMENDMENT INTEREST**

Justice Scalia's most significant impact on the Court's Fourth Amendment jurisprudence is the reintroduction of a property/trespass analysis to determine whether the Fourth Amendment applies in a given circumstance. This watershed moment occurred in the 2012 case of *United States v. Jones*,³¹⁵ but it would be a mistake to view *Jones* in isolation. *Jones* is the culmination of Justice Scalia's twenty-six-year long fight to alter the Court's test for determining whether a Fourth Amendment interest is present in a given case. This section will examine the evolution of Justice Scalia's campaign to replace the *Katz* test with a property/trespass test, how that campaign became a compromise, and how that compromise ultimately led to the *Jones* decision.

search of probationer did not violate Fourth Amendment).

³¹⁵ 132 S. Ct. 945 (2012).

In 1967, the United States Supreme Court decided the now-famous case of *Katz v. United States*.³¹⁶ In *Katz*, the Supreme Court considered whether the Fourth Amendment was violated when police officers placed a listening device outside of a public telephone booth and recorded Katz's conversation with a bookie.³¹⁷ The Court held that it did.³¹⁸ In reaching this conclusion, the majority wrote that "the Fourth Amendment protects people not places."³¹⁹ Justice Harlan, concurring in the judgment, sought to elaborate on the majority's opinion, proposing a two-part test to determine if a Fourth Amendment right was at issue in a particular case. Justice Harlan's two-part test asks, (1) whether the defendant has an actual, subjective expectation of privacy, and (2) whether it is an expectation that society is willing to recognize as reasonable.³²⁰

Until 2012, the *Katz* test was the primary method of determining if Fourth Amendment protection existed in a given circumstance.³²¹ Below is a discussion of three opinions by Justice Scalia that addressed the *Katz* test and laid the ground work for *Jones*: *O'Connor v. Ortega*,³²² *Minnesota v. Carter*,³²³ and *Kyllo v. United States*.³²⁴

³¹⁶ 389 U.S. 347 (1967).

³¹⁷ *Id.* at 348–50.

³¹⁸ *Id.* at 359.

³¹⁹ *Id.* at 351.

³²⁰ *Id.* at 361 (Harlan, J., concurring).

³²¹ Justice Scalia might argue this point. In *Jones*, he cites post-*Katz* cases that support the claim *Katz* was never meant to displace a property-based approach to the Fourth Amendment but was only meant to supplement it. *United States v. Jones*, 132 S. Ct. 945, 951 (2012). This opinion seems not entirely consistent with some of his earlier opinions, like *Kyllo*, where he states that the Court had "decoupled violation of a person's Fourth Amendment rights from trespassory violation of his property" based on *Katz*. Compare *Jones*, 132 S. Ct. at 951, with *Kyllo v. United States*, 533 U.S. 27, 32 (2001).

³²² 480 U.S. 709 (1987).

³²³ 525 U.S. 83 (1998).

In 1987, Justice Scalia published his first opinion to address the *Katz* test, a concurrence in *O'Connor v. Ortega*.³²⁵ In *O'Connor*, Justice Scalia rejected the majority's method of analyzing the Fourth Amendment and indirectly challenged the *Katz* test.³²⁶ He argued that the proper question to ask when determining if Fourth Amendment protections exist is whether the government searched a place or thing protected by the Fourth Amendment.³²⁷ If the answer to this question was yes, then generally, the Fourth Amendment applied.³²⁸ Once the Fourth Amendment applied, the next question was whether the government's search or seizure was reasonable. Although Justice Scalia's proposed method of determining whether the Fourth Amendment applies in a given situation does not seem particularly innovative, it is not the method applied by the majority.

O'Connor v. Ortega involved a lawsuit brought by Dr. Magno Ortega against Dr. Dennis O'Connor. In 1981, Dr. Ortega was the Chief of Professional Education at Napa State Hospital.³²⁹ Allegations were made regarding Dr. Ortega's conduct in managing the hospital's residency program.³³⁰ In response to the allegations, the hospital launched an investigation, and Dr. Ortega was required to remain away from the hospital.³³¹ One of the individuals tasked with carrying out the

³²⁴ 533 U.S. 27 (2001).

³²⁵ *O'Connor*, 480 U.S. at 729–30 (Scalia, J., concurring).

³²⁶ *Id.* at 729–30.

³²⁷ *Id.* at 730–31.

³²⁸ *Id.*

³²⁹ *Id.* at 712.

³³⁰ *Id.* (outlining accusations of misconduct, including sexual harassment and “coercion” of financial contributions from medical residents for the purchase of an office computer).

³³¹ *O'Connor*, 480 U.S. at 712–13.

investigation, Mr. Friday, entered Dr. Ortega's office and conducted a "thorough" search.³³² Several of Dr. Ortega's personal items were seized during that search and were later used against him during an administrative proceeding.³³³ Dr. Ortega brought a Section 1983 action against Dr. O'Connor for a violation of his Fourth Amendment rights. Dr. O'Connor and Dr. Ortega each moved for summary judgment. Ultimately, the Ninth Circuit granted Dr. Ortega's summary judgment motion in part, ruling that Dr. O'Connor had violated the Fourth Amendment.³³⁴ The Supreme Court granted certiorari and reversed and remanded the case.

The majority opinion by Justice O'Connor concluded that government employees may have a reasonable expectation of privacy in their place of work but "[t]he operational realities of the workplace . . . may make *some* employees' expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement official."³³⁵ Also, "some government offices may be so open to fellow employees or the public that no expectation of privacy is reasonable," and thus no Fourth Amendment protection would apply.³³⁶ Justice O'Connor stated that "[g]iven the great variety of work environments in the public sector, the question whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis."³³⁷

With citation to *Oliver v. United States*, Justice Scalia's concurrence rejected both the majority's case-by-case approach and "the

³³² *Id.* at 713.

³³³ *Id.*

³³⁴ *See id.* at 714 (summarizing the Ninth Circuit's decision granting partial summary judgment because hospital policies relating to entering employee offices were limited to departing or terminated employees).

³³⁵ *Id.* at 717.

³³⁶ *Id.* at 717–18.

³³⁷ *O'Connor*, 480 U.S. at 718.

standard it proscribes for the Fourth Amendment inquiry.”³³⁸ Although Justice Scalia did not attack *Katz* head on, as he did in later opinions, it seems the *Katz* method of Fourth Amendment analysis concerned him. Based on the facts of *O'Connor*, Justice Scalia argued that the determination of Fourth Amendment protection should not turn on why the government searched a protected thing or location or how frequently government officials entered an employee’s office. Those questions do not speak to whether the Fourth Amendment should apply; rather they speak to whether the government’s conduct was reasonable.³³⁹ Justice Scalia wrote that the proper approach would be to hold, “the offices of government employees, and *a fortiori* the drawers and files within those offices are covered by Fourth Amendment protection as a general matter The case turns, therefore, on whether the Fourth Amendment was violated—*i.e.*, whether the governmental intrusion was reasonable.”³⁴⁰

Justice Scalia’s concurrence in *O'Connor* foreshadows his later opinions. Central to his rejection of the majority’s Fourth Amendment inquiry are its failure to apply the text of the Fourth Amendment in the order it appears and its failure to provide any sort of clear rule for future application.³⁴¹ The Fourth Amendment protects papers and effects—e.g., Dr. Ortega’s personal papers and property inside his office. Thus, the Fourth Amendment should apply to Dr. Ortega’s office. Once the Amendment applies, Dr. Ortega’s office is protected against unreasonable searches and seizures. The question the text of the Fourth Amendment begs in Dr. Ortega’s case is not whether the Fourth Amendment applies but whether it has been violated.

Justice Scalia’s dissatisfaction with the *Katz* test is more openly

³³⁸ *Id.* at 729–30 (Scalia, J., concurring).

³³⁹ *Id.* at 731–32.

³⁴⁰ *Id.*

³⁴¹ *Id.* at 730–31.

expressed in his concurring opinion in *Minnesota v. Carter*.³⁴² In *Carter*, Officer Thielen of the Eagan Police Department received a tip from one of his confidential informants about a drug operation.³⁴³ The informant stated that he had seen drugs being placed in bags at an apartment building by looking in through a ground floor window.³⁴⁴ Thereafter, Officer Thielen went to the apartment and looked through a gap in the blinds of the window described by his informant.³⁴⁵ The officer saw Carter and another man, Johns, bagging drugs.³⁴⁶ Officer Thielen asked police headquarters to pursue a warrant but, in the meantime, Carter and Johns left the building in a car.³⁴⁷ Officer Thielen stopped the car, ordered the men out of the vehicle, and discovered a gun and drug paraphernalia in the car.³⁴⁸ The warrant for the apartment arrived, and a search of the apartment uncovered evidence of cocaine.³⁴⁹

Further investigation by police revealed that neither Carter nor Johns owned the apartment, nor were they overnight guests there.³⁵⁰ The day Officer Thielen observed them was the first time Carter or Johns had been to that address, and, at the time they were observed, they had only been there for approximately two and a half hours.³⁵¹ Carter and Johns

³⁴² *Minnesota v. Carter*, 525 U.S. 83, 91–99 (1998).

³⁴³ *Id.* at 85.

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ *Carter*, 525 U.S. at 85.

³⁴⁹ *Id.* at 86.

³⁵⁰ *Id.*

³⁵¹ *Id.*

were in the apartment for the sole purpose of bagging drugs for sale.³⁵² Carter sought to suppress all the evidence seized by the police, claiming that Officer Thielen's act of looking through the blinds of the window violated Carter's Fourth Amendment rights.³⁵³

The opinion of the Court in *Carter* was written by Chief Justice Rehnquist.³⁵⁴ The Chief Justice began his analysis by applying the *Katz* test.³⁵⁵ He determined that Carter did not have a legitimate expectation of privacy, and identified several factors that led him to that conclusion.³⁵⁶ Those factors included "the purely commercial nature of the transaction engaged in . . . the relatively short period of time on the premises, and the lack of any previous connection between the respondents and the householder."³⁵⁷

In a concurring opinion, Justice Scalia rejected the use of the *Katz* test to determine whether the Fourth Amendment applies in a particular context. He argued the plurality opinion "gives short shrift to the text of the Fourth Amendment, and to the well and long understood meaning of that text."³⁵⁸ He accused the majority of "leap[ing] to apply the fuzzy standard of 'legitimate expectation of privacy' . . . to the threshold question [of] whether a search or seizure covered by the Fourth Amendment *has occurred*."³⁵⁹ In *Carter*, as in other cases, Justice Scalia suggested that the *Katz* test might have a place in Fourth Amendment analysis, but not in determining whether the Fourth Amendment

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ *Carter*, 525 U.S. at 85.

³⁵⁵ *Id.* at 88.

³⁵⁶ *Id.* at 90–91.

³⁵⁷ *Id.* at 91.

³⁵⁸ *Id.* at 91 (Scalia, J., concurring).

³⁵⁹ *Carter*, 525 U.S. at 91–92.

applies.³⁶⁰

After rejecting the majority's use of the *Katz* test, Justice Scalia conducted a full textualist/originalist analysis.³⁶¹ This analysis focused on the fair meaning of the word "their" in the Fourth Amendment.³⁶² Justice Scalia could have concluded his concurrence by stating the Fourth Amendment only protects individuals in "their" homes—and clearly Carter and Johns were not in "their" home—but he did not. Instead, he stated that "the phrase 'their . . . houses' . . . is, in isolation, ambiguous."³⁶³ He then explained that the phrase "their persons, houses, papers, and effects" could refer to "their respective and each other's houses," so that each person would be protected even when visiting the house of someone else."³⁶⁴ This proposed alternative interpretation of the Fourth Amendment seems more like a straw man than a genuine possibility. However, Justice Scalia used this alternative reading as a foil to explain why the context and history surrounding the Fourth Amendment also support a restricted reading of the word "their."³⁶⁵

Justice Scalia concluded his concurrence as he began, by attacking the *Katz* test. He wrote: "[W]hen that self-indulgent test is employed . . . to determine whether a 'search or seizure' within the meaning of the Constitution has *occurred* . . . it has no plausible foundation in the text of the Fourth Amendment."³⁶⁶ He went on to remark that the Fourth Amendment was not intended to "guarantee some generalized 'right of privacy' and leave it to this Court to determine which particular

³⁶⁰ *Id.*

³⁶¹ *Id.* at 92–97.

³⁶² *Id.*

³⁶³ *Id.* at 92.

³⁶⁴ *Id.* (internal citations omitted).

³⁶⁵ *Carter*, 525 U.S. at 96.

³⁶⁶ *Id.* at 97.

manifestations of the value of privacy ‘society was willing to recognize as ‘reasonable.’ Rather, it enumerated (‘person, houses, papers, and effects’) the objects of privacy protection to which the *Constitution* would extend.”³⁶⁷

Justice Scalia’s *Carter* concurrence makes it clear that he believed *Katz* was the wrong test. He asserted the *Katz* test had no foundation in the text or context of the Constitution and lacked the necessary clarity.³⁶⁸ Justice Scalia’s opinion in *Carter* is his most openly hostile opinion to the *Katz* test but does not go so far as to say *Katz* should have no role in Fourth Amendment analysis. In the *Carter* concurrence, we can see Justice Scalia’s vision of where the *Katz* test should fit within the Fourth Amendment: a subordinate test for determining whether a particular search is reasonable.

Kyllo v. United States is the next case in which Justice Scalia critiques the *Katz* test.³⁶⁹ In his majority opinion, he continues to criticize the test, describing it as “circular, and hence subjective and unpredictable.”³⁷⁰ However, he nonetheless applies it.³⁷¹ If one were to create a caption for Justice Scalia’s discussion of *Katz* in *Kyllo* it might be, “if you can’t beat them, join them, sort of.” Despite his willingness to apply *Katz*, Justice Scalia still takes up several paragraphs explaining why the test is deficient.

The *Kyllo* case arose out of a Department of the Interior drug investigation of Danny Kyllo.³⁷² As part of its investigation, agents of the Department of the Interior scanned Kyllo’s home with a heat sensing

³⁶⁷ *Id.*

³⁶⁸ *Id.*

³⁶⁹ *Kyllo v. United States*, 533 U.S. 27, 32–35 (2001).

³⁷⁰ *Id.* at 34.

³⁷¹ *Id.* at 34–35.

³⁷² *Id.* at 29.

device.³⁷³ The agents were on a public street when they scanned the house.³⁷⁴ The scanning device revealed the relative hot and cold spots on the house.³⁷⁵ Agents were using the device to investigate whether Kyllo was using heat lamps to help marijuana plants to grow.³⁷⁶ The heat scan revealed that the roof over Kyllo's garage was warmer than the roofs over adjoining homes.³⁷⁷ Armed with the results of the thermal scan and other information, agents were able to secure a search warrant.³⁷⁸ Over 100 marijuana plants were discovered, and Kyllo was charged with manufacturing marijuana.³⁷⁹ Kyllo unsuccessfully sought to suppress the evidence secured from the search, claiming the use of the thermal imaging device violated the Fourth Amendment. The case ultimately made it to the Supreme Court, which held that the scan violated the Fourth Amendment and that the evidence should have been suppressed.³⁸⁰

Justice Scalia began by noting the centrality of the home to Fourth Amendment protection. Quoting *Silverman v. United States*³⁸¹ he wrote, “[a]t the very core’ of the Fourth Amendment ‘stands the right of a man to retreat into his own home and there be free from unreasonable

³⁷³ *Id.*

³⁷⁴ *Id.* at 30.

³⁷⁵ *Kyllo*, 533 U.S. at 30.

³⁷⁶ *Id.*

³⁷⁷ *Id.*

³⁷⁸ *Id.* (describing the basis of the warrant as “tips from informants, utility bills, and the thermal imaging”).

³⁷⁹ *Id.*

³⁸⁰ *Id.* at 40.

³⁸¹ *Silverman v. United States*, 365 U.S. 505, 511 (1961) (holding that attaching a microphone to the heating duct of a suspect's house constituted a Fourth Amendment violation).

governmental intrusion.”³⁸² He went on to remark that the general rule regarding warrantless searches of a home was that they were unreasonable.³⁸³

However, rather than immediately describing the *Katz* test and applying it, Justice Scalia first explained the shortfalls of the test. In addition to describing the *Katz* test as “circular, and hence subjective and unpredictable,”³⁸⁴ Justice Scalia, as in *Minnesota v. Carter*, pointed out the lack of textual support for *Katz*. He noted that the decision extended Fourth Amendment protection to “a location not within the catalog . . . that the Fourth Amendment protects against unreasonable searches” and seizures.³⁸⁵ He then pointed out that, just as the *Katz* test had extended Fourth Amendment protection beyond the locations the Amendment describes, it had also been used on occasion to declare the Fourth Amendment inapplicable to the home, a location specifically mentioned in the text. As an example, Justice Scalia noted that the Supreme Court had used *Katz* to conclude that “it is not a search for the police to use a pen register at the phone company to determine what numbers were dialed in a private home.”³⁸⁶ Nor was it a search under the *Katz* test when police used “aerial surveillance of private homes and surrounding areas.”³⁸⁷ After this critique of the shortfalls and apparent contradictions created by *Katz*, Justice Scalia concluded that the *Katz* test was easily met in *Kyllo*’s case.³⁸⁸

³⁸² *Kyllo v. United States*, 533 U.S. 27, 31 (2001).

³⁸³ *Id.* (“With few exceptions, the question of whether a warrantless search of a home is reasonable and hence constitutional must be answered no.”).

³⁸⁴ *Id.* at 34.

³⁸⁵ *Id.* at 32.

³⁸⁶ *Id.* at 33.

³⁸⁷ *Id.*

³⁸⁸ *Kyllo*, 533 U.S. at 34.

Kyllo is a critical opinion in Justice Scalia's Fourth Amendment jurisprudence. In the opinion, he offers a clear and reasonable method for addressing technology's capacity to shrink privacy in the home.³⁸⁹ He also writes the majority opinion in a five-to-four decision where he has joined with three traditionally liberal justices.³⁹⁰ Finally, Justice Scalia offers another explanation of the dangers posed by a stand-alone *Katz* test for Fourth Amendment protections, and yet applies the test nonetheless. In *Kyllo*, Justice Scalia works with the test despite its shortcomings. Justice Scalia's later success in reintroducing a property-based approach to determine the applicability of the Fourth Amendment can be traced to this compromise in *Kyllo*.

The arguments advanced in *O'Connor*, *Carter*, and *Kyllo* finally won a victory in *United States v. Jones*, where Justice Scalia, writing for the majority, reintroduced a property/trespass test for determining application of the Fourth Amendment. *Jones* established a new two-part test that asks first, whether the government committed a trespass, and if not, whether they violated an individual's "reasonable expectation of privacy" under *Katz*.³⁹¹

The *Jones* decision included three opinions: Justice Scalia's majority opinion,³⁹² Justice Sotomayor's concurrence,³⁹³ and Justice

³⁸⁹ It is important to note one potential weakness in *Kyllo*'s protection of the home from technology's ability to invade privacy. Justice Scalia has qualified the general declaration that police may not use technology to collect information about the interior of the home that could not have otherwise been revealed without a physical entry. He has stated that police may not use technology unavailable to the "general public." See *id.* This phrase has created some question as to what it means.

³⁹⁰ *Id.* at 29. The majority opinion included Justices Scalia, Thomas, Souter, Ginsburg and Breyer. I suggest that Justices Souter, Ginsburg and Breyer are considered "liberal."

³⁹¹ *United States v. Jones*, 132 S. Ct. 945, 949–52 (2012).

³⁹² *Id.* at 948.

³⁹³ *Id.* at 954 (Sotomayor, J., concurring).

Alito's concurrence.³⁹⁴ Although every justice agreed on the outcome in the case, they split five-to-four on why the Court should arrive at that outcome.³⁹⁵ The critical point of disagreement was over what role a property-based analysis should play in the Court's determination of whether the Fourth Amendment applied under the circumstances.³⁹⁶ Justice Scalia's opinion that a property-based analysis should be part of the Court's Fourth Amendment jurisprudence won out.

In *Jones*, Washington D.C. police and the FBI were involved in a joint investigation of the defendant.³⁹⁷ Law enforcement believed Jones, who ran a D.C. nightclub, was trafficking in narcotics.³⁹⁸ Police secured a warrant that permitted them to affix a global positioning system (GPS) tracking device to the car registered to Jones' wife.³⁹⁹ The warrant specified the time when the GPS device could be affixed.⁴⁰⁰ Police waited, inexplicably, until the time specified in the warrant expired, and then placed the GPS tracker on the car.⁴⁰¹ Law enforcement tracked Jones for twenty-eight days and used the information they acquired to indict Jones on multiple drug-related charges.⁴⁰² Jones brought a motion to suppress the information secured through the use of the GPS device, which was

³⁹⁴ *Id.* at 957 (Alito, J., concurring).

³⁹⁵ One could argue they split 5 to 1 to 4, since Justice Sotomayor joined the majority but also wrote a concurrence. *Id.* at 954 (Sotomayor, J., concurring).

³⁹⁶ *Id.* at 953 (majority opinion).

³⁹⁷ *Jones*, 132 S. Ct. at 948.

³⁹⁸ *Id.*

³⁹⁹ *Id.*

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*

⁴⁰² *Id.*

only partially granted by the trial court.⁴⁰³ Jones was convicted, but the United States Court of Appeals for the D.C. Circuit reversed the trial court's ruling and overturned the conviction, finding that the use of the GPS device violated the Fourth Amendment.⁴⁰⁴ The Supreme Court granted certiorari and affirmed the D.C. Circuit Court's ruling.

Justice Scalia began the majority opinion by emphasizing that "[t]he Government physically occupied private property for the purpose of obtaining information."⁴⁰⁵ Based on that alone, Justice Scalia stated "[w]e have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted."⁴⁰⁶ He went on to quote *Entick*, reference *Boyd*, and cite the text of the Fourth Amendment to support his assertion that the Fourth Amendment was intended to be tied to the common law of trespass.⁴⁰⁷ He noted that the connection between the Fourth Amendment and the common law of trespass was a part of the Court's Fourth Amendment jurisprudence until the mid-twentieth century when the *Katz* test became the Court's method of determining whether a Fourth Amendment interest was at stake.⁴⁰⁸ At this point in his opinion, Justice Scalia makes a leap, claiming that the *Katz* test was never meant to exclude a property-based approach, only supplement it.⁴⁰⁹ Much of the remainder of the opinion is

⁴⁰³ *Jones*, 132 S. Ct. at 948 ("The District Court . . . suppress[ed] the data obtained while the vehicle was parked in the garage adjoining Jones's residence.").

⁴⁰⁴ *Id.* at 949.

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.* ("[O]ur Fourth Amendment jurisprudence was tied to common-law trespass . . . until the latter half of the 20th century.").

⁴⁰⁹ *Jones*, 132 S. Ct. at 952 ("[T]he *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test.") (emphasis in original).

devoted to defending this assertion.

Justice Scalia's opinion in *Jones* created a new "trespass plus" analysis for determining whether the Fourth Amendment should apply.⁴¹⁰ This approach asks first if the government has trespassed on an interest protected by the Fourth Amendment—persons, houses, papers, and effects—and, if not, then asks whether a reasonable expectation of privacy has been infringed.⁴¹¹ The "trespass plus" approach closes gaps in Fourth Amendment protection which the *Katz* test alone might not address, thereby "provid[ing] at a *minimum* the degree of protection it [the Fourth Amendment] afforded when it was adopted."⁴¹²

Four justices refused to join the majority in *Jones*, with Justice Alito writing the concurrence for this group.⁴¹³ Justice Alito argued the majority's use of the property based/trespass approach was "unwise."⁴¹⁴ He wrote that "[i]t strains the language of the Fourth Amendment; it has little if any support in current Fourth Amendment case law; and it is highly artificial."⁴¹⁵ In essence, Justice Alito claimed that the trespass test died with *Katz* and should remain dead. Instead of the property/trespass approach, Justice Alito suggested the proper method was simply to apply the *Katz* test.⁴¹⁶

Although Justice Alito's concurrence raised a variety of potential problems with the majority's approach, his proposed application of the *Katz* test is not without its problems. He began his *Katz* analysis with the statement that "relatively short-term monitoring of a person's movements

⁴¹⁰ *Id.* 953–54.

⁴¹¹ *Id.* at 953.

⁴¹² *Id.*

⁴¹³ *Id.* at 957 (Alito, J., concurring).

⁴¹⁴ *Id.* at 958.

⁴¹⁵ *Jones*, 132 S. Ct. at 958.

⁴¹⁶ *Id.* at 962.

on public streets accords with expectations of privacy our society has recognized as reasonable.”⁴¹⁷ This statement begs the question, what is a relatively short period of time? What case has ever held that police are limited under the Fourth Amendment from following an individual twenty-four hours a day, seven days a week, so long as they always remain on public roads? Justice Alito then wrote that “the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.”⁴¹⁸ This statement also raises questions. Why would the offense being investigated affect an individual’s expectation of privacy? And, what offenses would cause long-term GPS monitoring to fall outside of legitimate expectations of privacy? Justice Scalia raised several of these questions while responding to Justice Alito’s concurrence.⁴¹⁹ Justice Alito concluded by declaring that “[w]e need not identify with precision the point at which the tracking of this vehicle became a search”⁴²⁰ or “whether prolonged GPS monitoring in the context of investigations involving extraordinary offenses would similarly intrude on a constitutionally protected sphere.”⁴²¹

Since *Jones*, the “trespass plus” test has been applied by the Supreme Court in one case—*Florida v. Jardines*—previously discussed in Section I, Part C of this article. In *Jardines*, Justice Scalia wrote the opinion for the Court with Justices Thomas, Ginsburg, Sotomayor, and Kagan joining. Justice Kagan wrote a concurrence in which Justices Ginsburg and Sotomayor joined. The dissent included Chief Justice Roberts, Justices Alito, Kennedy, and Breyer.⁴²² The majority, concurrence, and dissent all applied the “trespass plus” test with none

⁴¹⁷ *Id.* at 964.

⁴¹⁸ *Id.*

⁴¹⁹ *Id.* at 954.

⁴²⁰ *Id.* at 964.

⁴²¹ *Jones*, 132 S. Ct. at 964.

⁴²² *Florida v. Jardines*, 133 S. Ct. 1409, 1412 (2013).

suggesting the Court reconsider the test.

Today, the *Jones* opinion impacts virtually every Fourth Amendment case that involves a search throughout the country. The apparent acceptance by the majority, concurrence, and dissent in *Jardines* of the “trespass plus” test is promising. Through the *Jones* decision, Justice Scalia has brought about a fundamental change in the Court’s Fourth Amendment jurisprudence and moved the Court, at least in this area, toward his originalist approach.

B. TECHNOLOGY AND PRIVACY

Recent revelations regarding the National Security Agency’s monitoring programs have once again thrust into the limelight the issue of technology’s infringement on privacy.⁴²³ This question is not new to the Supreme Court. Since its decision in *Olmstead* in 1928, the Court has sought a solution to this perpetual Fourth Amendment problem.⁴²⁴

In 2001, Justice Scalia wrote the majority opinion in *Kyllo v. United States* and created one of the clearest methods for reducing technology’s encroachment on Fourth Amendment protections to come out of the Court.⁴²⁵ The facts of *Kyllo* were discussed above; however the dissent and Justice Scalia’s response were not discussed because they were not relevant to *Kyllo*’s significance to the *Katz* test. The dissent and Justice Scalia’s response, however, are relevant to technology and privacy.

Certain facts from the *Kyllo* case are worth repeating. First, the

⁴²³ See, e.g., Charlie Savage, *Appeals Court is Urged to Strike Down Program for Collecting Phone Records*, N.Y. TIMES, Nov. 5, 2012, available at <http://www.nytimes.com/2014/11/05/us/appeals-court-is-urged-to-strike-down-program-for-collecting-phone-records.html>; VOA News, *Obama, Cameron Meet at White House*, VOICE AM. NEWS, January 16, 2015.

⁴²⁴ See, e.g., *Riley v. California*, 134 S. Ct. 2473, 2480 (2014) (determining “whether the police may, without a warrant, search digital information on a cell phone seized from an individual who has been arrested”).

⁴²⁵ See *Kyllo v. United States*, 533 U.S. 27 (2001).

government agents who used the thermal imaging device never physically entered the defendant's property. Not only were the government agents on the public street at the time they scanned Kyllo's home, but the device they used emitted no beam, ray or wave.⁴²⁶ The search was entirely passive. Thus, one of the dissent's arguments was that the device employed only gathered "off the wall" rather than "through the wall" information.⁴²⁷ Justice Scalia responded that in the past, the Court had rejected such mechanical applications of the Fourth Amendment.⁴²⁸

The government also argued that a distinction should be made between intimate and non-intimate details of a home—with the relative heat being released from a home qualifying as a non-intimate detail.⁴²⁹ Justice Scalia rejected this argument, much as he had in *Hicks*, stating:

[T]he Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained. In *Silverman*, for example, we made clear that any physical invasion of the structure of the home, 'by even a fraction of an inch,' was too much, and there is certainly no exception to the warrant requirement for the officer who barely cracks open the front door and sees nothing but the non-intimate rug on the vestibule floor.⁴³⁰

Justice Scalia, quoting *Carroll*, also stated that "[t]he Fourth

⁴²⁶ *Id.* at 30 (describing the technological features of the scanning equipment used).

⁴²⁷ *Id.* at 42–43 (Stevens, J., dissenting) (likening "off-the-wall" measurements to "the ordinary use of the senses [which] might enable a neighbor or passerby to notice the heat emanating from a building").

⁴²⁸ *See id.* at 35 (majority opinion) (identifying the contradiction between the dissent's theory and the reasoning of *Katz*).

⁴²⁹ *See id.* at 37–39.

⁴³⁰ *Id.* at 37 (majority opinion) (citing *Silverman v. United States*, 365 U.S. 505, 512 (1961)).

Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.”⁴³¹ To that end, he declared that the warrantless use of sense-enhancing technology—technology not in general public use—which allowed the government to obtain information about the interior of a home that was otherwise unavailable absent a physical trespass, violated the Fourth Amendment.⁴³²

Justice Scalia’s opinion in *Kyllo* is remarkable for several reasons, some of which have already been discussed. Two reasons not discussed at length are: (1) Justice Scalia’s opinion demonstrates a flexibility that critics of his approach have argued is absent in his theory of constitutional interpretation, and (2) it has provided a blueprint for addressing the Fourth Amendment, technology, and privacy.

C. A MATTER OF CONSEQUENCES: *HUDSON* AND *ANDERSON*

Justice Scalia has authored several opinions that address the consequences of violating the Fourth Amendment. These cases involve the exclusionary rule, civil suits for Fourth Amendment violations, and the standard for qualified immunity in civil cases.⁴³³ Justice Scalia has expressed concern over the social cost that accompanies both the exclusionary rule and civil suits against law enforcement officers.⁴³⁴ He has described the exclusionary rule as a massive deterrent and seems to

⁴³¹ *Kyllo*, 533 U.S. at 40.

⁴³² *Id.* In his dissent, Justice Stevens pointed out the potential problem with tying the Court’s new rule to the availability and use by the public of sense enhancing technology. *Id.* at 47.

⁴³³ See *infra*, Part III. C.1–2.

⁴³⁴ *Hudson v. Michigan*, 547 U.S. 586, 591 (2006).

prefer civil liability, viewing it as a better remedy.⁴³⁵ This view is consistent with the belief of some scholars that the primary method of addressing a violation of the Fourth Amendment in 1791 was through civil suit.⁴³⁶

However, despite evidence supporting the view that fear of civil liability was a—if not *the*—primary method of deterring violations of the Fourth Amendment, Justice Scalia has expressed concern over the social cost of civil suits as well.⁴³⁷ Based on that concern, he has supported a broad reading of the “objective legal reasonableness” standard in Fourth Amendment cases to support the position that an officer can reasonably conduct an unreasonable search or seizure.⁴³⁸ This partial application of originalism, coupled with a disfavor of the exclusionary rule, threatens to unbalance the Fourth Amendment in favor of law enforcement interests.

1. JUSTICE SCALIA AND THE EXCLUSIONARY RULE

Justice Scalia has not written a great deal on the Fourth Amendment exclusionary rule. His most extensive discussion of the remedy occurred in his majority opinion in *Hudson v. Michigan*. Justice Scalia made clear his view that the exclusionary rule is a tool of last resort whose necessity may be waning. In *Hudson*, Justice Scalia concluded that the exclusionary rule was not a proper remedy in cases involving “knock and announce” violations.⁴³⁹

In *Hudson*, Justice Scalia discussed the history, purpose,

⁴³⁵ *Id.* at 596.

⁴³⁶ Amar, *Bill of Rights*, *supra* note 130, at 1178; Amar, *First Principles*, *supra* note 11, at 797–98; William Cuddihy, *The Fourth Amendment: Origins and Original Meaning, 1530–45* (1990) (unpublished Ph.D. dissertation, Claremont Graduate School).

⁴³⁷ *Anderson v. Creighton*, 483 U.S. 635, 646 (1987).

⁴³⁸ *Id.* at 643–44.

⁴³⁹ *See Hudson v. Michigan*, 547 U.S. 586, 599 (2006).

mechanics of application, and deterrent effect of the exclusionary rule in the context of the Fourth Amendment.⁴⁴⁰ Through that discussion, Justice Scalia asserted that “[w]e cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago.”⁴⁴¹ He went on to argue that, when the Fourth Amendment exclusionary rule was first applied to the states through the Fourteenth Amendment, it was the only real tool available to deter Fourth Amendment violations.⁴⁴² However, much has changed since then. Today, citizens can sue the government for Fourth Amendment violations. Laws have been passed to make obtaining legal representation in such suits easier.⁴⁴³ Law enforcement agencies have become more professional, producing better-informed police and more career-minded officers.⁴⁴⁴ All this, Justice Scalia wrote, supports the conclusion that a “[r]esort to the massive remedy of suppressing evidence of guilt is unjustified.”⁴⁴⁵

It is important to note that, although Justice Scalia considers exclusion of evidence to be a “massive” deterrent, he has applied it many times.⁴⁴⁶ *Hudson* simply illustrates Justice Scalia’s reluctance to use it and his willingness to consider alternative remedies.⁴⁴⁷ This reluctance is consistent with the view that evidentiary exclusion was not a remedy the Founders considered when enacting the Fourth Amendment. Thus, Justice

⁴⁴⁰ *Id.* at 590–94.

⁴⁴¹ *Id.* at 597.

⁴⁴² *Id.*

⁴⁴³ *Id.* at 597–98.

⁴⁴⁴ *Id.* at 598.

⁴⁴⁵ *Hudson*, 547 U.S. at 599.

⁴⁴⁶ See, e.g., *Florida v. Jardines*, 133 S. Ct. 1409 (2013); *United States v. Jones*, 132 S. Ct. 945 (2012); *Kyllo v. United States*, 533 U.S. 27 (2001).

⁴⁴⁷ *Hudson*, 547 U.S. at 597.

Scalia's reluctance to apply exclusion as a remedy for Fourth Amendment violation follows from his originalist approach to the Fourth Amendment.

2. CIVIL LIABILITY

Although the Supreme Court has applied the exclusionary rule to Fourth Amendment violations since 1914, some scholars believe that exclusion was not the remedy the Founders had in mind.⁴⁴⁸ The principal method of preventing government agents from violating the Fourth Amendment in 1791 was the fear of civil liability. Professor Amar, who was cited and relied upon by Justice Scalia in two Fourth Amendment opinions,⁴⁴⁹ found civil liability to be rooted in seminal, pre-Revolutionary War cases involving John Wilkes and North Briton No. 45.⁴⁵⁰ As discussed in Part I.B, Justice Scalia has cited the Wilkes/Entick controversy as important to understanding the context of the Fourth Amendment.

The *Huckle v. Money*, *Wilkes v. Wood*, and *Entick v. Carrington* cases, discussed in greater detail *infra*, were civil suits for trespass and false imprisonment brought against the government agents who used a general warrant to search the plaintiffs' homes.⁴⁵¹ The results in these three cases were that the warrants were found to be invalid, and the

⁴⁴⁸ Cf. Amar, *First Principles*, *supra* note 11, at 785–86 (arguing that there is no evidence to suggest that the “Found[ers] . . . support[ed] Fourth Amendment exclusion of evidence in a criminal trial.”).

⁴⁴⁹ *Virginia v. Moore*, 553 U.S. 164, 170 (2008); *California v. Acevedo*, 500 U.S. 565, 581 (1991).

⁴⁵⁰ See Amar, *Bill of Rights*, *supra* note 130, at 1178 (citing *Wilkes v. Wood*, 98 Eng. Rep. 489 (K.B. 1763)).

⁴⁵¹ *Entick v. Carrington*, 95 Eng. Rep. 807 (K.B. 1765); *Wilkes v. Wood*, 98 Eng. Rep. 489 (K.B. 1763); *Huckle v. Money*, 95 Eng. Rep. 768 (K.B. 1763); see also LEVY, *supra* note 170, at 159–62.

officers who executed the searches were personally liable for damages.⁴⁵² Further, the juries in those cases awarded what was called exemplary damages—i.e., punitive damages.⁴⁵³

Justice Scalia, relying on the scholarship of Professors Amar and Taylor, asserted that the Constitution did not contain a warrant presumption because, in 1791, warrants were looked on with suspicion.⁴⁵⁴ Part of the public's distrust of warrants, according to Professor Amar, was that warrants provided the officers executing them with immunity from civil suit.⁴⁵⁵ Both Professors Amar and Taylor believed the second clause of the Fourth Amendment was not an expression of approval of warrants, but rather an effort to restrict when magistrates could issue them.⁴⁵⁶ Although Justice Scalia has expressly agreed with Professors Amar and Taylor's conclusions regarding the warrant presumption and has agreed that civil liability is an appropriate method of enforcing the Fourth Amendment,⁴⁵⁷ he parts ways with Amar on how this method of accountability should be executed.⁴⁵⁸

⁴⁵² *Entick v. Carrington*, 95 Eng. Rep. 807 (K.B. 1765); *Wilkes v. Wood*, 98 Eng. Rep. 489 (K.B. 1763); *Huckle v. Money*, 95 Eng. Rep. 768 (K.B. 1763); see also LEVY, *supra* note 170, at 159–62; Cuddihy, *supra* note 436, at 1530–45.

⁴⁵³ TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 31–32 (1969).

⁴⁵⁴ *California v. Acevedo*, 500 U.S. 565, 582 (1991). Justice Scalia also cited to Judge Posner's work *Rethinking the Fourth Amendment*, 1981 S. CT. REV. 49, 72–73 (1981).

⁴⁵⁵ *Id.* (citing Amar, *Bill of Rights*, *supra* note 130, at 1180).

⁴⁵⁶ *Id.* (citing TAYLOR, *supra* note 453, at 41–43; Amar, *Bill of Rights*, *supra* note 130).

⁴⁵⁷ *Acevedo*, 500 U.S. at 581–85.

⁴⁵⁸ Compare *id.* at 582, with Amar, *Bill of Rights*, *supra* note 130, at 1179 (“Reasonableness vel non was a classic question of fact for the jury; and the Seventh Amendment, in combination with the Fourth, would require the federal government to

Important to Professor Amar's conclusions regarding the Fourth Amendment is the role of the jury in determining what is a reasonable search or seizure.⁴⁵⁹ Professor Amar has argued that all the constitutional players—executive, legislative, judicial, and “the people”—should be expected to have a role in determining what the word “reasonable” means under the Fourth Amendment.⁴⁶⁰ By having juries determine what was reasonable and possess the power to impose punitive awards, government agents would be careful to ensure their conduct was “reasonable.”⁴⁶¹

The structure Justice Scalia has advocated, particularly in civil suits, is inconsistent with Professor Amar's in at least two ways. First, Justice Scalia has argued civil liability for officers comes at a high societal cost; thus, the standard for liability must be high and only applied when the law is clear.⁴⁶² Officers concerned with potential civil liability may hesitate to act properly, potentially endangering lives and their law enforcement mission. Based on that concern, Justice Scalia wrote a majority opinion which stated, in effect, that officers will benefit from qualified immunity unless their actions are grossly negligent or purposely in violation of a clearly established constitutional rule.⁴⁶³ Furthermore, the question of whether qualified immunity should apply is a legal determination taken out of the hands of a jury.⁴⁶⁴

Justice Scalia has decided, in the matter of civil liability and qualified immunity, that the original meaning of the Fourth Amendment

furnish a jury to any plaintiff-victim who demanded one, and protect that jury's finding of fact from being overturned by any judge or other government official.”).

⁴⁵⁹ Amar, *Bill of Rights*, *supra* note 130, at 1178–80; Amar, *First Principles*, *supra* note 11, at 774.

⁴⁶⁰ Amar, *First Principles*, *supra* note 11, at 816–19.

⁴⁶¹ Amar, *Bill of Rights*, *supra* note 130, at 1179.

⁴⁶² *Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

⁴⁶³ *Id.* at 646.

⁴⁶⁴ *Cf. Scott v. Harris*, 550 U.S. 372 (2007).

should not be applied. In *Anderson v. Creighton*, he rejected a strict application of original meaning, stating it would be “procrustean” to hold officers strictly liable for the unsuccessful warrantless search of a home for a fugitive.⁴⁶⁵ This decision, and the general decision to maintain a low bar for qualified immunity, reduces deterrents against violations of the Fourth Amendment. Arguably, the very arbitrariness of a strict liability rule in this context has value. Under such a rule, police may enter a home without a warrant. By requiring police to do so at their own risk—i.e., if they are wrong, they may be liable in a civil action—the rule ensures that warrantless entries will be based on strong, reliable evidence. If the officer wishes to avoid that risk, he can seek a warrant.

Further, a strict liability rule provides flexibility where there is strong evidence of a crime, but still encourages police to secure a warrant when they are unsure and thus unwilling to risk their own financial well-being. The facts in the *Anderson* case support a strict liability standard. In *Anderson*, police entered three homes without a warrant to search for a suspect and were wrong each time.⁴⁶⁶ It is difficult to argue that law enforcement had probable cause for each entry. Even worse, the entry into the Creighton’s home was done in the nighttime with guns drawn.⁴⁶⁷ Such behavior seems like exactly the sort the Fourth Amendment should deter.

When several of the major pieces of Justice Scalia’s vision of the Fourth Amendment are put together, there is the potential for a lack of balance. Justice Scalia has made it clear that there are times where originalism must give way to practical concerns—he has been famously quoted as saying “I am a textualist, I am an originalist. I am not a nut.”⁴⁶⁸ However, Justice Scalia’s position argues that, when practical concerns

⁴⁶⁵ *Anderson*, 483 U.S. at 644.

⁴⁶⁶ *Creighton v. St. Paul*, 766 F.2d 1269, 1271 (8th Cir. 1985).

⁴⁶⁷ *Anderson*, 483 U.S. at 664 n.21.

⁴⁶⁸ See Molly McDonough, *Scalia: ‘I Am Not a Nut,’* A.B.A. J. (2008) (referring to remarks made by Justice Scalia to students at Roger Williams University).

require alterations to the original vision of the Fourth Amendment, the balance of the Amendment should, as much as possible, be preserved.

The original vision of the Fourth Amendment, which was described by Professor Amar and others, implied by *Entick*, and cases involving the North Briton No. 45 controversy, and apparently accepted by Justice Scalia in *Acevedo*, included a substantial deterrent to law enforcement conducting warrantless searches or seizures.⁴⁶⁹ This deterrent was personal, exposing officers to money damages.⁴⁷⁰ Today, we have a system of deterrents that includes civil damages and an exclusionary rule. For the Fourth Amendment to provide at least as much protection as it did in 1791, the deterrents in place must be equal those of yesterday. By endorsing a doctrine of qualified immunity that permits officers to avoid liability for a warrantless “reasonably unreasonable” search or seizure, today’s Fourth Amendment deterrent structure risks being less vigorous than at the time of the founding.

Of course, the exclusionary rule is another method of deterring violations of the Fourth Amendment, and Justice Scalia has used this method many times. However, in *Hudson*, Justice Scalia expressed significant concerns regarding the social costs involved with the exclusionary rule. Justice Scalia also argued that the civil liability structure that exists today is a powerful deterrent to violations of the Fourth Amendment and that, in *Hudson*, such civil liability was preferable to the “massive” deterrent of exclusion.⁴⁷¹ If Justice Scalia continues to advocate for the reduction of the Fourth Amendment exclusionary rule, he will have to reconsider his position on civil liability and qualified immunity or risk supporting a rule that provides less Fourth Amendment protection than existed in 1791.

⁴⁶⁹ *California v. Acevedo*, 500 U.S. 565, 581–84 (1982).

⁴⁷⁰ See Amar, *Bill of Rights*, *supra* note 130, at 1178; Amar, *First Principles*, *supra* note 11, at 786; see also *Entick v. Carrington*, 95 Eng. Rep. 807 (K.B. 1765); *Wilkes v. Wood*, 98 Eng. Rep. 489 (K.B. 1763); *Huckle v. Money*, 95 Eng. Rep. 768 (K.B. 1763).

⁴⁷¹ *Hudson v. Michigan*, 547 U.S. 586, 595 (2006).

CONCLUSION

Among the protections guaranteed by the Bill of Rights, the Fourth Amendment is unique. The text of the Amendment is at once both specific and vague. It describes with specificity where the rights apply—"houses, persons, papers, and effects"—but it is vague about what the rights are—"to be secure . . . from unreasonable searches and seizures."⁴⁷² The Court's interpretation of the Fourth Amendment has the capacity to affect the daily lives of all citizens in their most sacred zones of privacy (their bodies, homes, papers, and effects). The protections guaranteed by the Fourth Amendment are especially vulnerable to changes in technology. Since at least 1928, the Court has struggled to balance Fourth Amendment protections with advances in search and seizure techniques. These unique aspects of the Fourth Amendment make the need for clear and concrete rules, tied to a stable theoretical base, especially important. Perhaps it is this need for clarity and certainty amid our rapidly changing technological landscape that has allowed Justice Scalia to become such an important voice on the Court regarding the Fourth Amendment.

The consistency and clarity of Justice Scalia's Fourth Amendment jurisprudence is one of its greatest strengths. He has defined his textualist/originalist philosophy of constitutional interpretation in detail. He has been consistent (with some exceptions) regarding what he believes the Fourth Amendment should protect and the primary methods of providing that protection. The occasions on which Justice Scalia has strayed from his originalist philosophy—particularly regarding civil liability—threaten to undermine both the cohesiveness of his broader Fourth Amendment vision and the deterrent structure of the Amendment. Nonetheless, most of his opinions include rules of general application that clarify how the Fourth Amendment should be applied in a range of circumstances, rather than case-by-case factually-intensive decisions that provide little guidance for how the next case should be resolved.

⁴⁷² U.S. CONST. amend. IV.

During an interview with *New York Magazine* in the fall of 2013, Justice Scalia repudiated his 1989 declaration that he might be a faint-hearted originalist.⁴⁷³ He explained that now he aspires to be a stout-hearted originalist.⁴⁷⁴ It is unclear when Justice Scalia made this intellectual transition; however, it is possible this renewed commitment to originalism has already been seen in Justice Scalia's Fourth Amendment opinions. For example, Justice Scalia's dissent in *King* had a distinctly originalist focus and tenor.⁴⁷⁵ A firmer originalism could lead to a reinvigoration of civil liability in Fourth Amendment cases. As this article has suggested, by removing the presumption against civil liability for Fourth Amendment violations, the Court could more appropriately balance individual privacy against law enforcement interests. Such a shift would be more in line with what Justice Scalia has identified as the original meaning of the Fourth Amendment.

Understanding Justice Scalia's vision of the Fourth Amendment gives important insight into how the Court will decide future cases. As demonstrated in this article, his opinions have gone a long way toward creating and shaping a reliable roadmap for dealing with emerging Fourth Amendment issues. The expectation is that the next decade will surpass the last in the number of Fourth Amendment challenges. Through a generally consistent application of the core principles of textualism/originalism, Justice Scalia has authored several of the most important Fourth Amendment opinions of the past two decades. Text, context, and clarity have driven his analysis in most of these Fourth Amendment opinions and can be expected to drive his future opinions—and thereby the Court's Fourth Amendment jurisprudence.

⁴⁷³ Senior, *supra* note 242, at 1.

⁴⁷⁴ *Id.*

⁴⁷⁵ *Maryland v. King*, 133 S. Ct. 1958, 1980–81 (discussing the founding principles of the Fourth Amendment).