Sense-Enhanced Searches and the Irrelevance of the Fourth Amendment

David E. Steinberg

Repository Citation
David E. Steinberg, Sense-Enhanced Searches and the Irrelevance of the Fourth Amendment, 16 Wm. & Mary Bill Rts. J. 465 (2007), https://scholarship.law.wm.edu/wmborj/vol16/iss2/4
INTRODUCTION ............................................. 466
I. THE SUPREME COURT, CONGRESS, AND SENSE-ENHANCED SEARCHES ... 467
   A. The Supreme Court's Sense-Enhanced Search Analysis .......... 467
      1. Physical Trespass .................................. 468
      2. The Visual/Aural Distinction .......................... 469
      3. The Home ........................................ 470
      4. Summary .......................................... 471
   B. The Emerging Statutory Regime .................................. 471
   C. The Response from the Academy .................................. 473
      1. Unpredictability Versus Complexity ...................... 473
      2. Delay Versus Haste ................................ 475
      3. Inflexibility Versus Inaction .......................... 477
      4. Summary .......................................... 479
II. THE ORIGINAL UNDERSTANDING OF UNREASONABLE SEARCHES AND SEIZURES ...... 479
   A. Origins ............................................. 480
   B. The Principle Controversies Regarding Government Search Powers ........ 481
      1. The John Wilkes Cases ................................ 482
      2. Paxton's Case ..................................... 483
      3. American Opposition to the Townshend Act .............. 484
      4. Summary ........................................ 484
   C. Early Commentaries on Unreasonable Searches ................. 484
   D. The Fourth Amendment Did Not Apply Outside House Searches .... 485
      1. The Federal Experience ................................ 485
      2. The State Experience ................................ 486
      3. Summary .......................................... 488
III. THE IMPLAUSIBILITY OF AN EVOLVING FOURTH AMENDMENT .......... 491


INTRODUCTION

With increasing frequency, law enforcement agencies are turning to sense-enhanced searches.¹ In comparison to the traditional direct physical inspection of evidence by law enforcement agents, sense-enhanced searches use sophisticated technology to gather evidence.

Increasingly, regulation of sense-enhanced searches has occurred through statutes, not through court interpretations of the Fourth Amendment.² This development has led to scholarly debate, focusing on whether courts or legislatures should regulate sense-enhanced searches.³

In an article published more than fifteen years ago, I suggested that the Fourth Amendment could regulate sense-enhanced searches effectively.⁴ I was wrong.

I now believe that the Fourth Amendment has no applicability to the vast majority of sense-enhanced searches, because the Framers never intended that the amendment would apply to such searches. When the Framers enacted the Fourth Amendment, the Framers only intended to proscribe unlawful physical searches of residences. The amendment prohibited physical trespasses into houses pursuant to a general warrant, as well as warrantless house searches.⁵ In cases that did not involve house searches, the Fourth Amendment was simply inapplicable.

Part I of this Article reviews the current regulation of sense-enhanced searches. This Part examines Supreme Court decisions on sense-enhanced searches, concluding that such decisions are arbitrary and inconsistent. Part I examines the rise of statutes as an important mechanism for regulating sense-enhanced searches. Finally, Part I

---

¹ In this Article, I use the term "sense-enhanced search" to describe police examination of a person or their property through the use of some method that provides information not available to unaided sensory perceptions. This Article uses the term "physical search" to describe the traditional police search, which relies on unaided sensory perception.

² U.S. CONST. amend. IV.

³ See infra Part I.C.


discusses the scholarly debate about whether such high technology searches should be regulated by legislatures through statutes or courts through interpretations of the Fourth Amendment.

Part II of this Article reviews historical evidence on the original understanding of the Fourth Amendment. To a remarkable degree, framing-era discussions of unreasonable searches and seizures all focused on a single, discrete problem—unlawful physical trespasses into residences. Although the modern Supreme Court has assumed that the Fourth Amendment was intended to regulate all searches and seizures, the historical record provides little if any support for this assumption.

Part III of this Article reviews arguments that the Fourth Amendment should evolve, or change as law enforcement technology changes. Unfortunately, such "growing constitution" arguments lack content. If the Fourth Amendment should evolve, then how should it evolve? Consider just one problem—aerial overflights used by law enforcement officers for surveillance and evidence gathering. Should the "evolving" Fourth Amendment permit such flights without regulation, permit such flights only with a prior warrant, or prohibit such aerial surveillance altogether? The problem with the descriptions of a growing Fourth Amendment is the lack of a consensus about how the amendment should grow.

In short, the Fourth Amendment is no more applicable to most sense-enhanced searches than the Second Amendment or the Eighth Amendment. When the Framers enacted the Fourth Amendment, they never intended to regulate problems such as sense-enhanced searches. Given the inapplicability of the Fourth Amendment, the regulation of powerful new search techniques should come from statutes written by elected legislators.

I. THE SUPREME COURT, CONGRESS, AND SENSE-ENHANCED SEARCHES

The Supreme Court has failed to develop a coherent body of law that governs sense-enhanced searches. Perhaps in light of this failure, today the law regulating such searches increasingly comes from statutes enacted by Congress, rather than from Supreme Court interpretations of the Fourth Amendment. Scholars have expressed mixed reactions to the regulation of sense-enhanced searches by legislators rather than judges. Unfortunately, this scholarly debate often does not consider the original understanding and purposes of the Fourth Amendment.

A. The Supreme Court's Sense-Enhanced Search Analysis

In my 1990 article, I noted three important variables in the Supreme Court's sense-enhanced search cases: 1) physical trespass; 2) the aural/visual distinction; and

---

3) searches of the home. As I noted in 1990, the shakiness of these distinctions "has resulted in unpredictable and inconsistent decisions." As demonstrated by more recent decisions, the Court's sense-enhanced search approaches rest on an untenable foundation.

1. Physical Trespass

Courts are more likely to invalidate sense-enhanced searches that involve physical trespass into a constitutionally protected area, as opposed to those searches that do not involve any such trespass. The presence or absence of a physical trespass often seems determinative in the Court's sense-enhanced search cases. In United States v. Knotts, the Court upheld the warrantless monitoring of a beeper located in a defendant's car, as the car traveled across public streets. Conversely, in United States v. Karo, the Court invalidated the warrantless monitoring of a beeper, which one of the defendants had carried into a residence. And in California v. Ciraolo, the Court upheld the warrantless surveillance of the defendant's backyard from an airplane, where the officers did not trespass into the defendant's backyard.

Although the presence or absence of a physical trespass seems significant in many sense-enhanced search cases, other cases downplay the importance of a physical trespass. In Kyllo v. United States, the Supreme Court held that before using a thermal imaging device to measure heat inside of a residence, federal agents should have obtained a warrant. In finding a Fourth Amendment violation, the Court explicitly rejected the government's arguments that the agents did not need a warrant because the thermal imaging device was located in a federal agent's car parked on a public street. According to Justice Antonin Scalia, making Fourth Amendment decisions turn on the presence of a physical trespass "would leave the homeowner at the mercy of advancing technology—including imaging technology that could discern all human activity in the home.

As the Kyllo decision correctly observes, the power of sense-enhanced searches makes physical trespass increasingly irrelevant. As law enforcement officers rely

---

7 See Steinberg, Making Sense of Sense-Enhanced Searches, supra note 4, at 583–84.
8 Id. at 584.
9 See, e.g., Steinberg, The Original Understanding, supra note 5, at 1084.
11 Id.
13 Id.
15 Id.
17 Id.
18 See id. at 35.
19 Id. at 35–36.
on sophisticated and powerful new search technologies, those officers will have little reason to physically enter a suspect’s property. In fact, such excursions would subject the officers to unnecessary danger, and could cause a spooked suspect to destroy evidence.

2. The Visual/Aural Distinction

The Court is far more likely to require a warrant when technology enhances aural impressions, rather than visual impressions. In a series of cases, the Justices rejected the warrantless use of wiretapping devices. In United States v. United States District Court, Justice Lewis Powell wrote that “official eavesdropping” could “deter vigorous citizen dissent and discussion of Government action in private conversation.”

Typically, the Justices have been far more willing to permit vision-enhancing devices without a warrant. In Kyllo v. United States, Justice Scalia explicitly noted that “the lawfulness of warrantless visual surveillance of a home has still been preserved.” In California v. Ciraolo, the Justices upheld warrantless surveillance of a suspect’s backyard from an airplane. And in United States v. Knotts, the Court held that law enforcement officers need not obtain a warrant before tracking a beeper in a car. The Knotts Court emphasized that visual surveillance “would have sufficed to reveal” all relevant facts.

The continuing use of this aural/visual distinction is problematic. The assumption that aural impressions are somehow more private than visual impressions is not always accurate. Imagine that by using an extremely high resolution telescope, law enforcement officers could read a suspect’s diary entries, written at a bedroom desk. Clearly, this visual observation would invade a suspect’s privacy.

Perhaps more fundamentally, some new technologies do not clearly augment either the visual or aural senses. In Kyllo, the thermal imaging unit enhanced neither

---


22 407 U.S. at 314.

23 Id.


25 Id. at 32 (2001) (emphasis added).


27 Id. at 211–15.


29 Id. at 282.

30 Id.
a federal agent’s vision or hearing, but instead enhanced the agent’s sense of touch.\textsuperscript{31} And in \textit{United States v. Place},\textsuperscript{32} the particular sense enhanced by the use of a drug detecting dog is not immediately clear.\textsuperscript{33} Perhaps the dog augmented a federal agent’s sense of smell. But even an extraordinarily magnified human sense of smell might not detect some odors apparent to a dog. In short, some sense-enhancing search techniques do not fall neatly into aural enhancing and visual enhancing categories.

3. The Home

Sense-enhanced search techniques that intrude on the home are subject to a more searching review than techniques that do not involve surveillance of a residence. As Justice Scalia wrote in \textit{Kyllo v. United States}, protection of the home stands "[a]t the very core' of the Fourth Amendment."\textsuperscript{34} Accordingly, the \textit{Kyllo} Court struck down the warrantless use of a thermal imaging device to detect heat emanating from a residence.\textsuperscript{35} And in \textit{United States v. Karo},\textsuperscript{36} the Justices held that law enforcement officers could not monitor a beeper without a warrant when one of the suspects had unknowingly carried the beeper into a residence.\textsuperscript{37}

Away from residences, the Justices have been far more willing to permit the use of sense-enhancing technology. In \textit{United States v. Knotts},\textsuperscript{38} the Court upheld the warrantless monitoring of a beeper that had traveled in a defendant’s car but had not entered a residence.\textsuperscript{39} And in \textit{United States v. Place},\textsuperscript{40} the Court held that the use of a drug-detecting dog at an airport was not even a “search,” and was not constrained by the Fourth Amendment in any way.\textsuperscript{41}

As with other sense-enhanced search factors, the Justices have not applied a consistent scrutiny to surveillance of the home. While striking down the use of the thermal imaging unit in \textit{Kyllo},\textsuperscript{42} the Court permitted warrantless aerial surveillance of a residential backyard in \textit{California v. Ciraolo}.\textsuperscript{43} If anything, the aerial surveillance permitted in \textit{Ciraolo} was more intrusive than the thermal imaging search invalidated in \textit{Kyllo}. The thermal imaging unit only would inform federal agents about the heat

\textsuperscript{31} See \textit{Kyllo}, 533 U.S. at 29–30.
\textsuperscript{32} 462 U.S. 696, 707 (1983) (holding that the limited intrusion resulting from a canine sniff was not a search and was not covered by the Fourth Amendment).
\textsuperscript{33} \textit{Id.}
\textsuperscript{34} \textit{Kyllo}, 533 U.S. at 31 (quoting \textit{Silverman v. United States}, 365 U.S. 505, 511 (1961)).
\textsuperscript{35} \textit{Id.} at 40–41.
\textsuperscript{36} 468 U.S. 705 (1984).
\textsuperscript{37} \textit{Id.} at 714.
\textsuperscript{38} 460 U.S. 276 (1983)
\textsuperscript{39} \textit{Id.} at 285.
\textsuperscript{40} 462 U.S. 696 (1983)
\textsuperscript{41} \textit{Id.} at 707.
\textsuperscript{42} \textit{Kyllo}, 533 U.S. 27.
emanating from a suspect’s house. Conversely, “[t]he indiscriminate nature of [the] aerial surveillance” in Ciraolo would allow law enforcement officers to view a variety of private activities not only in a suspect’s backyard, but also in the backyards of the suspect’s neighbors.

4. Summary

The Supreme Court has determined the Fourth Amendment legality of sense-enhanced searches based on the presence of physical trespass, the visual/aural distinction, and the extent to which search techniques intrude on the home. These analytic approaches are not entirely coherent and have not been applied consistently by the Justices.

B. The Emerging Statutory Regime

Most law school classes on Criminal Procedure emphasize the Fourth Amendment, while giving little if any attention to federal statutes. But, at least with respect to sense-enhanced searches: “Fourth Amendment protection continues to recede from a litany of law enforcement activities, and it is being replaced by federal statutes.”

With increasing frequency, regulation of sense-enhanced searches has taken place through federal statutes, rather than the Fourth Amendment. In Katz v. United States, the Supreme Court held that law enforcement officers must obtain a warrant before installing a wiretap. However, the important practical restrictions on wiretaps appear not in a Supreme Court Fourth Amendment opinion, but rather in a federal statute—Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III). Title III specifies the requirements for a wiretap application, and the standards that a judge must apply in determining whether to grant the application.

---

44 Kyllo, 533 U.S. at 29.
45 See Ciraolo, 476 U.S. at 225 (Powell, J., dissenting). In his Ciraolo dissent, Justice Lewis F. Powell, Jr. observed that Dante Ciraolo’s yard “contained a swimming pool and a patio for sunbathing and other private activities.” Id. at 222 n.7.
49 Id.
In the Electronic Communications Privacy Act of 1986 (ECPA), Congress specified regulations of "pen registers" and "trap and trace" devices. A pen register is a "device or process which records or decodes . . . information transmitted by an instrument or facility from which a wire or electronic communication is transmitted." A trap and trace device is a mechanism that "captures the incoming electronic or other impulses which identify the originating number..." or signaling information that is "reasonably likely to identify the source of a wire or electronic communication." Under the ECPA, the government must obtain a court order to use these devices. Unlike a traditional search warrant, the order may be obtained with a lesser showing than probable cause.

Soon after the September 11 terrorist attacks, Congress enacted the Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001. Among other things, the Patriot Act expanded the ECPA to cover searches that identify the source of emails, as well as internet protocol addresses. The Patriot Act also expanded the information that the government may obtain from internet service providers (ISPs).

In recognizing the increased regulation of sense-enhanced searches through statutes, one should not overlook the continuing importance of Fourth Amendment doctrine. Some very important sense-enhanced search technologies are not covered by any statutes and are governed solely by Fourth Amendment decisions. These sense-enhanced search techniques include aerial surveillance, beeper tracking, and thermal imaging units.

Nonetheless, the trend is toward regulation of new law enforcement technologies through statutes enacted by Congress, rather than through Supreme Court interpretations through statutes enacted by Congress, rather than through Supreme Court interpretations.

---

55 Id. § 3127(4).
56 Id. § 3121(a).
57 See id. § 3123.
63 See Kyllo v. United States, 533 U.S. 27, 40–41 (2001) (holding that before law enforcement officers use a thermal imaging device to measure the heat radiating from a suspect's residence, the officers first must obtain a warrant).
of the Fourth Amendment. As discussed below, scholars have expressed mixed reactions to this trend.

C. The Response from the Academy

Having observed the trend toward regulation of sense-enhanced searches through statutes rather than court decisions, Fourth Amendment scholars have offered a mixed response. Professor Orin Kerr has argued that when law enforcement officers use new sense-enhanced searches to uncover evidence, courts "should place a thumb on the scale in favor of judicial caution... [while] allowing legislatures to provide the primary rules governing law enforcement investigations." Other scholars, including Professors Sherry Colb and Daniel Solove, disagree with Professor Kerr's arguments for judicial deference in favor of legislative regulation. Some of the principle arguments for and against such judicial deference are summarized below.

1. Unpredictability Versus Complexity

Since the 1967 decision in *Katz v. United States*, courts have determined whether law enforcement officers need a warrant based on whether a particular search invaded a "reasonable expectation of privacy." As Professor Kerr correctly observes, this test is vague and circular, leading to unpredictable results. Professor Kerr writes: "In this era of high-tech surveillance and the Internet, no one knows whether an expectation of privacy in a new technology is 'reasonable.'"

Indeed, despite my familiarity with this area of law, I have been unable to predict the Supreme Court's decisions in sense-enhanced search cases. In *Kyllo v. United States*, the Supreme Court considered whether federal agents must obtain a warrant before inspecting the outside of a house with a thermal imaging unit. Prior to the *Kyllo* decision, I predicted that the Court would not require a warrant. The Court previously had upheld warrantless surveillance of a suspect's backyard from an airplane. Such aerial surveillance would reveal far more private information about a suspect than the thermal imaging unit, which merely would record the heat emanating

---

65 See Colb, *supra* note 20; Solove, *supra* note 47.
66 389 U.S. 360 (1967)
67 Id. at 360 (Harlan, J., concurring).
68 Kerr, *supra* note 64, at 808.
69 533 U.S. 27 (2001)
70 Id.
71 California v. Ciraolo, 476 U.S. 207, 213–15 (1986) (holding that when police officers used an airplane to view marijuana plants growing in a fenced backyard, the officers did not engage in a Fourth Amendment search, and the officers did need to obtain a warrant).
from a suspect’s house. I reasoned that if the aerial surveillance would not violate a reasonable expectation of privacy, then the use of a thermal imaging unit also would be permissible without a warrant.

However, the Supreme Court reached a different result. In Kyllo, the Court held that the resident did have a reasonable expectation of privacy with respect to the use of the thermal imaging unit.\textsuperscript{72} Accordingly, the warrantless use of this unit was unconstitutional.\textsuperscript{73} Kyllo distinguished the aerial search case, concluding that mere “visual observation is no ‘search’ at all.”\textsuperscript{74} In contrast, the agents in Kyllo invaded a reasonable expectation of privacy by employing “a device that is not in general public use, to explore the details of the home.”\textsuperscript{75}

I have spent a considerable part of my professional life studying, teaching, and writing about the Fourth Amendment. If I cannot accurately predict future Fourth Amendment decisions, why should we expect police officers or prosecutors to make accurate predictions?

Further, the consequences of an incorrect decision are substantial. If evidence is obtained in violation of the Fourth Amendment, the exclusionary rule typically requires that a court must exclude this evidence.\textsuperscript{76} Because such physical evidence frequently is highly probative, application of the exclusionary rule often means that the state cannot successfully prosecute guilty defendants, who then go free.\textsuperscript{77}

Unlike the vagueness of Fourth Amendment doctrine, legislative regulation of sense-enhanced searches can be very specific.\textsuperscript{78} Congress can pass statutes that regulate

\textsuperscript{72} Kyllo, 533 U.S. at 40.
\textsuperscript{73} Id.
\textsuperscript{74} Id. at 32.
\textsuperscript{75} Id. at 40.

The Supreme Court has held that the exclusionary rule does not apply in some circumstances, even where police officers have obtained evidence in violation of the Fourth Amendment. For example, the Supreme Court has held that courts should not exclude evidence “when an officer acting with objective good faith” relies on a valid search warrant. United States v. Leon, 468 U.S. 897, 920 (1984); see also United States v. Havens, 446 U.S. 620, 627–28 (1980) (holding that illegally obtained evidence could be used to impeach a defendant’s credibility on cross-examination, when the cross-examination questions had been suggested by a defense attorney’s direct examination).

\textsuperscript{77} See, e.g., Illinois v. Gates, 462 U.S. 213, 254–55 (1983) (noting that “[b]ecause of the inherent trustworthiness of seized tangible evidence and the resulting social costs from its loss through suppression,” application of the exclusionary rule has been carefully restricted); Akhil Reed Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757, 799 (1994) [hereinafter Amar, Fourth Amendment First Principles] (indicating as a result of the exclusionary rule, the Fourth Amendment “has lost its luster and become associated with grinning criminals getting off on crummy technicalities”).

\textsuperscript{78} See supra Part I.B.
every conceivable use of technology by law enforcement. If the original statute
overlooks some situation, Congress may amend the statute.

But with this increased specificity comes increased complexity. In an attempt to
cover every imaginable situation, statutes often become extremely long and detailed.
For example, consider the Electronic Communications Privacy Act (ECPA), which
governs investigations involving internet service providers and the use of pen registers.
As Professor Solove accurately observes, “the rules of the ECPA are notoriously
confusing and unclear.”

The complexity of statutes provides further ammunition for scholars who believe
that the Fourth Amendment primarily should regulate sense-enhanced searches.
Unlike complicated statutory schemes, Fourth Amendment concepts tend to be
relatively accessible. Fourth Amendment standards such as the “reasonable expectation
of privacy” test, probable cause, and reasonable suspicion can be understood fairly
easily by lawyers and non-lawyers. But while the general Fourth Amendment concepts
are clear, the application of these vague concepts is far from certain.

These observations form one battlefield in the debate between those who favor
regulating sense-enhanced searches through the Fourth Amendment and those who
favor regulation by statutes. Scholars favoring regulation through the Fourth Amend-
ment emphasize the accessibility of Fourth Amendment doctrine and the complexity
of statutes. Scholars favoring regulation by statutes emphasize the specificity of
statutory law and the vagueness of Fourth Amendment standards.

2. Delay Versus Haste

Fourth Amendment law tends to evolve slowly, with definitive decisions often
rendered long after the development and use of some new search technique. For
example, Professor Orin Kerr observes: “Pen registers were in widespread use by
the 1960s, but the Supreme Court did not pass on whether their use violated the
Fourth Amendment until 1979.” As the power and variety of sense-enhanced search
devices increases exponentially, court decisions may be unable to keep pace with
these changes.

A number of factors will delay the time when courts rule on a search conducted
through use of a new technology. First, law enforcement authorities must initiate a
prosecution based in part on the new technology. If no such prosecution is brought,

80 Solove, supra note 47, at 766.
81 Kerr, supra note 64, at 869 (citations omitted). In 1979, the Supreme Court concluded
that the use of a pen register was not a Fourth Amendment “search.” Smith v. Maryland, 442
82 Kerr, supra note 64, at 869 (“By the time courts decide how a technology should be
regulated . . . the factual record of the case may be outdated, reflecting older technology
rather than more recent developments.”).
courts typically will not have an opportunity to rule on the sense-enhancing technology.\textsuperscript{83} Even if a prosecution is initiated, usually the prosecution will end in a plea bargain.\textsuperscript{84} This plea bargain may occur without a court ever ruling on the new technology.

Now assume that the prosecution brings a case, no plea bargain occurs, and the case actually goes to trial. A trial judge must rule on the legality of the sense-enhanced search. However, most attorneys never will learn of this ruling. Federal trial courts publish few of their rulings.\textsuperscript{85} State trial courts publish their decisions even more rarely.\textsuperscript{86}

If the defendant is acquitted, the case will end in the trial court.\textsuperscript{87} Even if the defendant is convicted, the defendant may enter into a sentencing agreement and waive his right to appeal.\textsuperscript{88} If so, the case again will end in the trial court.

The sense-enhanced search issue will reach an appeals court only if the defendant is convicted and decides to appeal. However, even if an appeals court rules on the legality of the new technology, the ruling may not provide a definitive answer. Other appeals courts in the state or federal system may reach different results.

Ultimately, a definitive Fourth Amendment ruling will come only from the United States Supreme Court. But even once a case has reached the appeals courts and a defendant has petitioned for review, the Supreme Court has discretion about whether to hear the case.\textsuperscript{89} By the time that the Supreme Court Justices finally

\textsuperscript{83} Federal courts may not decide cases when there is no case or controversy. See U.S. CONST. art. III, § 2.

\textsuperscript{84} Over ninety percent of all criminal cases end in a plea bargain. See, e.g., GEORGE FISHER, PLEA BARGAINING’S TRIUMPH 223 (2003) (noting that the current guilty plea rate is ninety-four percent); Gabriel J. Chin & Richard W. Holmes, Jr., Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 CORNELL L. REV. 697, 697 (2002) (“[O]ver ninety percent of criminal convictions result from guilty pleas . . . .”)

\textsuperscript{85} See Scott E. Gant, Missing the Forest for a Tree: Unpublished Opinions and New Federal Rule of Appellate Procedure 32.1, 47 B.C.L. REV. 705, 706 n.3 (2006) (describing how district court opinions are not precedential, and thus, have no reason to be published).


\textsuperscript{87} The Constitution forbids a retrial of an acquitted criminal defendant. See U.S. CONST. amend. V.

\textsuperscript{88} See, e.g., Nancy J. King & Michael E. O’Neill, Appeal Waivers and the Future of Sentencing Policy, 55 DUKE L.J. 209, 211 (2005) (“For well over a decade, anecdotal evidence has suggested that appeal waivers have become increasingly frequent in federal cases.”).

\textsuperscript{89} See, e.g., LISA A. KLOPPENBERG, PLAYING IT SAFE: HOW THE SUPREME COURT SIDESTEPS HARD CASES AND STUNTS THE DEVELOPMENT OF LAW 4 (2001) (reporting that the Supreme Court agrees to review only about one percent of the cases that reach the Court through a petition for certiorari).
rule on the legality of a new sense-enhanced search technology, that technology may be outdated.

Congress and state legislatures are able to act more quickly. As law enforcement agencies adopt new technologies, legislators can regulate that technology promptly. However, fast decisions are not necessarily prudent decisions. The deliberate judicial process has the advantage of encouraging equally deliberate decisions. By the time a Fourth Amendment case finally reaches the Supreme Court, all arguments about the particular search procedure probably have been discussed somewhere in the lower courts.

In contrast, legislators may act in haste without giving complete consideration to the advantages or disadvantages of various technology regulations. For example, the Patriot Act seemed driven by the need of elected officials to respond to the World Trade Center disaster of September 11, as opposed to a careful and measured attempt to regulate new technologies. Rather than a careful consideration of competing concerns, Professor Solove writes that the Patriot Act "was rushed through Congress in great haste."

For scholars who prefer judicial or legislative solutions, the appropriate speed of response to sense-enhanced searches represents another point of contention. Those favoring legislative regulation contrast the slow pace of judicial action with a more rapid possible response from legislators. Those favoring judicial regulation through the Fourth Amendment describe judicial decisions as careful and deliberate, and legislative decisions as sometimes hasty.

3. Inflexibility Versus Inaction

In regulating sense-enhanced searches, courts have relatively limited Fourth Amendment tools to work with. The strongest Fourth Amendment limitation is to require that law enforcement officers must obtain a warrant before initiating a search. To obtain a warrant, the officers must have probable cause. If a warrant is not

---

90 See Kerr, supra note 64, at 868 ("Fourth Amendment rules . . . tend to lag behind parallel statutory rules and current technologies by at least a decade . . . ").

91 See Erik G. Luna, Sovereignty and Suspicion, 48 DUKE L.J. 787, 790 (1999) (noting how judicial deliberation in Fourth Amendment cases provides "protection against intemperate decisionmaking").


93 See Kerr, supra note 64, at 873 (noting that it is difficult for courts to develop "flexible rules under the Fourth Amendment").

94 See U.S. CONST. amend. IV.

95 See id.
required, a court may hold that law enforcement officers must establish probable cause or reasonable suspicion. If a search technique raises few Fourth Amendment concerns, courts may permit indiscriminate use of the technique. If law enforcement officers violate the Fourth Amendment, the remedy almost always is the exclusion of evidence.  

Legislators, on the other hand, have far greater flexibility in specifying both the appropriate rules for the use of law enforcement technology, and the remedy if law enforcement officers violate those rules. For example, under the ECPA, law enforcement officers must obtain a court order prior to the use of a pen register or a trap and trace device. Law enforcement officers may obtain this order by certifying that "the information likely to be obtained is relevant to an ongoing criminal investigation." This standard requires far less rigorous proof than the probable cause standard for a Fourth Amendment warrant. And unlike Fourth Amendment law, violations of the ECPA are not subject to an exclusionary rule, which prevents juries from hearing probative evidence.

However, another option available to legislators, and not courts, is the option to do nothing. When the defense challenges a sense-enhanced search as a Fourth Amendment violation, a court hearing a criminal case must decide the Fourth Amendment issue.

Frequently, Congress simply has not taken any action to regulate sense-enhanced searches. Further, as Professor Solove has noted, Congress has enacted legislation governing sense-enhanced searches sporadically. The ECPA was adopted in 1986. The Patriot Act was adopted in 2001. In the fifteen-year interim, Congress did not enact any new major legislation on sense-enhanced searches, despite the rise of the Internet during this fifteen-year period.

In part, congressional inaction may occur because legislators view courts as the dominant regulatory agency on search and seizure questions. However, legislators also may fear that sense-enhanced search regulations will be politically sensitive and politically risky. For advocates of law enforcement and the war on terror, any

---

96 See supra note 76 and accompanying text.
99 See Solove, supra note 47, at 756.
100 See supra text accompanying note 61-63.
104 Congress did adopt some modest amendments to the ECPA during this fifteen-year period. See Solove, supra note 47, at 770–71.
legislation that restricts the use of sense-enhancing technology will be criticized as protecting hoodlums and terrorists. For civil liberties advocates, any legislation that liberalizes the use of sense-enhanced technology will amount to an invasion of privacy and liberty. All too often, the politically expedient response is to do nothing.

The competence of different branches to regulate sense-enhanced searches represents another point of contention among scholars. For scholars who favor legislative regulation, Congress possesses greater flexibility in crafting federal statutes, as compared with court interpretations of the Fourth Amendment. For scholars who favor judicial regulation through the Fourth Amendment, Congress has demonstrated an uneven response and frequent inaction in the face of new search techniques.

D. Summary

Sense-enhanced searches form an increasingly important component of the investigative techniques used by law enforcement. In its attempts to apply the Fourth Amendment to these new search techniques, the Supreme Court has struggled to devise a coherent methodology.\textsuperscript{105}

Perhaps as a result of the Court’s struggles, sense-enhanced searches today are increasingly regulated by congressional statutes.\textsuperscript{106} Scholars disagree on whether this move toward statutory regulation is a positive or negative development.\textsuperscript{107}

Arguments on the proper regulation of technology often have focused on the institutional capabilities of legislators and courts, as opposed to an examination of the Fourth Amendment itself. However, the original understanding of the Fourth Amendment should be a critical component of this debate.

The remainder of this Article endorses the case for statutory regulation of sense-enhanced searches. My argument is in no way based on the functional superiority of Congress over the courts. Instead, the argument derives from the limits of the Fourth Amendment.

As the next section of this Article indicates, the Fourth Amendment never was intended to regulate anything like sense-enhanced searches. With respect to such high-technology searches, the amendment should be almost entirely irrelevant.

II. THE ORIGINAL UNDERSTANDING OF UNREASONABLE SEARCHES AND SEIZURES

In discussions of sense-enhanced searches, modern analysis tends to assume that the Framers enacted the Fourth Amendment as a general regulation of all searches and seizures. Such an assumption is incorrect.

\textsuperscript{105} See supra Part I.A.
\textsuperscript{106} See supra Part I.B.
\textsuperscript{107} See supra Part I.C.
The Framers adopted the Fourth Amendment exclusively to regulate house searches. Specifically, the Framers enacted the Fourth Amendment solely to prohibit physical entries into a house pursuant to a general warrant, or no warrant at all. When they enacted the Fourth Amendment, the Framers did not intend to regulate other types of searches or seizures.

Sense-enhanced searches typically do not involve a physical trespass into a residence, even when law enforcement officers are using such searches to gather evidence about a residence. Attempts to regulate sense-enhanced searches through the Fourth Amendment are doomed to incoherence. With respect to such searches, the amendment should be simply irrelevant.

A. Origins

William Cuddihy observes that the concept of unreasonable searches and seizures did not originate out of attempts to control government power, but instead began with laws that sought to prevent private citizens from breaking and entering into houses. Professor Cuddihy writes that as early as the seventh century, English codes “penalized severely those who invaded a neighbor’s premises or provoked a disturbance within it.”

By the thirteenth century, the laws that prohibited housebreaking had developed into the crime of “hamsocn.” Professor Cuddihy describes this crime as “among the more serious of crimes in medieval England, one hundred shillings being the usual fine for it.” By the end of the sixteenth century, the crime of “hamsocn” had been transformed into more modern codes that proscribed burglary, housebreaking, and trespass.

Prior to 1485, English government officials rarely searched private houses. But after 1485, England’s Tudor monarchs expanded the justifications for house

---

109 Id.
110 See, e.g., Kyllo v. United States, 533 U.S. 27, 33–41 (2001) (striking down the warrantless use of a thermal imaging unit to measure the temperature inside of a residence, which did not involve a physical trespass into the residence); California v. Ciraolo, 476 U.S. 207, 213–15 (1986) (upholding the warrantless aerial surveillance of a residential backyard, which did not involve a physical trespass).
112 Id. at 32.
113 Id. at 33.
114 Id.
115 Id. at 33–34.
116 Id. at 75.
searches. Government agents now possessed broad powers to search houses for evidence of customs violations, religious heresy, and political dissent.

As house searches by government officials became more frequent, English thought began to assert that certain types of government house searches were unreasonable and unlawful. As Professor Cuddihy summarizes this movement, "Elizabethan Englishmen began to insist that their houses were castles for the paradoxical reason that the castle-like security that those houses had afforded from intrusion was vanishing. As the violence and frequency of searches escalated, the perception that some types of search and seizure were unreasonable appeared."

This historical backdrop sheds considerable light on the eighteenth-century American opposition to unreasonable searches and seizures, which culminated in the Fourth Amendment. When eighteenth-century Americans spoke of unreasonable searches, they were criticizing one particular government practice—the unlawful trespass into houses.

B. The Principle Controversies Regarding Government Search Powers

Prior to the enactment of the Fourth Amendment, criticisms of unreasonable searches and seizures focused on searches of residences conducted pursuant to a general warrant. The term "general warrant" referred to warrants with either of two deficiencies. A warrant was inadequate if the document failed to specify the places to be searched or the things to be seized. A warrant also would be inadequate if the document lacked sufficient evidentiary support.

As noted by Nelson Lasson, Thomas Davies, and others, discussion of unreasonable searches in the late eighteenth century primarily focused on three controversies—the John Wilkes cases in England, Paxton's case in Boston, and American reactions to

---

117 Id. at 81–82.
118 Id. at 100–02.
119 Id. at 105–06.
120 Id. at 111–18.
121 Id. at 127–28.
122 Id. at 128.
123 Article X of the Virginia Declaration of Rights of 1776 adopted the first American constitutional provision to regulate searches and seizures. Article X contains a straightforward prohibition on general warrants. See VA. BILL OF RIGHTS OF 1776, art. X, reprinted in 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 3814 (Francis N. Thorpe ed., 1909) (asserting that general warrants "are grievous and oppressive, and ought not to be granted").
124 Davies, supra note 108, at 558 n.12.
125 Id.
126 Id.
the English Townshend Act. All three controversies arose out of physical searches of homes pursuant to general warrants.

1. The John Wilkes Cases

The John Wilkes cases grew out of a letter published anonymously by opposition politician John Wilkes, which was highly critical of the English Tory government. In a general warrant, the Tory Secretary of State authorized English officers to search any places that might contain evidence identifying the author of the libelous letter. Ultimately, the officers searched at least five houses and arrested at least forty-nine people pursuant to this general warrant.

Wilkes and his supporters responded with a number of trespass and false imprisonment suits. In a series of decisions issued between 1763 and 1769, English courts ruled that the house searches conducted pursuant to the general warrant violated English common law.

The John Wilkes cases focused exclusively on the impropriety of house searches. These cases did not suggest that similar searches of shops, warehouses, or vessels would violate common law principles. For example, in an opinion that was highly critical of the general warrant, Chief Justice Pratt wrote: "To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject."

See, e.g., Nelson B. Lasson, The History and Development of the Fourth Amendment to the United States Constitution 43-76 (1937) (discussing the John Wilkes cases, Paxton's case, and the Townshend Act); Davies, supra note 108, at 561-67 (noting general agreement that these three controversies represent the most important events that resulted in the adoption of the Fourth Amendment).

Lasson, supra note 127, at 43-76.

For a detailed account of the John Wilkes cases, see Cuddihy, supra note 111, at 886-927.

Id. at 887.

Id. at 893.

Id. at 894.


See, e.g., Entick, 95 Eng. Rep. at 818 (holding that "to enter a man's house, search for and take away all his books and papers" violated common law principles); Wilkes, 98 Eng. Rep. at 498 (when "[t]he defendants claimed a right... to force persons houses, break open escutores, seize their papers, &c. upon a general warrant," these actions were "totally subversive of the liberty of the subject").

2. Paxton's Case

Charles Paxton was a Boston customs officer. In 1761, the Boston Surveyor General of Customs sought to review a writ of assistance, which Paxton had received from the Superior Court in Boston. The writ of assistance was the American equivalent of the English general warrant.

In January 1761, a group of Massachusetts merchants challenged Paxton's writ before the Superior Court in Boston. On behalf of the merchants, attorney James Otis, Jr., argued that the writ violated common law principles.

In challenging Paxton's writ, Otis began by noting that "the freedom of one's house" was among "the most essential branches of English liberty." Otis argued that the writ of assistance violated common law principles because customs officials "may enter our houses when they please . . . may break locks, bars and every thing in their way—and whether they break through malice or revenge, no man, no court can inquire."

Otis lost the case. In November 1761, the Superior Court in Boston approved the continued use of the writs of assistance. Nonetheless, Otis's argument against the writs of assistance was a major event, which fueled the American movement for independence from England.

As was true in the John Wilkes cases, Paxton's case focused exclusively on the illegality of house searches pursuant to general warrants. Otis did not challenge searches of warehouses or seizures of ships. Otis's argument exclusively challenged physical intrusions into residences.

---

136 Cuddihy, supra note 111, at 760.
137 Id. at 761–64.
138 Id. at 759. The writ was named a writ of assistance because the writ compelled all persons present to assist customs officers in a search for customs violations. See Davies, supra note 108, at 561 n.18.
139 Cuddihy, supra note 111, at 764.
140 Id. at 765; see M. H. SMITH, THE WRITS OF ASSISTANCE CASE 344 (1978).
141 SMITH, supra note 140, at 344.
142 Id.
143 Cuddihy, supra note 111, at 798.
144 According to John Adams, during Otis's argument "American independence was then and there born." 10 THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES 247 (Charles Francis Adams ed., 1856). But cf. Davies, supra note 108, at 562 n.20 (noting that although "Otis's argument was widely known in Boston," news of the argument may not have reached beyond Massachusetts).
145 Davies, supra note 108, at 601–02. Otis's decision only to challenge house searches is particularly noteworthy. Otis's clients were "merchants who also owned ships and warehouses." Id. at 602.
146 Id. at 602.
147 Id.
3. American Opposition to the Townshend Act

In the Townshend Act of 1767, the British Parliament reauthorized the use of writs of assistance by American customs officials. But after 1767, as a result of popular resistance, colonial officers obtained and enforced few of these writs.

As was the case with the earlier search and seizure controversies, opposition to the Townshend Act focused on house searches conducted pursuant to general warrants. For example, in a 1774 address to the American people, the Continental Congress complained that customs officers could "break open and enter houses without the authority of any civil magistrate founded on legal information." Similarly, in a 1774 letter to the inhabitants of Quebec, the Congress warned that British customs officers would break into "houses, the scenes of domestic peace and comfort and called the castles of English subjects in the books of their law."

4. Summary

More than anything else, three controversies led to the adoption of the Fourth Amendment—the John Wilkes cases, Paxton's case, and the Townshend Act. In each case, opponents of government search powers focused their criticism exclusively on physical entries of houses pursuant to general warrants. Critics did not argue against searches of shops, warehouses, or other commercial structures—even though English agents certainly did enter these locations in search of customs violations. Instead, discussion of unreasonable searches focused entirely on house searches.

C. Early Commentaries on Unreasonable Searches

Like statesmen and attorneys, legal commentators who discussed unreasonable searches and seizures referred almost exclusively to house searches. In his 1644

---

148 Cuddihy, supra note 111, at 1040.
149 Id. at 1046. As Professor William Cuddihy describes the implementation of the Townshend Act: "In only a few colonies did the courts issue the writs as general search warrants, and the massive searches that those writs authorized were never implemented on an effective scale." Id.
150 For example, at a Boston town meeting in 1772, Samuel Adams attacked the writs of assistance with the following statement: "[O]ur homes and even our bed chambers, are exposed to be ransacked, our boxes chests & trunks broke open ravaged and plundered by wretches... whenever they are pleased to say they suspect there are in the house wares etc. for which the duties have not been paid." A STATE OF THE RIGHTS OF THE COLONISTS, reprinted in TRACTS OF THE AMERICAN REVOLUTION, 1763–1776, at 243 (Merrill Jensen ed., 1967) (report typically attributed to Samuel Adams).
151 Cuddihy, supra note 111, at 1116.
152 Id. at 1117.
treatise, English commentator Sir Edward Coke described unreasonable searches in the following terms: "One or more justice or justices of peace cannot make a warrant upon a bare surmise to break any man's house to search for a felon, or for stoln [sic] goods . . .". In his 1721 treatise, Sir Matthew Hale agreed that general warrants could not serve as a justification "to break open any man's house."

In America, Thomas Cooley was one of the first commentators to write extensively about the Fourth Amendment. Cooley described the Fourth Amendment as follows: "The maxim that 'every man's house is his castle' is made a part of our constitutional law in the clause prohibiting unreasonable searches and seizures . . ." Cooley continued that the Fourth Amendment constituted a response to "the unwarrantable intrusion of executive agents into the houses and among the private papers of individuals."

The statements of early American and English commentators are consistent with other contemporary statements about unreasonable searches and seizures. In short, the Fourth Amendment was intended only to regulate physical intrusions into houses and not other types of searches or seizures.

D. The Fourth Amendment Did Not Apply Outside House Searches

Without question, the Framers enacted the Fourth Amendment primarily to prohibit house searches pursuant to general warrants. But did the Framers also intend to regulate searches away from the home? While this question cannot be answered definitively, most of the evidence suggests that the Framers did not intend to regulate searches and seizures outside of the home.

1. The Federal Experience

Prior to the Supreme Court decision in Boyd v. United States, it is very difficult to find any federal cases that apply the Fourth Amendment. In some ways, this dearth of cases is unsurprising. During the eighteenth century and the early nineteenth

153 SIR EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 176 (London, W. Clarke and Sons 1817). Coke also wrote: "[F]or justices of peace to make warrants upon surmises, for breaking the houses of any subjects to search for felons, or stoln [sic] goods, is against [the] Magna Carta . . ." Id. at 177. Coke's treatise was originally published in 1644. Davies, supra note 108, at 578 n.74.


156 Id. at 300.

157 116 U.S. 616 (1886).
century, most criminal laws were enacted by the states, not the federal government. Therefore, one plausibly might attribute the lack of federal Fourth Amendment cases to a lack of federal searching and seizing that accompanies criminal investigations.

However, the early federal government did seize ships, with some of the resulting litigation reaching the Supreme Court. In the 1804 case of *Little v. Barreme*, the Supreme Court reviewed a ship seizure resulting out of a law that prohibited trading with France. In *The Apollon*, an 1824 case, the Supreme Court reviewed a ship seizure that arose out of alleged customs violations.

Neither of these cases found a Fourth Amendment violation. But more importantly, neither the Justices nor the litigants even discussed the Fourth Amendment in these cases. These omissions strongly support the following inference: Both lawyers and judges understood that the Fourth Amendment simply did not apply to ship searches and seizures.

This argument is further supported by early legislation. In the 1789 Collections Act, Congress approved the warrantless search of vessels for customs violations. If the Framers had intended for the Fourth Amendment to govern searches and seizures other than house searches, why would Congress need to enact a statute that governed ship searches? In fact, both the ship seizure cases and the Collections Act support the argument that the Fourth Amendment was never intended to apply outside of house searches.

2. The State Experience

The concept of unreasonable searches and seizures appeared almost as rarely in the state courts as in the federal courts. Admittedly, during the eighteenth century and the nineteenth century, the federal Fourth Amendment only applied to the federal government.

---

159 6 U.S. (2 Cranch) 170 (1804).
160 See id. at 177–79.
162 Id. at 364, 370–72.
163 See id.; *Little*, 6 U.S. (2 Cranch.) at 177–79.
164 Collections Act of 1789, ch. 5, § 14, 1 Stat. 29, 40.
165 But cf. *Carroll v. United States*, 267 U.S. 132, 150–51 (1925) (asserting that with the passage of the 1789 Collections Act, Congress indicated that the Fourth Amendment applied to ship searches).
166 See *Smith v. Maryland*, 59 U.S. (18 How.) 71, 76 (1855) (rejecting a Fourth Amendment challenge to a Maryland state statute because the Fourth Amendment applied only to the federal government).
However, during this period, most state constitutions contained search and seizure provisions using language very similar or identical to the federal Fourth Amendment. Nonetheless, published state court opinions rarely discussed these state constitutional search and seizure provisions. In both the federal courts and the state courts, constitutional search and seizure provisions probably were mentioned in fewer than fifty nineteenth-century cases. And in those rare cases where a creative attorney did invoke a constitutional search and seizure provision, courts typically dismissed the argument with very little discussion.

As was the case at the federal level, search and seizure law in the early states typically was regulated by statute, rather than by court interpretations of a constitutional provision. With the notable exception of house searches, the vast majority of police investigations were permitted without a warrant.

In those rare situations where early American law did require a warrant to search outside of the home, the source of that warrant requirement was found in statutes, not court decisions. For example, a 1786 Rhode Island statute required that federal tax agents must obtain a specific warrant before the agents could search a “Dwelling-House, Store, Ware-house, or other Building.” In another 1786 statute, Delaware required that state agents must obtain a warrant before searching buildings for cargo stolen from shipwrecked vessels.

In the Michigan Supreme Court case of *Weimer v. Bunbury*, Justice Thomas Cooley’s opinion clearly indicates why state constitutional provisions were not invoked in most search and seizure cases. *Weimer* involved a challenge to a

---

168 Id. at 611–19.
169 Id.
170 See, e.g., *Banks v. Farewell*, 38 Mass. (17 Pick.) 156, 159–60 (1838) (holding that a warrantless search of a shop did not violate the Massachusetts Constitution, which prohibited unreasonable searches and seizures); *Mayo v. Wilson*, 1 N.H. 53, 59–60 (1817) (rejecting the argument that a warrantless arrest violated a New Hampshire constitutional provision, which prohibited unreasonable searches and seizures); *Wakely v. Hart*, 6 Binn. 315, 318 (Pa. 1814) (rejecting the argument that a warrantless arrest violated a Pennsylvania constitutional provision, which prohibited unreasonable searches and seizures).
171 “Warrantless searches, then as now, were the rule rather than the exception, and each of the thirteen colonies, and then states, as a common statutory practice, authorized them.” Gerard V. Bradley, *Present at the Creation? A Critical Guide to Weeks v. United States and Its Progeny*, 30 ST. LOUIS U. L.J. 1031, 1041 (1986); see also id. at 1041 nn. 64–65 (citing statutes).
172 Cuddihy, *supra* note 111, at 1292.
173 Id. at 1293.
174 30 Mich. 201 (1874).
175 Justice Cooley was also the author of an important treatise on the United States Constitution, which described the Fourth Amendment as regulating house searches. See Cooley, *supra* note 155.
Michigan state statute, providing for a "warrant" that authorized the repossession of property in tax delinquency cases. The Weimer plaintiff argued that this statute violated a Michigan state constitutional provision, which proscribed unreasonable searches and seizures.

According to Justice Cooley, the repossession statute did not violate the state constitutional search and seizure provision. The constitutional search and seizure provision was intended for "something quite different from an open and public levy upon property after the usual method of execution levies." Instead, the "main purpose" of the state constitutional search and seizure provision "was to make sacred the privacy of the citizen's dwelling and person against everything but process issued upon a showing of legal cause for invading it." In short, the state constitutional provision that prohibited unreasonable searches and seizures was simply inapplicable.

E. Summary

Discussions of unreasonable searches and seizures before, during, and soon after the enactment of the Fourth Amendment focused on a single, discrete issue—the need to prevent house searches pursuant to a general warrant, or no warrant at all. Based on the historical record, it seems most likely that the Fourth Amendment was enacted solely to regulate searches involving a physical trespass into a residence. The record also indicates that the Fourth Amendment was not applicable to other types of searches and seizures. In the eighteenth century and the early nineteenth

---

177 Id. at 208.
178 Id.
179 Id.
180 See supra Part II.A-D.
181 Akhil Amar advocates an interpretation of Fourth Amendment history that is quite different from the account presented in this article. See, e.g., Amar, Fourth Amendment First Principles, supra note 77; Akhil Reed Amar, The Bill of Rights as a Constitution, 100 YALE L.J. 1131, 1175–81 (1991) [hereinafter Amar, The Bill of Rights as a Constitution]; Akhil Reed Amar, The Fourth Amendment, Boston, and the Writs of Assistance, 30 SUFFOLK U. L. REV. 53 (1996). Professor Amar's historical argument rests on two critical propositions. First, like the current Supreme Court, Professor Amar asserts that the Fourth Amendment was intended to impose a global reasonableness requirement on almost all government evidence gathering activities. Amar, Fourth Amendment First Principles, supra note 77, at 801–04.

Second, Professor Amar asserts that the Framers actually sought to limit searches pursuant to any warrant, general or specific. Id. at 771–80. According to Professor Amar, the Framers did not view the warrant process as protecting against unreasonable searches. Instead, civil trespass suits offered the primary protection from such searches. Id. at 774. Professor Amar contends that the Framers sought to limit warrants, because a warrant would provide "an absolute defense in any subsequent trespass suit." Id. Professor Amar concludes, "[j]udges and warrants are the heavies, not the heroes, of our story." Amar, The Bill of
century, historical precedents, contemporary controversies, and scholarly commentaries all focused on house searches.182

Rights as a Constitution, supra at 1179; see also TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION: SEARCH, SEIZURE, AND SURVEILLANCE AND FAIR TRIAL AND FREE PRESS 41 (1969) (arguing that the Framers viewed all warrants as “an enemy”).

Although Professor Amar’s account is creative and engaging, his contentions often seem at odds with the historical record. To take just one example, when early American legislatures passed statutes regulating searches and seizures, those statutes sometimes included a warrant requirement. See, e.g., Excise Act of 1791, ch. 15, § 32, 1 Stat. 199, 207 (requiring that federal customs officers must obtain a warrant before the officers searched certain types of buildings for spirits that were concealed “with intent to evade the duties thereby imposed upon them”); Davies, supra note 108, at 681–83 (noting that in 1780 and 1785, the Pennsylvania legislature enacted statutes that required specific warrants for house searches). Although Professor Amar contends that the Framers sought to limit searches pursuant to warrants, these early American statutes requiring warrants contradict Professor Amar’s contention.

A number of Fourth Amendment scholars disagree with Professor Amar’s reading of Fourth Amendment history. For critiques of Professor Amar’s arguments, see Morgan Cloud, Searching Through History; Searching for History, 63 U. CHI. L. REV. 1707, 1739 (1996) (Amar “selectively deploys incomplete fragments of the historical record to advance a partisan thesis”); Davies, supra note 108, at 575 n.63 (“Amar is an engaging writer, but his treatment of text and history is often loose and uninformed.”); Tracey Maclin, The Complexity of the Fourth Amendment: A Historical Review, 77 B.U. L. REV. 925, 929 (1997) (“Amar provides an incomplete account of the [Fourth] Amendment’s history.”). For an extended discussion and evaluation of Professor Amar’s historical argument, see Steinberg, Akhil Amar and Fourth Amendment History, supra note 5.

Thomas Davies has advanced a reading of Fourth Amendment history that is very similar to the interpretation presented in this article. Professor Davies appropriately emphasizes that the historical concerns resulting in the Fourth Amendment “were almost exclusively about the need to ban house searches under general warrants.” Davies, supra note 108, at 551; see also id. at 642–50 (emphasizing the sanctity of the home in eighteenth-century America).

However, I disagree with Professor Davies on at least two points. Professor Davies concludes that the sole purpose of the Fourth Amendment was “banning Congress from authorizing the use of general warrants.” Id. at 724. “In other words, the Framers did not address warrantless intrusions at all in the Fourth Amendment or in the earlier state provisions . . . .” Id. at 551.

In concluding that the Fourth Amendment did not address warrantless searches, Professor Davies notes the absence of eighteenth-century protests about warrantless searches. Id. at 603. However, the lack of debate about warrantless house searches likely occurred because in early America, “the common law apparently provided no justification for a search of a house beyond the ministerial execution of a valid search warrant.” Id. at 649. In other words, everyone agreed that warrantless house searches were impermissible.

According to Professor Davies’s reading of the Framers’ intent, a search of a house pursuant to a general warrant would be an “unreasonable search,” as that term is used in the Fourth Amendment. Id. at 577 n.67, 600. However, Professor Davies asserts that a warrantless house search would not be an unreasonable search, at least for Fourth Amendment purposes. Id. at 601, 610–11. Given the profound common law tradition that proscribed unauthorized entries into houses, I cannot agree with Professor Davies’s conclusion that the Fourth Amendment did not proscribe warrantless house searches.
But for the sake of argument, assume that the Framers did intend for the Fourth Amendment to govern police investigations other than house searches. Because contemporary discussions focused exclusively on house searches, framing-era discourse provides no clues about how the Fourth Amendment would apply in cases that did not involve a physical trespass into a residence.

Perhaps for this reason, the Supreme Court's attempts to apply the Fourth Amendment outside of house searches have a highly arbitrary quality. Sometimes, the Court has permitted searches only when police officers possess probable cause. Sometimes, the Court has permitted searches under the less demanding "reasonable suspicion" standard. And sometimes, the Court has permitted searches that are completely random, without any heightened level of suspicion.

Professor Davies and I also disagree on the implications of the Framers' original intent for current Fourth Amendment doctrine. Professor Davies believes that a return to the original understanding of the Fourth Amendment "would subvert the purpose the Framers had in mind when they adopted the text." Id. at 741. Professor Davies largely accepts the Supreme Court's rewriting of the Fourth Amendment, because today's law enforcement officers exercise "a level of discretionary authority that the Framers would not have expected a warrantless officer could exercise unless general warrants had been made legal." Id.

I agree with Professor Davies that unrestrained police discretion is undesirable. However, judicial activism is not the only potential source for police restraint. Police discretion could be constrained by elected officials who supervise police departments, by statutes, or by amendments to state constitutions or the federal Constitution.

In short, having nine appointed Supreme Court Justices reinvent the Fourth Amendment based on their personal views about "unreasonable searches and seizures" is not the most sensible way to regulate police discretion. In my opinion, Fourth Amendment doctrine is such a mess because well-intentioned judges have invoked the Amendment in situations where it never was intended to apply. See supra Part I.A (discussing Fourth Amendment decisions that seem arbitrary and incoherent).

183 See, e.g., Chambers v. Maroney, 399 U.S. 42, 51 (1970) (holding that when police officers possess probable cause, the officers may conduct a warrantless search of a car stopped on a public highway); Carroll v. United States, 267 U.S. 132, 155 (1925) (same).

184 See, e.g., New Jersey v. T.L.O., 469 U.S. 325, 341–42 (1985) (holding that a high school vice principal could search a student's purse, when the vice principal had "reasonable grounds" to believe that the student had violated a school rule); Terry v. Ohio, 392 U.S. 1, 30 (1968) (holding that when a police officer has reasonable grounds to believe that any suspect is armed and dangerous, the officer may "conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him").

In the Fourth Amendment itself, the term "probable cause" appears only as a limitation on the issuance of warrants, not as a justification for warrantless searches. See U.S. CONST. amend. IV (providing that "no Warrants shall issue, but upon probable cause"). The term "reasonable suspicion" is not mentioned in the Fourth Amendment. See id.

III. The Impossibility of an Evolving Fourth Amendment

With respect to modern discussions of sense-enhanced searches, one might easily question the relevance of the eighteenth-century and nineteenth-century Fourth Amendment principles. The Framers of the Constitution lived in a far different world. The Framers almost certainly could not have imagined the telephone—much less pen registers and thermal imaging devices. As times and technologies change, why not permit the meaning of the amendment to change with the times?

Further, modern Fourth Amendment law is premised on the notion of an evolving amendment. The first case in my Criminal Procedure textbook and course is the 1967 Supreme Court decision in Katz v. United States.\(^{186}\) In holding that federal agents must obtain a warrant before placing a wiretap on a telephone booth, Katz embraced the concept of an evolving Fourth Amendment.\(^{187}\) Noting that any Fourth Amendment warrant requirement was once limited to cases involving a physical trespass, the Katz opinion concluded that the underpinnings of the trespass precedents “have been so eroded by our subsequent decisions that the ‘trespass’ doctrine there enunciated can no longer be regarded as controlling.”\(^{188}\)

Arguments for a growing or evolving Fourth Amendment face at least two problems. First, given the increasing threat posed by criminal activity, the Fourth Amendment might evolve into a provision that offers less protection, rather than more protection. More fundamentally, although many jurists and scholars may agree that the Fourth Amendment should evolve, defining how the amendment should evolve presents a much more difficult question. Little, if any, consensus exists about application of the Fourth Amendment to new search techniques. Ultimately, any Fourth Amendment consensus may be limited to the original understanding—that law enforcement officers ordinarily cannot physically enter a home without a warrant.\(^{189}\)

A. An Evolving Fourth Amendment May Be a Reduced Fourth Amendment

When commentators speak of an evolving Fourth Amendment, most seem to assume that such an evolution would offer greater protection to individual liberty and impose more restrictions on government searches and seizures.\(^{190}\) However, recent Supreme Court decisions do not necessarily support this assumption. On the one hand, the Court typically has held that the Fourth Amendment applies to new search


\(^{188}\) Id. at 353.

\(^{189}\) See supra Part II.

\(^{190}\) See infra note 203 and accompanying text.
techniques. But in cases involving aerial surveillance, sobriety checkpoints, and random drug testing, the Court usually has upheld the new search technique against Fourth Amendment challenges. Such decisions suggest that an evolving Fourth Amendment may not in fact provide greater security to individuals.

The Fourth Amendment implicitly balances the right of the people "to be secure in their persons, houses, papers, and effects" against the state interest in investigating criminal activity. The amendment does not proscribe all searches and seizures, but only "unreasonable searches and seizures."

In early America, law enforcement interests were relatively modest. At this time, law enforcement efforts most frequently focused on the crime of smuggling. By evading customs duties, smugglers deprived government authorities of significant revenues. Nonetheless, smuggling was rarely a violent crime and did not threaten a wholesale loss of life.

In contrast, modern law enforcement efforts deal with far more dangerous criminal behavior. In 2005, more than 16,000 people were murdered in the United

---

191 See supra Part I. But cf. United States v. Place, 462 U.S. 696, 707 (1983) (holding that a canine sniff is not a search and is not covered by the Fourth Amendment).


196 U.S. CONST. amend. IV.

197 Id.

198 LASSON, supra note 127, at 51–78 (noting that the Fourth Amendment was a response to house searches by customs agents, who were seeking smuggled goods); see also JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 20 (1966) (stating that intrusions by British customs officers “had done violence to the ancient maxim that ‘A man’s house is his castle.’”)

At least in southern states, a second focal point of law enforcement efforts was the capture and return of fugitive slaves. See Cuddihy, supra note 111, at 1280–82.

199 See LASSON, supra note 127, at 51–78.

200 See id.
Further, law enforcement officials confront the possibility of terrorist attacks that could result in a massive loss of life and destruction of property. For example, about 3000 people died in the September 11, 2001, attacks on the World Trade Center.

Given the weight of these law enforcement interests, the direction of any Fourth Amendment evolution is highly problematic. A wholesale revision of Fourth Amendment doctrine would not necessarily result in greater Fourth Amendment regulation of sense-enhanced searches or other police investigations that use new technology. To the contrary, any such evolution may mean a reduction in the protections offered by the amendment.

B. The Lack of Consensus About Fourth Amendment Evolution

Statements that the Fourth Amendment should change or evolve with the times are commonplace. While commentators often express that the amendment should "grow" or "evolve," one finds considerably less agreement about how the amendment should evolve. As two relatively recent cases illustrate, the lack of a broad consensus about the direction of Fourth Amendment growth dooms the possibility of a coherent new version of the amendment.

In Kyllo v. United States, the Supreme Court struck down the warrantless use of a thermal imaging unit to record temperatures emanating from a residence. Writing for a five Justice majority, Justice Antonin Scalia announced the rule that where "the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion," the government has engaged in a search that ordinarily will require a warrant. Although the thermal imaging unit was located in a car parked on a public street, Justice Scalia worried that a refusal to regulate the thermal imaging unit could

---

203 For arguments that modern notions of reasonableness should influence Fourth Amendment doctrine, see Yale Kamisar, The Writings of John Barker Waite and Thomas Davies on the Search and Seizure Exclusionary Rule, 100 MICH. L. REV. 1821, 1865 (2002) (arguing that "changing times and changing circumstances seriously undermined the presuppositions and expectations regarding the drafting and adoption of the search and seizure provision"); Carol S. Steiker, Second Thoughts About First Principles, 107 HARV. L. REV. 820, 824 (1994) (asserting that "the construction of the Fourth Amendment's 'reasonableness' clause should properly change over time to accommodate constitutional purposes more general than the Framers' specific intentions").
205 Id.
206 Id. at 40.
"leave the homeowner at the mercy of advancing technology—including imaging
technology that could discern all human activity in the home."

Justice Scalia also wrote that the thermal imaging unit could disclose private information, such as "what hour each night the lady of the house takes her daily sauna and bath—a detail that many would consider ‘intimate.’"

Writing for four dissenters, Justice John Paul Stevens did not believe that the Kyllo defendant had a reasonable expectation of privacy in the heat radiating from his residence. Although federal agents had used a thermal imaging unit to measure the temperature, Justice Stevens asserted that "the ordinary use of the senses might enable a neighbor or passerby to notice the heat emanating from a building, particularly if it is vented." Justice Stevens argued: "Heat waves, like aromas that are generated in a kitchen, or in a laboratory or opium den, enter the public domain if and when they leave a building."

A similar lack of consensus appears in Board of Education v. Earls, where the Supreme Court upheld random drug tests through urinalysis for students participating in competitive extracurricular activities. Writing for a five Justice majority, Justice Clarence Thomas asserted that student privacy interests are "limited in a public school environment where the State is responsible for maintaining discipline, health, and safety." According to Justice Thomas, the urine testing involved a minimal intrusion on students’ privacy. Further, the drug tests were not "turned over to any law enforcement authority." The harshest possible sanction from a failed drug test would be "to limit the student’s privilege of participating in extracurricular activities."

Ultimately, Justice Thomas wrote that any privacy interests were outweighed by "the importance of the governmental concern in preventing drug use by school-children." Justice Thomas concluded: "Indeed, the nationwide drug epidemic makes the war against drugs a pressing concern in every school."

Justice Thomas’s reasoning in Earls did not persuade dissenting Justice Ruth Bader Ginsburg, or the three Justices who joined her dissent. Justice Ginsburg asserted that when a school required random urine tests, those tests could compromise the privacy of any "modest and shy" students who participated in extracurricular

---

207 Id. at 35–36.
208 Id. at 38.
209 Id. at 43–44 (Stevens, J., dissenting).
210 Id. at 43.
211 Id. at 43–44.
213 Id. at 830.
214 Id. at 832–33.
215 Id. at 833.
216 Id.
217 Id. at 834.
218 Id.
activities.\textsuperscript{219} Also, according to Justice Ginsburg, the school administrators in \textit{Earls} had not demonstrated a significant drug abuse problem in their school district.\textsuperscript{220}

With respect to students involved in competitive extracurricular activities, Justice Ginsburg was particularly skeptical about whether random drug testing would serve any important state interest. Justice Ginsburg wrote: "Nationwide, students who participate in extracurricular activities are significantly less likely to develop substance abuse problems than are their less-involved peers."\textsuperscript{221}

Split decisions such as \textit{Kyllo} and \textit{Earls} illustrate the lack of consensus about how the Fourth Amendment should evolve. Who had the better arguments in these cases—Justice Scalia and Justice Thomas for the majorities, or Justice Stevens and Justice Ginsburg for the dissenters? Are the majority opinions of Justice Scalia and Justice Thomas really more convincing just because these Justices obtained one more vote than the dissenters?

In the end, any Fourth Amendment "consensus" may be limited to the original understanding of the Framers. In short, the Fourth Amendment only should proscribe improper physical intrusions into residences, pursuant to a general warrant or no warrant at all. With respect to new issues raised by exotic sense-enhanced search techniques, the lack of any consensus precludes coherent regulation through the Fourth Amendment.

\textbf{CONCLUSION}

With the rise of sense-enhanced searches, scholars have debated whether courts or legislatures should regulate these powerful new search techniques. I have concluded that if sense-enhanced searches are to be regulated coherently, such regulation must come from elected legislators.

Unlike some previous commentators, I do not base this argument on functional advantages that legislators may or may not enjoy over courts. Instead, my argument stems from the limited reach of the Fourth Amendment. The Framers enacted the Fourth Amendment solely to prohibit unreasonable physical intrusions into residences, either with a general warrant or no warrant at all. The Framers never intended that the Fourth Amendment would regulate the complex problems raised by sense-enhanced searches. Nor has any new consensus emerged, which would permit coherent regulation of sense-enhanced searches through the Fourth Amendment.

Without question, the power and precision of sense-enhanced search technologies pose new dangers to security and liberty. But regulation of such searches must come from elected officials and not courts. Constitutional law cannot coherently regulate sense-enhanced searches, because the Fourth Amendment never was intended to govern this area.

\textsuperscript{219} \textit{Id.} at 847 (Ginsburg, J., dissenting).
\textsuperscript{220} \textit{Id.} at 850.
\textsuperscript{221} \textit{Id.} at 853.