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A Fourth Amendment "Search" in the Age of Technology: Postmodern Perspectives

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A FOURTH AMENDMENT "SEARCH" IN THE AGE OF TECHNOLOGY: POSTMODERN PERSPECTIVES

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The United States Supreme Court’s search and seizure
decisions have for decades prompted scholars to complain
about the Court’s Fourth Amendment¹ interpretive “mess.”²

¹ Professor of Law, William and Mary. The author thanks the National
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² U.S. CONST. amend. IV. The text of the Fourth Amendment provides that
These scholars have railed against the Court's inconsistent approaches in deciding the constitutionality of investigatory practices. Undoubtedly, the Court's decisions during the next decade will continue to contain these multiple, conflicting interpretive paths when applying the Fourth Amendment to governmental officials' use of technology during investigations. We can, however, stop chiding the Court for its unpredictability by embracing postmodern perspectives.\(^3\)

Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Id.


Complaints about the disarray of Fourth Amendment law have long been a staple of legal scholarship. It has not been thirty-five years since Roger Dworkin first called Fourth Amendment cases "a mess" and Anthony Amsterdam said this was an understatement. Nearly two decades ago, Silas Wasserstrom and Louis Michael Seidman found "virtual unanimity" that "the Court simply had made a mess of search and seizure law." More recently, Akhil Amar has described Fourth Amendment law as "jumble[d]," "contradictory," and--of course--a "mess." As Morgan Cloud has noted, "[c]ritics of the Supreme Court's contemporary Fourth Amendment jurisprudence regularly complain that the Court's decisions are," among other things, "illogical, inconsistent, . . . and theoretically incoherent." Id. at 291-92 (citations omitted); see also Erik Luna, Sovereignty and Suspicion, 48 DUKE L.J. 787, 787-88, 801 (1999) (referring to the Fourth Amendment "mess" and stating that "each doctrine is more duct tape on the Amendment's frame and a step closer to the junkyard"); David E. Steinberg, The Drive Toward Warrantless Auto Searches: Suggestions from a Back Seat Driver, 80 B.U. L. REV. 545, 571 (2000) (citing a metaphor related to "mess"-- the proverbial "tarbaby"). According to Professor Craig M. Bradley, the Fourth Amendment is "the Supreme Court's tarbaby: a mass of contradictions and obscurities that has ensnared the 'Brethren' in such a way that every effort to extract themselves only finds them more profoundly stuck." Id. (quoting Craig M. Bradley, Two Models of the Fourth Amendment, 83 MICH. L. REV. 1468, 1468 (1985)).

\(^3\) For a discussion of postmodernism, see infra text accompanying notes 4-5, 8-12, 17-20, 23, 35-46, and 62-112. But see Robert Weisberg, Criminal Law, Criminology, and the Small World of Legal Scholars, 63 U. COLO. L. REV. 521, 522 (1992) (stating that criminal-law scholarship "has not yet earned the right to subject itself to postmodern critiques because it has not yet fully passed into or through the modern phase").
which help us understand why the Court has no constant guiding principle or principles. Postmodernists would expect multiple, conflicting constructions of the Fourth Amendment because "interpretation" is merely a community construct.\textsuperscript{4} Because multiple communities compose our society\textsuperscript{5} (with

\textit{\textsuperscript{4} See, e.g., DOUGLAS E. LITOWITZ, POSTMODERNISM PHILOSOPHY AND LAW 11 (1997) (stating the postmodernists "argue that reason is not a uniform faculty in all humankind but rather socially constructed; it is always situated within existing practices and discourses, and it will therefore be biased or slanted in favor of existing power relations"); J.M. Balkin, \textit{What Is a Postmodern Constitutionalism?}, 90 MICH. L. REV. 1966, 1972 (1992) [hereinafter Balkin, \textit{Postmodern Constitutionalism}] (stating that postmodern philosophy "view[s] knowledge as an activity infused with social interaction and power rather than merely a set of articulable propositions or truths"). Professor Angela Harris's definition of postmodernism also rejected the notion of objective truth:

\begin{quote}
[Postmodernism] suggest[s] that what has been presented in our social-political and our intellectual traditions as knowledge, truth, objectivity, and reason are actually merely the effects of a particular form of social power, the victory of a particular way of representing the world that then presents itself as beyond mere interpretation, as truth itself.
\end{quote}

Angela P. Harris, \textit{Foreward: The Jurisprudence of Reconstruction}, 82 CAL. L. REV. 741, 748 (1994) (quoting Gary Peller, \textit{Reason and the Mob: The Politics of Representation}, 2 TIKKUN 28, 30 (July/Aug. 1987)); see also Scott L. Cummings & Ingrid V. Eagly, \textit{A Critical Reflection on Law and Organizing}, 48 UCLA L. REV. 443, 452 (2001) (describing the Critical Legal Studies (CLS) movement, which began in the late 1970s, as having as its "project" the revelation of "power hierarchies embedded in liberal individual rights"; describing CLS writings as "showing the indeterminacy of legal rules and the inherently political choices of underlying the current legal order"); Maxine Eichner, \textit{On Postmodern Feminist Legal Theory}, 36 HARV. C.R.-C.L. L. REV. 1, 1 n.1 (2001) (using to postmodernism "to designate the shift in theory from an approach that focuses on the search for reality to an approach that focuses on culturally constructed social meanings"). See generally J.M. BALKIN, CULTURAL SOFTWARE: A THEORY OF IDEOLOGY 7-14 (1998) (describing how the time in which we live shapes our lives and perspectives). But see J. Gregory Sidak, \textit{Mr. Justice Nemo's Social Statics}, 79 TEX. L. REV. 737, 739 (2001) (advocating that society should view law as an "evolutionary institution," one seeking "objective knowledge"; under this view of law, "law's legitimacy arises from objective knowledge that the particular legal rule at issue is superior to all other known means of ordering a specific kind of relationship or transaction"). Mr. Sidak also has criticized the Court and scholars for constructing doctrines and theories that are "inherently nonfalsifiable." (stating that "[N]onfalsifiable rationales for constitutional decisions tend to increase the size of the state, which derivatively increases the power and prestige of the Supreme Court, the lower courts, and legal clergisy in which law professors rank highly.").

which may arise because of “common styles of life and common senses of honor, prestige, or moral rectitude” or because of “religious and ethnic identities”; Charles W. Collier, Law As Interpretation, 76 Chi.-Kent L. Rev. 779, 817-23 (2000) (distinguishing between a community, which shares particular values, and society, which has diverse, divergent values).

Legal academic scholars represent numerous contrasting communities. For example, Professors Daniel A. Farber and Suzanna Sherry, who have described themselves as centrists and pragmatists, wrote a book vehemently attacking another academic community, one they labeled “radical multiculturalists” and paranoid “extremists.” Daniel A. Farber & Suzanna Sherry, Beyond All Reason: The Radical Assault on Truth in America 9, 11, 133 (1997) (characterizing their own arguments as “harsh,” but necessary because radical multiculturalism has “serious, profound, and dangerous flaws”). Their vitriolic book triggered academic salvos from other scholarly communities. See, e.g., Kathryn Abrams, How to Have a Culture War, 65 U. Chi. L. Rev. 1091, 1092, 1126 (1998) (arguing that Farber and Sherry heightened the “legal culture wars” and that their “flawed and inflammatory critique moves us in precisely the wrong direction”); John O. Calmore, Random Notes of an Integration Warrior: A Critical Response to the Hegemonic “Truth” of Daniel Farber and Suzanna Sherry, 83 Minn. L. Rev. 1589, 1590, 1609 (1999) (arguing that Farber and Sherry’s “truth” “operates to deny humanity to . . . people of color in the United States” and their book is “an expression of cultural racism”); Anne M. Couglin, C’est Moi, 83 Minn. L. Rev. 1589, 1621, 1622 (1999) (noting the hostile tone of the book and faulting the authors, “at least some of the time, for claiming that the political is the truth”); Jerome McCristal Culp, Jr., To the Bone: Race and White Privilege, 83 Minn. L. Rev. 1637, 1640 (1999) (describing the book as a “diatribe” against critical race theorists); Nancy Levit, Critical of Race Theory: Race, Reason, Merit, and Civility, 87 Geo. L.J. 795, 808 (1999) (rejecting Farber and Sherry’s view that radical multiculturalists have implicitly attacked tenured Jewish lawyers and professors, but stating that “[i]t is curious that two Jewish scholars understand what is means to be a member of a minority ethnicity when it is their ethnicity under attack—or perceived attack,” and adding “that is the whole point of perspectivism”); Francis J. Mootz, Ill, Between Truth and Provocation: Reclaiming Reason in American Legal Scholarship, 10 Yale J. L. & Human. 605, 606 (1998) (“By equating ‘reason’ with ‘truth,’ Farber and Sherry make a diagnostic error that one might expect from the country doctors who embrace right-wing legal ideologies but which is unforgivable for such talented and level-headed practitioners”); Edward J. Rubin, Jews, Truth, and Critical Race Theory, 93 Nw. U. L. Rev. 525, 527 (1999) (rejecting their view that critical race theory casts aspersions at Jewish scholars, but describing their anti-Semitic argument as a “brilliant rhetorical move”). Some scholars, who would want to be called “traditionalists,” have condemned the innovative scholarship styles and explorations of other scholars as reflecting the “Law Political Correctness (LPC) ideology.” See Arthur Austin, The Top Ten Politically Correct Law Review Articles, 27 Fla. St. U. L. Rev. 233, 235, 237-76 (1999) (denigrating authors in the following order: Mary Jo Frug (number one pick for LPC), Patricia Williams, Madeline Morris, Duncan Kennedy and Peter Gabel, Derrick Bell, Richard
numerous, contrasting communities), we should anticipate different constructions of the Fourth Amendment.

Even though postmodern philosophy rejects the idea of an objective grand, unifying theory, the loss of an objective constitutional interpretation should not dishearten us or make us fear that nihilism is right around the corner, ready to grab and rob us of vitality as members of the legal community

Delgado, Anthony D’Amato, Marie Ashe, Robin West, and Paul Butler); see also ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 7 (1991) ("exagerat[ing] only a little, the law-and-economics scholars believe that the law-and-society group is deficient in both sophistication and rigor, and the law-and-society scholars believe that the law-and-economics theorists are not only out of touch with reality but also short on humanity").

See, e.g., Jack M. Balkin, Bush v. Gore and the Boundary Between Law and Politics, 110 YALE L.J. 1407, 1442-43 (2001). In analyzing the Bush v. Gore, 121 S. Ct. 525 (2000), Professor Balkin has described the Court’s merging of politics and decisionmaking:

[It] was the conservatives who were making the equal protection argument and extending the Warren Court precedents; it was the liberals who were urging deference to the states’ legal processes . . . . The conservatives used whatever arguments were available to promote George W. Bush’s election, while the liberals offered the arguments that would have helped Al Gore. This is a more overt collapse of the boundary between law and politics than Critical Legal Studies would normally predict, although it is perhaps consistent with cruder forms of legal realism.

Id. In addition, Professor Balkin has noted that an argument that seems “loony” may become “positively thinkable” depending upon the status of the person making the argument. Id. at 1444 (noting law relies heavily on “institutional authority”).

See infra text accompanying notes 62-92.


[T]he absence of determinacy, objectivity, and neutrality does not condemn us to indifference or arbitrariness, nor make it ridiculous to ask, or impossible to answer, the question of what we should do or how we should live. The lack of a rational foundation to legal reasoning does not prevent us from developing passionate moral and political commitments. On the contrary, it liberates us to embrace them.

Id.; see also SANFORD LEVINSON, CONSTITUTIONAL FAITH 157-62 (1988). Professor Levinson has described how Dean Paul Carrington of Duke Law School had argued that legal nihilists “have an ethical duty to choose a career other than teaching law.” Id. at 157. Levinson responded with a question: “Does socializing the young, including fledgling lawyers, into the central tenet of the faith—defined by Lincoln as ‘reverence for the law’—allow toleration within the schoolhouse of the ‘civil atheist?’” Id. at 162.
and communities within society. Instead postmodernism perspectives allow us to see the "'language games' that arise with respect to different spheres of social life, each incomplete and constantly subject to alteration and development." By examining the language games the Court has used to construct what constitutes a Fourth Amendment "search," we are better able see the numerous roads from which the Court could have selected.

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10 See, e.g., Mootz, supra note 6, at 638, 640 (describing that a "plurality of discourses yields perspective and clarity," not "relativistic chaos of incommensurate group identities").

11 Balkin, Postmodern Constitutionalism, see supra note 4, at 1972; see also Guyora Binder & Robert Weisberg, Literary Criticisms of Law 122 (2000). Professors Guyora Binder and Robert Weisberg noted that philosopher Ludwig Wittgenstein used the term "language games" to describe the uncertainty of meaning in words, in contrast to Fernand de Saussure, who viewed language as a "sign system" with "a discrete body of rules," which functioned in a system with "a definite boundary." Id. They described Wittgenstein's view of language and meaning:

Since meaning is use in his [Wittgenstein's] pragmatist scheme, understanding a sign means competence in using it as discourse. Such discourses do not have hard boundaries—the range of moves that may be recognized as going on with a linguistic practice, as "within rules," cannot be exhaustively specified in advance and is contingent on the responses of other participants in the game. There is no common feature, for example, that all correct uses of a word must have. Correct uses are unified only by a "family resemblance," a set of "overlapping" characteristics not specifiable in advance.

Id. at 122-23. Professor Dennis Patterson has also used the term "language-game" to describe discourse in postmodernism:

[T]he question "is this law valid?" has no point for the "knowledge" required to answer the question is a knowledge that can never exist. In postmodernity, legitimation of first-order discourses (e.g. law and science) by resort to second-order discourses of reason (e.g. philosophy) is replaced with a picture of knowledge as a move within a game, specifically a "language game."

Dennis Patterson, Postmodernism/Feminism/Law 77 Cornell L. Rev. 254, 256 n. 9 (1992).

12 See, e.g., Mootz, supra note 6, at 638-39. Professor Mootz has described critical legal theorists as seeking to reveal the inherent choices courts faces in interpreting the law:

Much of the work by critical race theorists, radical feminist, and gay legal scholars . . . seek to displace the conceit that law operates as a rational enterprise, not by claim that law is hopelessly irrational, but by demonstrating that law often requires a reasonable judgment as between
In examining the Court's language games, this Article describes rhetorical tools that the Court has used in deciding cases. Instead of despairing at the Fourth Amendment jurisprudential "mess," this Article invites the reader to ask what the "mess" tell us about policing in our society. By discerning the lack of clear, objective rules, we are able to view legal doctrines, principles and interpretations as two or more logically acceptable resolutions of any given issue. The radical critique discloses connections between the seemingly "natural" presuppositions of judgment by tracing them to constitutive social processes that embody contingent and debatable beliefs about, inter alia, race, gender, and sexual orientation.

Id. See, e.g., MICHAEL J. GERHARDT, THOMAS D. ROWE, REBECCA L. BROWN, & GIRARDEAU A. SPANN, CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES 1 (2d ed. 2000) (stating that even though "widespread consensus does exist that the constitutional text, history, structure, and precedent are valid sources for constitutional advocacy and decisionmaking, deep divisions [have arisen] over their use and their very nature"); J.M. Balkin, Transcendental Deconstruction: Transcendent Justice, 92 Mich. L. Rev. 1131, 1138 (1994) (arguing that "deconstructive argument is a species of rhetoric, which can be used for different purposes depending upon the moral and political commitments of the deconstructor"); Linda Meyer, Between Reason and Power: Experiencing Legal Truth, 67 U. Cin. L. Rev. 727, 754 (1999) (stating that judges ultimately have to decide which rhetorical tool best fits a particular case: "slippery slope" argument, "floodgates of litigation" argument, "plain language" argument, "deterrence" argument, "counter-majoritarian" argument and "framer's intent" argument); Patricia M. Wald, The Rhetoric of Results and the Results of Rhetoric: Judicial Writings, 62 U. Chi. L. Rev. 1371, 1377 (1995) ("In virtually all cases, the judge shapes her raw material. She picks her rhetoric to foreshadow the result"); Robin West, Constitutional Fictions and Meritocratic Success Stories, 53 Wash. & Lee L. Rev. 995, 995 (1996) (noting that the Supreme Court "tells stories about our collective past--our political and social history--to support the results for which it argues"; adding that "those political and social histories are not simply true or false: like stories of fact and precedent, such histories are a blend of fact and falsehood").

Professor Laurence H. Tribe in 1988 raised a similar, but different, question about the Supreme Court's wildly inconsistent state-action decisions. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1691 (2d ed. 1988). He stated that "it is possible to construct an 'anti-doctrine,' an analytical framework which, in explaining why various cases differ from one another, paradoxically provides a structure for the solution of state action problems." Id. Professor Tribe characterized this approach as "the way out of the forest is through the trees." Id. In contrast, this Article does not offer a structural solution to the "mess," but rather views the inconsistencies under the Fourth Amendment as lenses to examine the culture as seen by the Supreme Court justices.
reflecting our society, the “small-'c' constitution,” a term Professor David A. Strauss has used in discussing the relationship between the written Constitution and its interpretation. The “small-'c' constitution” refers to the “fundamental institutions of a society, or the constitution in practice.” For him, “the forces that bring about constitutional change work their will almost irrespective of whether and how the text of the Constitution is changed.”

One leading postmodern scholar, Professor Jack Balkin, has contended that the best way to use postmodern perspectives is to ask the following question: “How have changes in technology, communication, and the organization of living and working changed the public’s understanding and practice of law, the Constitution, human rights and democracy?” His question has special significance when police officers, lawyers, and judges question whether governmental officials’ use of new technology would violate the Fourth Amendment, particularly after the tragic events of September 11, 2001. Since adoption of the Fourth Amendment in 1791, the United States Supreme Court has repeatedly confronted the question of how to interpret the Fourth Amendment in light of technological developments, but the rapid growth of technology in our contemporary world heightens our need to understand the Court’s definition of

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16 Id. at 1458-59. Professor Strauss establishes the importance of current society in interpreting the Constitution by examining four propositions:

First . . . sometimes matters addressed by the Constitution change even though the text of the Constitution is unchanged. Second, . . . some constitutional changes occur even though amendments that would have brought about those very changes are explicitly rejected. Third, when amendments are adopted, they often do no more than ratify changes that have already taken place in society without help of an amendment. The changes produce the amendment, rather than the other way around. Fourth, when amendments are adopted even though society has not changed, the amendments are systematically evaded. They end up having little effect until society catches up with the ambitions of the amendment.

Id. at 1459. In short, society projects meaning (or no meaning) onto an amendment; the text does not give us its meaning, but society does.
17 Balkin, Postmodern Constitutionalism, see supra note 4, at 1977.
what constitutes a "search" within the meaning of the Fourth Amendment.

Postmodern constitutional law theory recognizes the evolving nature of law. It helps us to see that Fourth Amendment analysis is a product of our times. By considering several themes of postmodernism, we are able to view justices' and scholars' offering constructions of the law rather than "interpretations." As one postmodernist has stated, the "reigning mythology of American law and legal studies... typically frames law as if it were a priori subject to the dictates of reason, intelligence and really good normative arguments." The metaphor of "constructing" law as opposed to "interpreting" law highlights communities' projecting their meaning in text. The perception of the Court's shifting paradigms and inconsistencies may not only reflect our particular communities' values, but also suggests changes in our society or, in the context of this Article, particular changes in technology.

Part I discusses postmodernism. It reveals that both

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18 Professor Morgan Cloud has stated that "pragmatism commands that decisionmakers should not be bound by antecedent principles or rules; they should make decisions grounded in social and physical realities." Morgan Cloud, Pragmatism, Positivism, and Principles in Fourth Amendment Theory, 41 UCLA L. REV. 199, 212 (1993). In contrast, postmodernists do not believe that "antecedent principles and rules" actually constrain decisionmakers. In addition, under Professor Cloud's characterization of pragmatism, this approach can be "conservative" when "rooted in contextualism" because it "empowers instrumental impulses." Id. at 211. In contrast, postmodernists believe that their view of interpretation allows decisionmakers great latitude, affording liberal, conservative, down-the-middle-of-the-road constructions. See Stephen Feldman, The Supreme Court in a Postmodern World: A Flying Elephant, 84 MINN. L. REV. 673, 678-79 (2000).


20 Id.

21 For a discussion of textual arguments, see infra text accompanying notes 87-90, 103-12.

conservatives and liberals may use the insights of postmodernism to further their communities' agendas or goals.\(^{23}\) As many scholars have noted, the word "rhetoric" itself is susceptible to different definitions\(^{24}\)—including the "ignoble art of persuasion,"\(^{25}\) the enterprise of describing the

\(^{23}\) See, e.g., Feldman, supra note 18, at 678 (stating that "postmodernism is politically ambivalent" and noting that Chief Justice Rehnquist's and Justice Scalia's "political conservatism does not prevent them from being postmodernists."); Robert Justin Lipkin, Can American Constitutional Law Be Postmodern? 42 BUFF. L. REV. 317, 325 n.18 (1994) (stating that "two general approaches to postmodernity exist: a radical approach and a reconstructive approach." The "radical approach seeks an abrupt break with modernity and modern theories, while the reconstructive approaches uses both modern and postmodern elements in their attempt to reconstruct critical social theory"); Peter C. Schanck, Understanding Postmodernism Thought and Its Implications for Statutory Interpretation, 65 S. CAL. L. REV. 2505, 2512 n.24 (1992) (stating that "postmodernism can serve the interests of right-wing dissenting or nonmainstream ideas as well as marginal left-wing perspectives"). But see Dennis W. Arrow, Spaceball (Or, Not Everything That's Left Is Postmodern), 54 VAND. L. REV. 2381, 2384-85, 2397 (2001) (generally describing postmodernists as embracing a "Leftist Vision").

\(^{24}\) See, e.g., Linda L. Berger, Applying New Rhetoric to Legal Discourse: The Ebb and Flow of Reader and Writer, Text and Context, 49 J. LEGAL Educ. 155, 155 (1999) (stating that the "rhetoric of legal discourse believes that writing is a process for constructing belief, not knowledge"); Lawrence Douglas, Constitutional Discourse and Its Discontents: An Essay on the Rhetoric of Judicial Review, in THE RHETORIC OF LAW 225, 225-26 (Austin Sarat & Thomas R. Kearns eds., 1994) (invoking Plato's and Aristotle's works to describe two meanings for "rhetoric"—argument to derive "the meaning rather than the truth of an event" and the "ability to twist and manipulate words for the purposes of winning"); Linda Meyer, Between Reason and Power: Experiencing Legal Truth, 67 U. CIN. L. REV. 727, 729 (1999) (rejecting characterization of "rhetoric" as "sweet talk" or manipulation and instead defining it as "the articulation of practical reason, a bringing to words, and thereby experience, of practical deliberation that resists formulation as rules or facts and may even become clearest for both the speaker and the audience at times as analogy, metaphor, story, or image"); Richard A. Posner, Judges' Writing Styles (And Do They Matter?), 62 U. CHI. L. REV. 1421, 1422 (1995) ("[r]hetoric' is both broader and narrower than 'style.' It is broader because it has, since Aristotle, connoted a process or reasoning as well as the medium of verbal expression, a process that Aristotle contrasted with logic and other modes of exact reasoning as being the mode appropriate for debate and deliberation over matters of deep uncertainty."); Gerald B. Wetlaufer, Rhetoric and Its Denial in Legal Discourse, 76 VA. L. REV. 1545, 1546, 1548 (1990) (describing "rhetoric" as "the discipline, sometimes the metadiscipline, in which objects of formal study are the conventions of discourse and argument" and adding that "[r]hetoric offers us a set of tools for thinking about the discursive conventions within which we work").

\(^{25}\) James Boyd White, Law as Rhetoric, Rhetoric as Law: The Arts of Cultural
probable "meaning" of an event or any type of argument. What distinguishes "crass manipulation" from probable "meaning" depends upon a particular community's experiences. Some communities find arguments to be "crass manipulation" but others will embrace the argument, labeling it a "truth." The difference in perception depends upon a particular community's constructed standards, which arise from its embedded experiences. In short, that which seems persuasive (or that which seems "true") "must always be a social construction," one mediated by our "social, cultural, linguistic, and historical circumstances." This article, with its postmodernism perspectives, considers "rhetoric" as indicative of cultural or community meaning rather than objective, universal "truth." In short, different communities

and Communal Life, 52 U. CHI. L. REV. 684, 687 (1985) (applying this denotation to "the standard modern condemnations of government propaganda and of the kind of advertising practiced by the wizards of Madison Avenue"); see also RICHARD A. POSNER, LAW AND LITERATURE 256 (2d ed. 1998) (stating that the "commonest meaning of the word 'rhetoric' in every day speech . . . [is] empty verbiage").

See, e.g., Douglas, supra note 24, at 226 (using the term "rhetoric" to describe meaning, not truth, for questions not capable of being placed in syllogisms, such as whether a "particular culture was in decline").

See, e.g., Schanck, supra note 23, at 2551 (stating that Stanley Fish's interpretative theory maintains that "[a]ll arguments . . . are rhetorical in nature" and that "we cannot logically maintain that certain statements are true representations of reality while others are 'mere' rhetoric"). The truthfulness of a statement depends upon a community's standards: "those arguments and statements that we consider persuasive are experienced by us as true or as substantive, while those we find empty or contrary to our understandings are experienced as rhetorical." Schanck, supra note 23, at 2551-52.

See, e.g., Schanck, supra note 23, at 2551.

Schanck, supra note 23, at 2551.

Professor James Boyd White has described law as "constitutive rhetoric:"

Both the lawyer and the lawyer's audience live in a world in which their language and community are not fixed and certain but fluid, constantly remade, as their possibilities and limits are tested. The law is an art of persuasion that creates the objects of its persuasion, for it constitutes both the community and the culture it commends.

White, supra note 25, at 691; see also Anthony T. Kronman, Rhetoric, 67 U. CIN. L. REV. 677, 690 (1999) (describing Michael Foucault as viewing the world as a "rhetorical structure," one that "possesses no antecedent order of its own, but acquires one only through the constitutive organizing power of "words").
construct different views of what is true, what is reasonable.

Part II considers the Court's shifting constructions of what constitutes a Fourth Amendment "search." It highlights that these shifting and conflicting views allow the Court to wander down many different roads when interpreting what constitutes a "search." For example, in 1987, Justice Scalia simply stated, "[a] search is a search," 32 but in 2001, he stated that doctrine should inform the Court "[i]n assessing when a search is not a search." 33 Part III then examines the Court's application of its modern "search" definition in several contexts; Part IV highlights the Court's rhetorical devices for constructing a Fourth Amendment "search" in its most recent decision, Kyllo v. United States. 34 It demonstrates the importance of characterization in deciding cases and in shifting or synthesizing "search" paradigms. Postmodern perspectives aid us in understanding the Court's alleged jurisprudential "mess." Instead of despairing about the inconsistencies, the section suggests that these rhetorical devices, created by a varieties of legal communities, give the Court great flexibility to shape Fourth Amendment jurisprudence, whether to merely decide a pending case or to foreshadow (and later explicitly construct) a new paradigm for evaluating officials' use of emerging technologies.

I. POSTMODERNISM THEMES

Numerous definitions of "postmodernism" exist. 35 Some

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32 Arizona v. Hicks, 480 U.S. 321, 325 (1987) (holding officer's moving of equipment was search under Fourth Amendment).
33 Kyllo v. United States, 533 U.S. 27, 32 (2001) (holding use of sense-enhancing technology to gain information on interior of home was "search" under Fourth Amendment).
34 Kyllo, 533 U.S. at 27.
35 See, e.g., Harris, supra note 4, at 748 (stating that "[t]here are as many different definitions of postmodernism as there are postmodernists"); Tracy E. Higgins, "By Reason of Their Sex": Feminist Theory, Postmodernism, and Justice, 80 CORNELL L. REV. 1536, 1539 n.12 (1995) (noting that "[p]ostmodernism is a disputed term, one not susceptible to simple definition; and focusing on one important aspect of postmodernism—"postmodernism's denial that ideas exist apart from the practices in which they are embodied"); Jennifer Wicke, Postmodern Identity and the Legal Subject, 62 U. COLO. L. REV. 455, 456 (1991) (stating that
scholars have identified three aspects of postmodernism. First, postmodernism is the time we live in; it is an historical period, one "originating just after World War II but gaining momentum as the sixties approached." Postmodernism first surfaced in the arts and included works by John Cage, William Faulkner, Phillip Glass, Edvard Munch, and Andy
Warhol, to name a few. These artists "stressed the breakdown of linear narrative" and "the rise of pastiche." Second, "postmodernism is also the set of cultural products created during the era of postmodernity," such as film, television, fax machines, cable television, video and the Internet. Third, postmodernism is a "set of general perspectives for interpreting and evaluating culture and the products of culture." Although these three levels in part explore new boundaries, postmodern legal interpretation theory has focused on how different communities construct different boundaries or perspectives. As a result, multiplicity is a strong theme within postmodernism as a philosophy, but not within one's circle. As one scholar aptly noted, "[a] postmodern philosophy does not—cannot—lead to a postmodern way of life" because within our own circle we do not embrace this multiplicity. Many scholars have attempted to describe this postmodern philosophical perspective by constructing different themes for postmodernism and modernism. As the language suggests, postmodernism follows modernity.

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39 See, e.g., Litowitz, supra note 4, at 8 (stating that movement began "just after World War II but gaining momentum as the sixties approached); see Wicke, supra note 35, at 458-59.
40 Litowitz, supra note 4, at 8.
41 Balkin, Postmodern Constitutionalism, supra note 4, at 1969.
42 Douglas Litowitz, In Defense of Postmodernism, 4 GREEN BAG 2D 39, 41 (2000) (arguing postmodernism can be understood on three corresponding levels); see also Balkin, Postmodern Constitutionalism, supra note 4, at 1969. But see Boyle, supra note 36, at 497 n.6 (rejecting communications developments as an aspect of postmodernism, but agreeing as to the arts forms that emerged).
43 Balkin, Postmodern Constitutionalism, supra note 4, at 1971.
44 See, e.g., Schanck, supra note 23, at 2560 (stating that "simply because intellectuals may believe that truth is contingent and local does not mean that most people do").
45 Schanck, supra note 23, at 2560.
46 See, e.g., Litowitz, supra note 4, at 10-17 (using contrasting quotations from postmodernist and modernist writers to highlight different perspectives); Schanck, supra note 23, at 2507 (describing postmodernism as the "prevailing paradigm" "underlying critical legal studies").
47 See, e.g., JEAN-FRANCOIS LYOTARD, THE POSTMODERN EXPLAINED: CORRESPONDENCE 1982-1985 12-13 (1993). Lyotard answered the question "What then is the postmodern?," with a paradox: "A work can become modern only if it is first postmodern. Thus, understood, postmodernism in not modernism at its end, but in a nascent state, and this state is recurrent." Id. He further added,
time frame spanned from "mid-Enlightenment to the 1960s and early 1970s." Modernism represented a belief in a foundation, one that "would support and constrain judicial decisionmaking." With respect to constitutional interpretation, modernism represented a belief that by using reason, we would be able to ascertain objective principles—to "discover the correct constitutional methodology." In addition, modernism believed in "the existence of a neutral and objective faculty of reason which can be used to generate first principles of morality and law."

Scholars have identified several general intellectual stages of modernism. In the first stage, lawyers and courts re-

"Postmodernism would be understanding according to the paradox of the future (post) anterior (modo)." Id. at 15.

48 Litowitz, supra note 4, at 7; see also Schanck, supra note 23, at 2575 (noting that legal realists "presaged postmodernism by rejecting legal formalism," but that not until the 1970s with the Critical Legal Studies movement did "postmodernism concepts again become highly visible"). But see Patterson, supra note 11, at 256 n.9 (stating that "[m]odernity is that period in human history which begins with the Enlightenment and continues to the present").

49 See, e.g., Minda, supra note 37, at 224-25 (stating that "modernity characterizes the view of traditional jurisprudential scholars who shared a common belief in the possibility of systematizing legal knowledge using coherent and verifiable propositions about the nature of law and adjudication"); Robert L. Hayman, Jr., The Color of Tradition: Critical Race Theory and Postmodern Constitutional Traditionalism, 30 Harv Cr-Civ L. Rev. 57, 59 n.5 (1995) (discussing the definition of postmodernism). Professor Hayman has noted that even though postmodernism "remains a very loose pastiche of ideas—the discourse is multi-dimensional, multi-directional, and largely unbounded"—it nevertheless calls "into question modernism's central beliefs in rationality, autonomy, progress, and self-awareness." Id.; see also Higgins, supra note 35, at 1539 n.9 (defining "modernism loosely as a form of thought that seeks to create a general theory about the representation of nature in the mind" and adding that the "modernist or foundationalist theory of representation provides a cross-cultural and trans-historical account of truth and rationality that in turn serves as a basis for social criticism").

50 Lipkin, supra note 23, at 321. Lipkin also stated that the "hallmark of the modern age was the commitment to reason, science, ethics, and more generally, the conviction that these disciplines reflected an independent reality." Lipkin, supra note 23, at 328.

51 Litowitz, supra note 4, at 10.

52 See, e.g., Feldman, supra note 37, at 22-28 (describing four stages of modernism: "rationalism," "empiricism," "transcendentalism," and "late crisis"); Minda, supra note 37, at 13-80. Professor Minda has created numerous categories for modernism, marking 1871, as the beginning of American modern jurisprudence,
jected natural law as a foundation for decisions. Instead of looking to churches or the King for knowledge, they looked to positivism and viewed law as a science after the Civil War. Law was “a transcendent object or transcendent subject, unaffected by social and economic context.” In the second stage, American legal realism occurred, which “turned to experience as the source of objectivity,” away from the belief that “abstract rules could disclose legal truths.” Legal pro-

with the publication of the first contracts casebook, MINDA, supra note 37, at 13; the Legal Realist movement of the 1920s and 1930s, MINDA, supra note 37, at 25; the Legal Process movement of 1940s and 1950s, which tried to explain “how respect for procedure and principled decision making might lead judges to outcomes that conform to institutional and democratic norms,” MINDA, supra note 37, at 34; the “neutral principles” of the 1960s, MINDA, supra note 37, at 37; “normative legal thought” of the post-1960s, MINDA, supra note 37, at 57.

See, e.g., Patterson, supra note 11, at 269 n.68 (noting that “premodern categories” were “religious authority[] and cosmology—an understanding of the world that explains the existence of the universe by postulating the existence of a deity”). See also Lipkin, supra note 23, at 326. Professor Lipkin has noted that in the pre-modern era “[o]ne had the right to proclaim knowledge only when one's position in society so permitted” and that “the word of the Pope or King, or their representative was law.” Lipkin, supra note 23, at 326. He explained that the ability to declare knowledge depended not on an individual's intellectual inquiry, but rather on “membership in particular groups, such as the church, the crown, the aristocracy, guilds, and other associations.” Lipkin, supra note 23, at 326.

FELDMAN, supra note 37, at 83-105. See also Patterson, supra note 11, at 263 n.41 (stating that “[i]f any single theme runs through the whole of modernity it is the idea of autonomy,” adding that “in politics, the subject is free to decide her own conception of the good; in the art, the work of art must be allowed to speak for itself”).

MINDA, supra note 37, at 14.

FELDMAN, supra note 37, at 113. Other scholars have described differently this period, labeling the legal science and legal realist movements as “marginal academic movements.” For example, Professor Guyora Binder and Robert Weisberg have characterized different stages within their categories of “Progressive Interpretation” and the “Crisis of Progressive Interpretation.” See BINDER & WEISBERG, supra note 11, at 56-111. Binder and Weisberg noted,

Morton Horwitz has defined Legal Realism broadly as including any attack on legal science (variously characterized as legal orthodoxy or classical legal thought) in the name of Progressive social policy. . . . Since we see legal science as an aspect of, or at most a dialectical moment in, the evolution of Progressive legal thought, we find this definition ultimately unhelpful. It amounts to building an ideologically and epistemologically purified Progressivism by projecting much of its conservative, technocratic, and elitist currents onto a fictively coherent opponent. This evades the
cess theory developed during the third stage, which believed in "right" answers to legal questions, rejecting legal realism's embracing of legal indeterminacy. Legal process theorists studied institutions and their competencies. In the final stage, crisis occurred, with some scholars characterizing it as the "Age of Anxiety." At this time, contemporary social problems seemed no longer addressed by law's authority; for some, "the authority of the law was seen as part of the problem." Many scholars still vehemently (and at times acrimoniously) debate what we mean by the labels "modernist" and "postmodernist." Even though postmodernism "is neither a challenge of understanding how ideas that today seem antithetical could have coexisted in the same discourses, the same social circles, and the same minds. We think it better to treat Legal Science and Legal Realism as necessarily marginal academic movements, illuminating sideshows to and rhetorical hypertrophies of mainstream legal thought.

Id. at 81 n.288.

See MINDA, supra note 37, at 34.

See, e.g., MINDA, supra note 37, at 34-35; FELDMAN, supra note 37, at 121 (stating the legal process theorists contended that "reasoned elaboration meaningfully constrain[ed] judges in ways that executive officers, legislators, and administrators [were] not constrained").

MINDA, supra note 37, at 66. See also FELDMAN, supra note 37, at 126 (stating that stage was "characterized by deeply inconsistent attitudes and projects—anxiety, despair, anger, denunciations, and increasingly complex modernist solutions that seized upon a combinations of rationalism, empiricism, and transcendentism").

See, e.g., Dennis W. Arrow, Pomobabble: Postmodern Newspeak and the Constitutional "Meaning" for the Uninitiated, 96 Mich. L. Rev. 461 (1997) (using "newspeak" and satire to capture the author's view that postmodernism has nothing to offer to any one, and ironically not defining "modernism" in this mammoth article). For an excellent (and readable) response, see Stephen Feldman, supra note 37, at 2362 (rejecting the view that postmodernism is tied to "nihilism, idealism, [and] relativism"); see also Ronald J. Krotoszynski, Jr., Legal Scholarship at the Crossroads: On Force, Tragedy, and Redemption, 77 Tex. L. Rev. 321, 325 (1998) (hypothesizing reasons for Arrow to write (and the law review's decision to publish) a 228-page parody).

See, e.g., John A. Powell, The Multiple Self: Exploring Between and Beyond Modernity and Postmodernity, 81 Minn. L. Rev. 1481, 1505 (1997) (ironically noting that a "number of writers have suggested that postmodernism derives from and depends on modernism and that the very attempt to disprove modernism is based on modernist assumptions"). Even self-described postmodernists have ironically noted that by labeling a period as "modernism" or "postmodernism" one is not expressing a postmodernist's perspective because postmodernism is anti-essentialism; yet, because postmodernism is also rooted in paradoxes and irony,
theory nor a concept, some scholars have nevertheless attempted to construct broad themes describing postmodernism, recognizing that their perspectives would necessarily lay the groundwork for both criticism and contradiction. Some of one may still characterize modernism and postmodernism. See, e.g., Feldman, supra note 37, at 40-41. Minda, supra note 37, at 224 (stating that postmodernism is "a skeptical attitude or aesthetic" that rejects grand theories and the belief in a "complete and coherent" legal system); see also Schanck, supra note 23, at 2597 (stating that "the practice of theory is a perfectly legitimate activity from a postmodern perspective, but not if it attempts to guide practices from an Olympian perspective"). See, e.g., Eagleton, supra note 37, at vii (defining "postmodernity" as "a style of thought which is suspicious of classical notions of truth, reason, identity and objectivity, of the idea of universal progress or emancipation, of single frameworks, grand narratives or ultimate grounds of explanation"); Feldman, supra note 37, at 44 (referring to the "pastiche of postmodern practices" after describing eight themes of postmodernism: the rejection of foundations and essentialism, id. at 163; the rejection of certainties, and boundaries, id. at 166; the recognizing of numerous paradoxes, id. at 169; the "focus on power and its manifold manifestations," id. at 169; the "social construction of the self or subject," id. at 174; the analysis of a postmodernist's own orientation, id. at 179; the "use of irony," id. at 180; and political "ambivalence," id. at 181; Litowitz, supra note 4, at 10-19 (describing themes of postmodernism: rejecting the idea of objective reason; viewing "human behavior" as "socially constructed"; believing that "truth is constructed, changing, and affected by the distorting influences of class, race, and gender"; rejecting "self-evident principles of justice and natural law"; believing that texts have multiple meanings and "no ultimate meaning"; rejecting the notion of history reflecting "moral progress"; and recognizing the difficulty and irony of using language to challenge modernist perspectives"); Brian Z. Tamanaha, Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law 4-5 (1997) (viewing the themes of postmodernism as including the following: "a conviction that no single a priori thought system should govern belief"; the world forms "the background and condition of every cognitive act"; "[a]ll human understanding is interpretation, and no interpretation is final"; in discerning truth and reality, a person "can never presume to transcend the manifold predispositions of his or her subjectivity"; and "all meaning [of a text] is ultimately undecidable") (quoting Richard Tarnas, The Passion of the Western Mind: Understanding the Ideas That Have Shaped Our World View 95-99 (1991)); Schanck, supra note 23, at 2508 (describing the following themes as interrelated: the self is "purely a social, cultural, historical, and linguistic creation"; because there are no foundational principles, "certainty as the result of either empirical verification or deductive reasoning is impossible"; "[t]here can be no such thing as knowledge of reality"; "all propositions and all interpretations, even texts, are themselves social constructions"). See generally Brian Bix, Jurisprudence: Theory and Context 231 n.18 (2d 1999) (listing five general themes of postmodernism: "rejecting the idea of a foundational or transcendent source for truth or justification," "rejecting the notion of determinate unique meanings or statements, texts, or events," asserting "that truth and identity are socially constructed or culturally constructed,"
these broad-brushed themes provide an excellent horizon for scrutinizing the Supreme Court's multiple constructions of what constitutes a Fourth Amendment "search," as later discussed in Parts II-IV.

One important theme of postmodernism is the rejection of foundations, which discards the idea of a singular Truth. In contrast to modernism, which viewed reason as the avenue to objectivity, postmodernism does not see this road. Instead, it sees multiple roads ahead because multiple communities compose our society and each one has its own "truth."
Postmodernism contends that "human knowledge is the historically contingent product of linguistic and social practices of particular local communities of interpreters, with no assured 'ever-closer' relation to an independent ahistorical reality." Postmodernism rejects the idea of an objective truth, an objective historical narrative, an objective "X." In short, postmodernism "challenges the possibility of grounding reason

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*Id.* As a result, postmodernists would continue debating, but realize that "(at some level) that there were no ultimate truths to be had, no ground-rules or principles beyond those offered by the range of currently available beliefs." *Id.; see also* Pierre Schlag, *The Empty Circles of Liberal Justification*, 96 Mich. L. Rev. 1, 31 (1997) (stating "the image of the consumer as someone induced from outside to enter the circle of liberal justification is wrong. In many important senses, the consumer is already within the circles of liberal justification").


*69* For an excellent, in-depth analysis of shifting constructions of history in constitutional law, see G. Edward White, *The Arrival of History in Constitutional Scholarship* 88 Va. L. Rev. 485 (2002). Professor White has noted that interpreters' claim to historical "objectivity" represents their belief that past is separate from the present. *Id.* at 492. In contrast, when interpreters view the present as linked to the past, their view "undermines a strong belief in historical objectivity." *Id.* at 493. For White, even when "present actors" view their circumstances different from the past, they cannot claim history to be "entirely 'irrelevant' to their existence." *Id.* at 614. He views them as acting "with the weight of their immediate past pressing upon them." *Id.; see also* Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine*, in Atwater v. Lago Vista, 37 Wake Forest L. Rev. 239, 246 (2002). Professor Thomas Davies has vehemently attacked the Court's perspective historical analysis of the Fourth Amendment in *Atwater*, which held that an officer acted reasonably when conducting a warrantless custodial arrest for minor offense. He stated that the Court's "supposed historical analysis consisted almost entirely of rhetorical ploys and distortions of historical sources." *Id.* He also claimed that the Court "omitted" historical sources that are "plainly inconsistent with framing-era doctrine." *Id.* at 246-47. Although a postmodernist would view such conflicting constructions of history as inevitable, the sharp contrast between Professor Davies' historical perspective and the Court's perspective highlights the role of rhetorical devices in constructing an historical argument.

*70* See, e.g., LITOWITZ, *supra* note 4, at 34-35 (stating that postmodernism rejects the "foundational concepts" of "neutrality, justice, reason, history, nature, the social contract, God, the rational self, and the inherent autonomy of the individual"; adding that "postmodernism is characteristically critical, seeking to expose the foundations of modern jurisprudence as constructs or ideologies which parade as eternal verities").
in anything other than actual social practices.  

Another way to describe postmodernism's rejection of foundations is to consider the term "antiessentialism." Essentialism has a core; antiessentialism has no static core. As a result, the postmodernist contends that any paradigm attempting to capture the essence of a doctrine or a person's identity necessarily reflects its own particular community's view, not the view of all communities. 

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71 Lipkin, supra note 23, at 329.

72 See, e.g., Powell, supra note 62, at 1484 (stating that the "tensions between modernism and postmodernism are often framed in terms of essentialism and antiessentialism" and arguing that resolving this tension is not necessary to understand "intersectionalism's claim of a decentered nonunitary self").

73 See, e.g., Trina Grillo, Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House, 10 BERKELEY WOMEN'S L.J. 16, 19 (1995) (defining essentialism as "the notion that there is a single woman's, or Black person's, or any other group's experience that can be described as independently from other aspects of the person—that there is an 'essence' to that experience"); Note, Patriarchy is Such a Drag: The Strategic Possibilities of A Postmodern Account of Gender, 108 HARV. L. REV. 1973, 1973 (1995) (defining and criticizing essentialism's search to find to "common trait that unites all women and constitutes a core of a universal female identity"); see also IAN HACKING, THE SOCIAL CONSTRUCTION OF WHAT? 16 (1999) (stating that "very often essentialism is a crutch for racism").

Professor Hacking explained what "essentialism" means as applied to race: 

[Essentialism is an especially strong form of background assumption. . . . If a person's race is an essential element of a person's being, then race is not inevitable only in the present state of affairs. It is inevitable, period, so long as there are human beings . . . . Essentialists (usually more implicit than explicit in their beliefs) hold that one's race is part of one's essence,

Id.

74 See, e.g., Nan D. Hunter, Expressive Identity: Recuperating Dissent for Equality, 35 HARV. C.R.-C.L. L. REV. 1, 3 (2000). Professor Nan Hunter has described the antiessentialist perspective of postmodernism when considering the construction of identity:

Postmodernist politics rejected both the modernist themes of individual autonomy and universal values, as well as the belief that identity politics claims were necessarily liberatory. The postmodern critique of identity politics asked: if identity claims are to be legitimate, who among the group gets to formulate and voice the substance of such claims? Antiessentialists caveats to easy notions of a unitary conception, for example, of "woman," or a single narrative or women's life experiences, complicated theories of equality. Postmodernism functioned in many respects as a dissent against certain features of identity politics, challenging identity orthodoxy and suggesting that overreliance on concepts like personhood
The difference between modernism's essentialism and postmodernism's antiessentialism was expressed in the contrasting views of feminists. Some early modernist feminists attempted to describe "woman" "by a preconceived and limited set of abstract characteristics, perspectives, or interests."\(^{75}\) Essentialist theory failed because "it picked one pebble and asked it to represent all" women.\(^{76}\) Later postmodern feminists challenged essentialism, contending that the studied "pebble" failed to include "women of color, lesbians, and poor women."\(^{77}\) They proposed the theory of an "intersectional self,"\(^{78}\) which was composed of multiple, contradictory selves that would arise depending upon the particular context.\(^{79}\) In short, later feminists saw the self as fractured, "relational and fluid," and "strongly linked to context."\(^{80}\)

causes as many problems as it solves. Often this strain of criticism took the form of further specification of unrecognized identities.

*Id.; see also* powell, *supra* note 62, at 1497 (stating that postmodernists "tend to agree with the notion of the self as relational and fluid—dependent upon the context in which it exists").

\(^{75}\) Feldman, *supra* note 37, at 160.

\(^{76}\) Grillo, *supra* note 73, at 21.


\(^{78}\) See, *e.g.*, Grillo, *supra* note 73, at 18 (rejecting the idea that the "situation of Black women is the composite of the situations of white women and Black men"; explaining that "we all stand at multiple intersections of our fragmented legal selves"); *see also* powell, *supra* note 62, at 1495-96 (relating the concept of intersectional self to postmodernism's view of a fractured and multiple self).

\(^{79}\) powell, *supra* note 62, at 1495.

\(^{80}\) powell, *supra* note 62, at 1497. Professor Grillo described well how we experience these multiple selves:

Each of us in the world sits at the intersection of many categories: She is Latina, woman, short, mother, lesbian, daughter, brown-eyed, long-haired, quick-witted, short-tempered, worker, stubborn. At any one moment in time and in space, some of these categories are central to her being and her ability to act in the world. Others matter not at all. Some categories, such as race, gender, class, and sexual orientation, are important most of the time. Others are rarely important. When something or someone highlights one of her categories and brings it to the fore, she may be a domi-
Echoing this antiessentialism perspective is "outsider" or "other" jurisprudence. This jurisprudence describes a person as an "other" when she feels "fragmented by society's dominant discourse." As one scholar has noted, "[T]he experience of otherness . . . exists across time and culture as the inevitable product of social organization." This jurisprudence has contended that those individuals who possessed power constructed legal doctrines from their own perspective, failing to question how other communities would view these doctrines. The product of this power was a "legal system [that] has consistently functioned to create and perpetuate the privi-

nent person, an oppressor of others. Other times, even most of the time, she may be oppressed herself. She may take lessons she has learned while in a subordinated status and apply them for good or ill when her dominant categories are highlighted. For example, having been mistreated as a child, she may be either a carefully respectful or an abusive parent.

Grillo, supra note 73, at 17; see also Patterson, supra note 11, at 257 n.9 (stating that "postmodernism poses a threat to any form of feminist critique that issues from a perspective assuming or presupposing a position outside the (dominant) discourse of (gendered) law").

81 For an excellent collection of articles in this genre, see CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995).

82 powell, supra note 62, at 1491. Professor Powell has illustrated how one becomes an "other" by relating the story of a young girl, who first lived in a "Negro town" until age 13, and became a "little colored girl" when she went to school with white children. powell, supra note 62, at 1492 (quoting Zora Neale Hurston, How It Feels to be Colored Me, in I LOVE MYSELF WHEN I AM LAUGHING 152-53 (Alice Walker ed., 1979).


84 See, e.g., Balkin, supra note 5, at 2374 (arguing that "we cannot understand how constitutional doctrine should be organized until we understand how society is organized"). Professor Jack Balkin has recognized the need for constitutional interpretation to recognize our diverse communities:

[We need] to look carefully at the structure of the society in which we live, to identify social stratification where it exists, and to recognize the possible connections between the moral justifications that majorities offer and the preservation of their superior status . . . . Social hierarchies appear in many forms and degrees: We should not imagine that there is a single test or a single clause of the Constitution that can deal with all of them fully and adequately.

Balkin, supra note 5, at 2374; see also Tracey Maclin, The Fourth Amendment on the Freeway, 3 RUTGERS RACE & L. REV. 117, 129-30 (2001) (proposing rules for police officers in conducting traffic stops to check their bias against minorities).
lege of White males." Outsider scholarship has reflected postmodernism’s view of multiple communities by critically examining the privilege that whites and males have in society. In addition, to discern this outsider or other, postmodernists have deconstructed texts.

Resonating with the themes of antifoundationalism, antiessentialism and outsider jurisprudence is postmodernism’s embracing of social construction theory or “constructionism.” Under this theory, how we perceive the

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56 powell, supra note 62, at 1483.
57 See CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR (Richard Delgado and Jean Stefancic eds., 1997) for an excellent collection of articles examining the privileges that whites and males possess in our society. See Balkin, supra note 5, at 2321 (highlighting that “[c]ritical race scholars have repeatedly noted that white Americans have certain status privileges conferred on them merely by being white”). See generally Schanck, supra note 23, at 2588 n.331 (describing that some feminists adopting postmodern perspectives may sense an undermining of their “feminist goal of portraying male chauvinism as unalterably evil in nature,” stating that this conflict arises from their suspending “judgment about behavior in an effort to relate to or connect with others and to empathize with them”).
58 See, e.g., J.M. Balkin, Transcendental Deconstruction, Transcendent Justice, 92 Mich. L. Rev. 1131, 1137 (1994) (describing deconstruction’s furthering justice by allowing communication with the outsider or other). See also Patterson, supra note 11, at 272-73:

Postmodern approaches to language do not present arguments against the modern, representationalist view. Rather, postmodernist conceptions of the word-world relation see the modernist picture of propositional, representational truth as unintelligible—as a project that never gets off the ground. The focus of the dispute is the modernist theory of correspondence, specifically, the Sentence-Truth-World relation. To put it in a nutshell, the postmodern alternative replaces the modernist picture of Sentence-Truth-World with an account of understanding that emphasizes practice, warranted assertability, and pragmatism.

Id. (citations omitted).
59 See, e.g., Litowitz, supra note 4, at 12 (stating that postmodernists “assert that the self is a product of language and discourse, that it is ‘decentered’ . . . and that there is no core self”; adding that “postmodernists tend to hold that human behavior is socially constructed, molded by tradition and practices”). See generally HACKING, supra note 73, at 7 (stating that “[u]ndoubtedly the most influential social construction doctrines have had to do with gender”).
60 HACKING, supra note 73, at 39. Philosopher Ian Hacking finds redundant the phrase “social construction.” HACKING, supra note 73, at 39 (stating that “[m]ost items said to be socially constructed could be constructed only socially, if they are constructed at all”; recommending using “social” only for “emphasis or contrast”). Because of his dissatisfaction with the phrase and its overuse, Hacking
"self" or a "subject" depends upon a person's particular community, its "social structures and cultural symbols." A person does not have an "essence," nor does she choose her own ideology, but rather her community provides the "framework" for her choices.

In attempting to limit or frame social construction theory, philosopher Ian Hacking has argued that three aspects represent the "starting point" of social construction theory: (1) "the existence or character of X is not determined by the nature of things;" (2) "X is not inevitable;" and (3) "X was brought into existence or shaped by social events, forces history, all of which could well have well been different." Ideas, theories and laws are obvious examples of social construction has recommended using the word "constructionism." Hacking, supra note 73, at 48.

90 Feldman, supra note 37, at 174; see also Marcossen, supra note 83, at 684 (noting that "there is widespread acceptance of the premise that concepts of self are culture-dependent"). Professor Samuel Marcossen has linked self-concept to cultural experiences by relying on the works of cognitive psychologists and sociologists:

[T]he very notion of self-understanding as affected by cultural context understates the importance of context: "the very core of self-understanding is constructed through, and reflects on, social interactions. Rather than understanding the self in cultural context or situating the self in interpersonal space, we argue for understanding the self as a social-cultural process.


91 Feldman, supra note 37, at 175.

92 Feldman, supra note 37, at 174; see also Marcossen, supra note 83, at 687 (describing the labels "masculine" and "feminine" as social constructs and noting that "some traits or roles might be (and often are) masculine in one culture and feminine in another"). But see Todd Zywicki, Evolutionary Psychology and the Social Sciences, 13 Humane Stud. Rev. 1, ¶ 10 (2000), available at http://libertyguide.org/libertyguide/hsr/hsr/php/36.html (rejecting the tabula rasa theory, the idea of "blank personalities subject to molding by social, cultural, legal, political, and economic forces economic focus theory," as "Darwinism from the neck up" (citing Todd J. Zywicki, The Nature of the State and the State of Nature: A Comment on Grady and McGuire, 1 J. Bioeconomics, 241 (1999).

93 See Hacking, supra note 73, at 19 (stating sarcastically that "[s]ocial construct is code for not universal, not part of pan-cultural human nature, and don't tread on me with those heavy hegemonic [racist, patriarchal] boots of yours").

94 Hacking, supra note 73, at 6-7.
because we easily discern that a particular society shaped them, for example, the cultural view of what constitutes "child abuse,"\footnote{See, e.g., HACKING, supra note 73, at 146 (stating that "a great deal of behavior that we hold intrinsically loathsome and terribly harmful to children is merely venial or even encouraged in other cultures"; and adding that "[c]hild abuse, as diagnostic and political concept, has chiefly been a phenomenon of the English-speaking world, with the United States as almost the only source of conceptual innovation"); J. Robert Shull, Emotional and Psychological Child Abuse: Notes on Discourse, History, and Change, 51 STAN. L. REV. 1665, 1697 (1999) (describing the legal concept of child abuse as moving from a medical perspective to perspectives embraced by "psychologists and sociologists").} legal requirements for citizenship\footnote{Marcosson, supra note 83, at 688-89 (describing citizenship as a social construct, one rooted in "political, social, historical, legal, and economic forces on geography").} or the establishing of a speed limit on a highway.\footnote{See, e.g., Charles W. Collier, Law as Interpretation, 76 CHI.-KENT L. REV. 779, 781 (2000) (stating that "without our current, contingent mix of legal practices and institutions, there would be no such thing as a speed limit at all").} What social construction theory is about is describing the areas that people do not easily perceive as socially created.\footnote{See HACKING, supra note 73, at 12 (stating that "[i]f "everybody knows that X is the contingent upshot of social arrangements, there is no point in saying that it is socially constructed").} For example, social construction theory has examined race, gender, identity and the idea of objective reason, viewing these as products of our culture.\footnote{See, e.g., NOEL IGNATIEV, HOW THE IRISH BECAME WHITE 1 (1995) (rejecting biology as a means to identify race by describing the following "absurdity[al]": "a white woman can give birth to a black child, but a black woman can never give birth to a white child"; adding that "people are members of different races because they have been assigned to them"); Daniel G. Blackburn, Why Race Is Not a Biological Concept, in RACE & RACISM IN THEORY & PRACTICE 3, 7 (Berel Lang ed., 2000) (rejecting the biological construction of race, claiming that it is as reliable as referring to "a genetic background that is 'Californian,' 'Episcopalian,' or 'Republican'"); Jane Maslow Cohen, Race-Based Adoption in a Post-Loving Frame, 6 B.U. PUB. INT. L.J. 653, 669 (1997) (noting that social construction theory views the "indeterminacy of race," with "interracial marriage and interracial reproduction . . . intimidating the concept of race"); Ian F. Haney Lopez, The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice, 29 HARV. C.R.-C.L. L. REV. 1, 7 (1994) (defining "race" as "a vast group of people loosely bound together by historically contingent, socially significant elements of their morphology an/or ancestry" and stating that "race must be understood as a sui generis social phenomenon in which contested systems of meaning serve as the connections between physical features, races, and personal characteristics").} Under this theory, Hacking discerns six different
uses of social construction theory: to reflect interest in history, to be ironic, to either reform or unmask society's beliefs, to rebel or to revolt. 101 Ironically, postmodernism itself is a social construction. 102

Social construction theory is also intertwined with another postmodern theme—the view that texts have multiple meanings because different communities construe them. 103 For the postmodernist, "meaning is determined by the interpretative conventions of the community." 104 Because society has many different communities, we will have multiple constructions, whether of texts, identities or social norms. 105 Many of postmodernism's themes have roots in the perception of multi-

believing that "classifications are not determined by how the world is, but are convenient ways in which to represent it"); Litowitz, _supra_ note 4, at 11 (stating that postmodernists would argue that "reason is not a uniform faculty of all humankind but rather is socially constructed; it is always situated within existing practices and discourses, and it will therefore be biased or slanted in favor of existing power relations").

101 Hacking, _supra_ note 73, at 33.
102 See, _e.g._, Schanck, _supra_ note 23, at 2581 (stating that postmodernists recognize that their positions are socially constructed).
103 See, _e.g._, Patterson, _supra_ note 11, at 274 (stating that the "postmodern approach to language eschews advancing explanations in favor of describing localized linguistic practices"); Schanck, _supra_ note 23, at 2514 (stating that postmodernism attracts both right-wing as well as left-wing ideals). Professor Schanck has linked "two strains"—poststructuralism and neopragmatism—which, though different, share a common view of language because of social construction theory. Schanck, _supra_ note 23, at 2514. Poststructuralism emphasizes "the role of language and language's underlying structures in shaping our understandings of reality and texts," and "neopragmatism emphasizes the social construction of knowledge and language." Schanck, _supra_ note 23, at 2514. Schanck has noted the paradox of poststructuralism's view that "there is nothing outside of the text" and neopragmatism's view "that there is no text," other than the one we create "through our preexisting, socially derived interpretations." Schanck, _supra_ note 23, at 2515 (quoting Jacques Derrida, _Of Grammatology_ 158 (Gayatri Chakravorty Spivak trans., 1976). He has characterized the link as rooted in social construction theory: "[o]ur perspectives on the world are culturally and linguistically conditioned, that reality is never transparent to us, and that the content of our knowledge depends on our different situations." Schanck, _supra_ note 23, at 2515.

104 See, _e.g._, Schanck, _supra_ note 23, at 2547.
105 See, _e.g._, Feldman, _supra_ note 37, at 165 (stating that "the Other refers not only to suppressed textual meanings but also to marginalized and subjugated individuals and groups (outgroups)—those individuals and groups whose meanings (or voices) are obscured or ignored").
plicity because postmodernism discerns communities creating different constructions. Postmodernism rejects a "true" interpretation of a text, just as it rejects a "true" foundation for legal analysis, or a "true" view of gender or identity. As a result, when a postmodernist reads a text, the restraints on interpretation arise from the community's conventions. For example, when interpreting law, judges employ the conventions of the legal profession. These conventions reflect a particular community's passions and prejudices. In addition, each community will perceive that it discerned "the correct and appropriate standards, not just one arbitrary set among many acceptable alternatives." In the end, "the intricate concepts and methodologies of deconstruction are themselves only social constructions, with no more right to privi-

106 Schanck, supra note 23, at 2547 (stating that because "[t]here can be no single correct interpretation of any text," there is also no single correct evaluation of "the practices, goals, morals, values, and norms of any institution or community").

107 See, e.g., Patterson, supra note 11, at 295 (stating that "[p]ostmodernism's singular contribution to feminism has been to raise the stakes in the sameness-difference debate"). Professor Patterson has examined the work of postmodernist Zillah Eisenstein and noted that "all questions of difference are simply a matter of one's own view" and that "their significance must remain open-textured." Id. at 297 (quoting ZILLAH R. EISENSTEIN, THE FEMALE BODY AND THE LAW 35 (1988)).

108 See, e.g., Patterson, supra note 11, at 276-77 (stating that postmodernism "challenges the primacy of the individual"; postmodernism "casts the individual not as the subject in control of discourse, but as an artifact produced by discourse").

109 See, e.g., Schanck, supra note 23, at 2545-46; see also Pierre Schlag, Clerks in the Maze, 91 MICH. L. REV. 2053, 2054 (1993) (noting that "[j]udges must destroy the worlds of meaning that others have constructed" and that they used the traditional "rules," 'doctrines,' and 'principles" to mask their "highly self-interested constructions").

110 See, e.g., FELDMAN, supra note 37, at 165 (stating that "[w]henever we understand a text from within our own horizon—which is the only way to understand a text—we necessarily deny potential meanings that might arise from some other perspective or horizon"); Brice R. Wacheterhauser, Prejudice and Reason, in HATRED, BIGOTRY, AND PREJUDICE: DEFINITIONS, CAUSES, AND SOLUTIONS 155, 157 (1999) (stating that "the role of prejudice in cognition seems to render the ideal of a fully explicit procedure impossible to achieve" because "an implicit element is always involved inexorably in any method"). See generally Schanck, supra note 23, at 2556 n.209 (noting that "multiculturalism . . . involves a recognition that various racial and ethnic groups constitute different interpretative communities with different assumptions, conventions, and implicit values").

111 Schanck, supra note 23, at 2548.
These broad themes of postmodernism emphasize the ever-shifting role communities play in creating society. They highlight how communities construct foundations that reflect their particular viewpoints, from creating (or ignoring) race as a type of identity to interpretive principles for examining laws. Underlying these themes is the contingency of social construction: what we create depends upon the community at a particular time in history. These postmodern perspectives help to explain the United States Supreme Court's shifting constructions what constitutes a "search" police practice under the Fourth Amendment.

II. COURT'S CONSTRUCTIONS OF A FOURTH AMENDMENT "SEARCH"

When the United States Supreme Court decides a Fourth Amendment issue, it frames its decision by using rationales embraced by the communities of lawyers, judges and some scholars. To date, the Court has not released an opinion stating, "We decide the case today this way because to do so is simply good policy." Granted it may add such a statement after offering other arguments to support its decision, but the way in which it talks about the Fourth Amendment issue depends upon which rhetorical arguments it selects from the communities' package of acceptable arguments. From a postmodernist's perspective, the Court could have offered several different justifications to support its holding, and the Court could have decided many cases differently. In short, multiple paths for decisionmaking are possible, and the Court's jurisprudence in defining a Fourth Amendment

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112 Schanck, supra note 23, at 2572.
113 See, e.g., Camara v. Mun. Court, 387 U.S. 523, 533 (1967). In Camara, the Court examined and rejected many arguments for allowing warrantless administrative searches. It concluded by stating that "of course, in applying any reasonableness standard, including one of constitutional dimension, an argument that the public interest demands a particular rule must receive careful consideration." Camara, 387 U.S. at 533. After considering what would constitute sound public policy, the Court concluded that it did "not find the public need argument dispositive." Id.
“search” reveals these different approaches.

In defining a Fourth Amendment “search,” the Court has familiar rhetorical tools at hand: textual arguments,\(^\text{114}\) historical arguments,\(^\text{115}\) structural arguments,\(^\text{116}\) arguments arising from precedents and explicit policy arguments.\(^\text{117}\) Because the legal community has never stated that one type of

\(^{114}\) See, e.g., Tracey Maclin, What Can Fourth Amendment Doctrine Learn from Vagueness Doctrine? 3 U. Pa. J. Const. L. 398, 401 (2001) (“Despite an explicit reference in the Constitution’s text that limits governmental intrusions, the Court’s Fourth Amendment cases regularly allow police broad discretion in conducting searches and seizures. At the same time, the Court’s vagueness cases have invalidated criminal statutes—even when they do not directly affect any enumerated right—when the statutes grant police too much discretion.”).

\(^{115}\) See, e.g., Morgan Cloud, Searching through History; Searching for History, 63 U. Chi. L. Rev. 1707, 1709 (1996) (noting that “[l]awyers writing briefs, judicial opinions, and scholarly commentaries tend to treat history as but one more source of evidence to be deployed in support of their arguments”). After examining Fourth Amendment histories, Cloud warned “constitutional decision makers [to] be skeptical when lawyers claim to have discovered the Amendment’s precise meaning in its complex history.” Id. at 1746-47. For Cloud, the history of the Fourth Amendment can nevertheless offer “broad background principles favoring privacy, property, and liberty.” Id. at 1747. He concluded, “Ultimately, we do have to make up our own minds about what the law will be in this time and in this place.” Id. see also David A. Sklansky, Back to the Future: Kyllo, Katz, and Common Law, 72 Miss. L.J. 143, 162 (2002) (highlighting the Court’s inconsistent consideration of history: the “new Fourth Amendment originalism’ . . . was obviously in considerable tension with the modernizing ahistorical approach of Katz and Terry”) (quoting David A. Sklansky, The Fourth Amendment and Common Law, 100 Colum. L. Rev. 1739, 1744 (2000)).

\(^{116}\) Raymond Shih Ray Ku, The Founder’s Privacy: The Fourth Amendment and the Power of Technological Surveillance after Kyllo, 86 Minn. L. Rev. 1325, 1328 (2002). By invoking a structural perspective, one linked to separation of powers concerns, Professor Ku has argued against the Court’s “removing entire categories of searches from Fourth Amendment scrutiny.” Id. He has contended that “new surveillance technologies must be treated as searches subject to Fourth Amendment restraints” in light of “the doctrine of separation of powers.” Id. at 148. For Professor Ku, this view of the Fourth Amendment would “protect the public from arbitrary and unrestrained executive power.” Id.

\(^{117}\) See, e.g., James J. Tomkovicz, California v. Acevedo: The Walls Close In On the Warrant Requirement, 29 Am. Crim. L. Rev. 1103, 1141-60 (1992) (examining policy arguments in support and in opposition to police officers’ need to obtain warrants in a variety of circumstances). Professor Tomkovicz distinguished “policy” arguments from “symbolic arguments,” which he characterized as an examination of “which symbols and messages are more compatible with the kind of society our ancestors envisioned.” Id. at 1162. He recognized that “[o]ur choices will undoubtedly be influenced by the symbols we see and the messages we hear” and that “neither choice is incontrovertible.” Id. at 1163.
argument always trumps another type of argument, the Court is able to wander down different paths simply by relying on a different category to decide a similar issue. In addition, within each category, the Court has a variety of arguments to support its decision. For example, the Court may selectively cite cases to support its position; it may distinguish other cases by creating a new gloss on prior cases that it now finds constitutionally sufficient; it may overrule prior cases or it may trash some but not all of its prior cases by retaining the "essential holding" of a prior cases. The Court may also blend these constructed categories by weaving them together, as in looking to history to illuminate what it discerns the text to mean. With these diverse and contrasting rhetorical arguments, the Court gets to choose how to frame and resolve a decision.118

In deciding whether the challenged conduct was a "search" within the meaning of the Fourth Amendment, the Court's initial basis was property law; it then characterized privacy as an essential component of determining whether a "search" had occurred. In its move from property to privacy, the Court cited language in old cases to make its shift to appear less jarring. The Court's broadly written 1886 decision in Boyd v. United States, for example, has given the Court language to select and focus on at different times. The Boyd Court discussed "the very essence of constitutional liberty and security," the need to protect the "sanctity of a man's home and privacies of life" and an "indefeasible right of personal security, personal liberty and private property."119 Later the Court repeatedly referred to the Fourth Amendment as protecting "personal security," generally not to define a "search,"120 but rather to describe an individual's interest

118 See, e.g., Morgan Cloud, The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory, 48 STAN. L. REV. 555, 583 (1996) (noting that even judges operating from a "formalist" perspective may ascribe "alternative outcomes for the same event."). Id. at 583. For Cloud, different outcomes are possible because a "decisionmaker may conclude that the properties suppressed by a particular rule are relevant to the events in the instant case, and choose to apply an alternative rule that emphasizes those relevant characteristics while suppressing others accentuated by the rejected rule." Id.


120 See, e.g., Johnson v. United States, 333 U.S. 10, 17 n.8 (1948). In Johnson,
protected by the Fourth Amendment.

The categories of property and privacy (as well as personal security and liberty) from a postmodernist’s view have permeable and overlapping boundaries, allowing us to understand the Court’s shifting rhetorical groundings. In the end, even though we may view the Court’s paths in defining a “search,” we are not certain as to what a particular path means when the facts under consideration are different from decided cases; we do not know how long the Court will stay on that road, nor do we know what the next road looks like and what its application will mean under the Fourth Amendment. What we do know is that the Court, like academic scholars, offers arguments for constructing the meaning of the Constitution, which is all it can do.

A. Constructing the Fourth Amendment with a “Property” Foundation

The Court first extensively examined the Fourth Amendment in *Boyd v. United States*.121 At issue was a government’s subpoena, issued pursuant to a statute, compelling a company to produce an invoice to show the purchase of goods for which it had not paid duties.122 The statute provided that if the company did not produce the papers, the government’s allegations were deemed true, allowing civil
forfeiture of the allegedly purchased goods. In determining that this compulsory process of private papers was an "unreasonable search and seizure," the Court did not define what constituted a "search" or "seizure," but it did describe a "right" protected by the Fourth Amendment: the "right of personal security, personal liberty, and privacy property, where that right has never been forfeited by his conviction for some public offence." Yet, in deciding the case, the Court focused on property law.

The Boyd Court distinguished between property in which the government was entitled to possess and that which is it was not. Lawful possession lay in the "seizure of stolen goods," "seizure of goods forfeited a breach of revenue laws" and "goods seized on attachment." Unlawful possession in this case arose from compelling a person to produce "private" papers. The Court stated that the "two things differ toto coelo." The Court thus constructed classes and stated that the classes were different, a classic rhetorical tool.

To justify its distinctions, the Court cited another classic

123 Id. at 621-22.
124 Id. at 622.
125 Id. (implying that "compulsory production of a man's private papers" was "equivalent" to a "search and seizure").
126 Id. at 630.
127 Id. at 623-24. Professor Morgan Cloud has differently characterized the Fourth Amendment foundation that the Court created in Boyd by viewing the decision through the lens of its era—Lochner v. New York, 198 U.S. 45 (1908). Cloud, supra note 118, at 580. Cloud strongly emphasized the Court's explicit references to "liberty" and acknowledged a role for implicit linking of property interests with an individual's interest in "liberty" or "personal autonomy." Cloud, supra note 118, at 580. He explained that "the Boyd decision is provocative precisely because it defined this realm of personal autonomy largely in terms of property rights." Cloud, supra note 118, at 580. Earlier, however, he noted that such categories are not discrete: "Personal security, liberty, and private property are not discrete interests; they unite to define significant attributes of individual freedom in the democracy." Cloud, supra note 118, at 576. See generally Akhil Reed Amar, The Constitution and Criminal Procedure: First Principles 23 (1997) (criticizing Boyd for its embracing of "property worship").
129 Id.
130 Id. at 624.
131 Id. at 623.
The Court stated that its property class distinctions derived from the "contemporary or then recent history," which had condemned the earlier English practices of using writs of assistance and general warrants. Writs of assistance arbitrarily gave officials great discretion to search for smuggled goods and general warrants, which similarly allowed officials to search for private papers. The Court stated that these oppressive practices "were in the minds of those who framed the Fourth Amendment to the Constitution, and were considered sufficiently explanatory of what was meant by unreasonable searches and seizures."

The Court proceeded to link the Fourth Amendment to trespass law. It quoted Lord Camden, who had authored English opinions celebrated by both the English and the colonists. In these opinions liberty meant having secure property interests. According to the Court, Lord Camden stat-

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132 See, e.g., Lipkin, supra note 23, at 368 n.159 (stating that "[i]f originalism contends that it is the correct methodology because the Framers intended it to be, the argument is circular," adding that even if the Constitution contained a clause that the "Framer's intent should control," the clause would still be subject to different interpretations, one linked to nontexual arguments, such as "the correct political theory"). With a different casting of history, Professor White, however, can envision history as an interpretative "restraint:"

One might argue that with the loss of objectivity there is nothing to prevent present actors from creating their own versions of history, designed to conform to or reinforce their contemporary agendas. But that argument is itself modernist-inspired. It proceeds from a conception of time as segmented, in which actors in the "present" have a discretely different experience and set of attitudes from actors in the past, and more fundamentally, in which actors in the present are capable of overwhelming or wholly erasing their past. . . . [C]ontemporaries, however, cannot escape the set of attitudes and experiences that defines their existence as occupants of a particular moment in time.

See White, supra note 69, at 619-20. This type of "restraint," however, has not lead to a uniform construction of history, as well explained by Professor White, as he examined the different constructions of history by critical legal scholars and "originalists." White, supra note 69, at 580-96.

133 Boyd, 116 U.S. at 625.
134 Id. at 626.
135 Id. at 626-27.
136 Id. at 626.
137 Id. at 627 (quoting Camden as stating that the "great end for which men entered into society was to secure their property" and that even the 'bruising the grass' may be a trespass if a person offers no justification") (citation omitted).
ed, "[p]apers are the owner's goods and chattels; they are his dearest property." 138 Although Camden declared that the "eye cannot by the laws of England be guilty of a trespass," 139 the compulsory production of papers is like the 
"[b]reaking into a house and opening boxes and drawers." 140 The Boyd Court thus viewed the Fourth Amendment as protecting "sacred right" 141 of property, which also encompassed "personal security and personal liberty." 142

After Boyd, the Court continued to interpret the Fourth Amendment through the lens of property law. 143 Yet, when trespass law did not address the government's access to intangible information, such as telephone conversations, the Court in Olmstead v. United States 144 had to decide whether wire tapping constituted a "search" or "seizure" protected by the Fourth Amendment. In 1928, with the Court's property perspective of the Fourth Amendment, it held that tapping telephone conversations did not constitute a "search" or "seizure." 145

To justify its interpretation, the Court viewed the language of the Fourth Amendment to indicate no protection because it listed "material things— the person, the house, his papers, or his effects." 146 The Warrant Clause, the Court added, similarly referred to tangibles capable of being seized. In addition, officials installed the wire taps without trespassing on the criminal defendants' property, 147 and they acquired evidence "by the use of the sense of hearing and that

138 Id. at 627-28.
139 Id. at 628.
140 Id. at 630.
141 Id.
142 Id.
145 Olmstead v. United States, 277 U.S. 438, 466 (1928).
146 Olmstead, 277 U.S. at 464.
147 Id. at 457.
only.” For the Court, it could not “enlarge[]” the language of the Fourth Amendment to “forbid hearing or sight.”

To further support its holding, the Court stated that officials’ of violations of trespass laws may not be sufficient to implicate the Fourth Amendment. It cited a prior decision in which it had held that viewing activities in an open field, even if accomplished by a trespass, did not constitute a “search of person, house, papers, or effects.”

For its interpretive grounding, the Olmstead Court also quoted a passage from the 1925 decision of Carroll v. United States, the same passage that the modern Court had repeatedly quoted, paraphrased or distorted. “The

\[\text{References:}\]

148 Id. at 464.
149 Id. at 465.
150 Id.
151 Id (citing Hester v. United States, 265 U.S. 57 (1924)).
152 267 U.S. 132 (1925).
154 See, e.g., Wilson v. Arkansas, 514 U.S. 927, 931 (1995) (authored by Justice Thomas) (stating that “[a]lthough the underlying command of the Fourth Amendment is always that searches and seizures be reasonable,” New Jersey v. T.L.O., 469 U.S. 325, 337 (1985), our effort to give content to this term may be guided by the meaning ascribed to it by the Framers of the Amendment”).
156 See also Wyoming v. Houghton, 526 U.S. 295, 299-300 (1999) (authored by Justice Scalia) (stating that “we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed. . . . Where that inquiry yields no answer, we must evaluate the search or seizure under traditional standards of reasonableness . . . ”); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652-53 (1995) (authored by Justice Scalia) (stating that “where there was no clear practice, either approving or disapproving the
Fourth 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.\[^{156}\] Although the Court did not elaborate on the significance of common law, it did state that the language of the Fourth Amendment acted as a restraint.

It then offered a perspective that it would later discard under a different Fourth Amendment paradigm: “The reasonable view is that one who installs in his house a telephone instrument . . . intends to project his voice to those” outside his house.\[^{157}\] In contrast, Justice Brandeis in his dissent rejected this construction, inviting the Court to interpret the Fourth Amendment with an appreciation of the government’s growing investigative capacities.\[^{158}\] He invoked the words of Chief Justice John Marshall, exclaiming “[w]e must never forget that it is a constitution we are expounding,”\[^{159}\]a malleable statement that ironically permits both broad and narrow interpretations of the Constitution.\[^{160}\] In

\[^{156}\] Olmstead, 277 U.S. at 465 (quoting Carroll v. United States, 267 U.S. 132, 149 (1925)).

\[^{157}\] Id. at 466.

\[^{158}\] Id. at 472-73 (Brandeis, J., dissenting).

\[^{159}\] Id. at 472 (quoting M'Culloch v. State, 17 U.S. 316, 407 (1819)).

\[^{160}\] Supreme Court Justices have often quoted this famous phrase from M'Culloch, sometimes to limit the government’s power and liability and sometimes to expand the government’s power and liability. See, e.g., Alden v. Maine, 527 U.S. 706,807 (1999) (Souter, J., dissenting) (rejecting constitutional sovereign immunity for states in state courts and declaring that since M'Culloch the “Court has repeatedly sustained the exercise of power by Congress, under various clauses of [the Constitution], over objects of which the Fathers could not have dreamed”); County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998) (stating that “only the most egregious official conduct can be said to be ‘arbitrary in the constitutional
his dissent, Justice Brandeis looked to Marshall's words to underscore the need to apply the Fourth Amendment to contexts not imaginable in 1791: "Clauses guaranteeing to the individual protection against specific abuses of power, must have a similar capacity to adaptation to a changing world."\(^{161}\)

This property-based perspective of the Fourth Amendment thus raised property-framed issues: whether the government had searched and seized a tangible item, whether an "area" had constitutional protection,\(^{162}\) and if so, whether the governmental officials trespassed by "physical invasion." As time passed, the Court's property-framed issues were sometimes dispositive\(^{163}\) and sometimes merely relevant.\(^{164}\) The

\(^{161}\) Olmstead, 277 U.S. at 472.

\(^{162}\) See, e.g., Silverman v. United States, 365 U.S. 505, 512 (1961) (stating that warrantless use of a spike microphone was unconstitutional, not because of trespass law, but rather because of "the reality of an actual intrusion into a constitutionally protected area").

\(^{163}\) See, e.g., Lanza v. New York, 370 U.S. 139, 143 (1962) (stating that prison cell is not a constitutionally protected area because it "shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room"); On Lee v. United States, 343 U.S. 747, 751 (1952) (stating that "no trespass had been committed" by officers using concealed microphone while in defendant's laundry).

\(^{164}\) See, e.g., Wong Sun v. United States, 371 U.S. 471, 485-86 (1963) (refusing to distinguish between "verbal evidence" and the "more common tangible fruits of [an] unwarranted intrusion"); Silverman, 365 U.S. at 512 (stating that the "deci-
Court's shifting emphasis of issues allowed the property-based foundation to slowly crack.

This movement is discernible by comparing the Court's 1942 decision in Goldman v. United States\textsuperscript{165} with its 1961 decision in Silverman v. United States.\textsuperscript{166} In Goldman, the Court relied on Olmstead to exclude oral statements from protection when officials, without a warrant, gathered information by using a listening device attached to a wall, but in Silverman granted protection to oral statements when officials, also without a warrant, used a microphone to puncture a baseboard and listen.\textsuperscript{167} In both cases, the Court refused to overrule Olmstead,\textsuperscript{168} but in Silverman, the Court's language reflected the tension in its constructed property foundation; it declared, "Inherent Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort or real property law."\textsuperscript{169} The Court, however, did not completely discard history, but selected that part related to the home. It noted the "long history"\textsuperscript{170} of protecting a person's interest in the home, language that is also reflective of more modern decisions:

A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty—worth protecting from encroachment. A sane, decent, civilized soci-

\textsuperscript{165} See, e.g., Goldman v. United States, 316 U.S. 129 (1942) (holding that Fourth Amendment not implicated by governmental officials' use of a device attached to a wall to listen to a conversation).

\textsuperscript{166} See, e.g., Silverman, 365 U.S. at 511 (holding that officials' warrantless use of a microphone with a foot-long spike to puncture a baseboard, allowing the heating duct to act as "a conductor of sound," violated the Fourth Amendment).

\textsuperscript{167} Id. at 508 (determining no need to re-examine Olmstead in "light of recent and projected developments in the science of electronics"); Goldman, 316 U.S. at 136 (stating that reconsideration of Olmstead "would serve no good purpose").

\textsuperscript{168} Id. at 511.

\textsuperscript{169} Id.

\textsuperscript{170} Id.
entity must provide some oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle.\(^{171}\)

Recognizing its incremental changes, the Silverman Court stated, "We find no occasion to re-examine Goldman here, but we decline to go beyond it, even by a fraction of an inch."\(^{172}\)

Later the Court would look at these cases and others,\(^{173}\) stating that they had "eroded"\(^{174}\) a property foundation for the Fourth Amendment.\(^{175}\) In a series of three decisions issued in 1967—Warden v. Hayden,\(^{176}\) Berger v. New York,\(^{177}\) and Katz v. United States,\(^{178}\)—the Court looked back and viewed the foundation with a different perspective: the Fourth Amendment also protects an individual's interest in privacy.\(^{179}\) In charac-
terizing its decisions as a "shift in emphasis from property to privacy," the Court did not completely abandon historical perspectives of property. Instead, it sought to bring privacy interests into the forefront, a move that both afforded governmental officials greater investigative means and gave individuals "the remedy of suppression."

**B. Reconfiguring the Fourth Amendment’s Foundation: Protecting Society's Interest in Privacy**

Although the Court decided numerous Fourth Amendment cases in 1967, several decisions highlighted privacy as an

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181 See, e.g., California v. Greenwood, 486 U.S. 35, 37 & 41 (1988) (holding that the Fourth Amendment does not prohibit "the warrantless search and seizure of garbage left for collection outside the curtilage of a home," which was an "area accessible to the public"); United States v. Dunn, 480 U.S. 294, 300-01 (1987) (relying on the 1924 case of Hester v. United States, 265 U.S. 57, 58 (1924) to aid it in creating four factors to define what kind of an area represents "curtilage," a common law construction to grant the area around the home the "same protection under the law of burglary": "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put; and the steps taken by the resident to protect the area from observation by people passing by"); Dow Chemical v. United States, 476 U.S. 227, 236, 237-38 (1986) (stating that area surrounding a large industrial complex "can perhaps be seen as falling somewhere between 'open fields' and curtilage, but lacking the critical characteristics of both," but recasting these property questions under the umbrella of society's "privacy" expectations).

182 Warden, 387 U.S. at 307 (stating that suppression, "which made possible protection of privacy from unreasonable searches without regard to proof of a superior property interest, likewise provides the procedural device necessary for allowing otherwise permissible searches and seizures conducted solely to obtain evidence of a crime").

183 See, e.g., Camara v. Mun. Court, 387 U.S. 523 (1967) (establishing Fourth Amendment standard for administrative health and safety inspections of the home). In Camara, the Court recognized privacy associated with one's home:

The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell
interest protected by the Fourth Amendment: Warden v. Hayden,\(^{184}\) Berger v. New York,\(^{185}\) and, most intensely, Katz v. United States.\(^{186}\) In these three cases, the Court lifted privacy strands from prior cases and highlighted them, thus allowing the Fourth Amendment to apply to some police practices that previously would not have been a "search." The Court recharacterized some older cases, which focused on property concepts, to symbolize the Fourth Amendment's protection for an individual's interest in privacy,\(^{187}\) and it overruled some prior cases,\(^{188}\) characterizing them as lacking a privacy focus. Yet, the Court's construction and application of its privacy standard has also resulted in many police practices not being "searches."

In Warden v. Hayden,\(^{189}\) the Court explicitly rejected a property focus for the Fourth Amendment as it strengthened the power of the government to gather information leading to

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\(^{184}\) 387 U.S. 294 (1967).

\(^{185}\) 388 U.S. 41 (1967).

\(^{186}\) 389 U.S. 347 (1967).

\(^{187}\) See generally Clancy, supra note 143, at 329 (stating that "after adopting privacy as the measure of the individual's interest protected by the Fourth Amendment, the Court had to retrofit its prior case law to coincide with it.").

\(^{188}\) See, e.g., Katz v. United States, 389 U.S. 347, 353 (1967) (concluding that "the underpinnings of Olmstead and Goldman have been so eroded by our subsequent decisions that the 'trespass' doctrine can no longer be regarded as controlling"); Warden, 387 U.S. at 300, 309-10 (rejecting prior case law distinction between the government's seizing "mere evidence" and the government's seizing "instrumentalities, fruits or contraband"), overruling Gouled v. United States, 255 U.S. 298 (1921); see also Berger v. New York, 388 U.S. 41, 64 (1967) (Douglas, J., concurring) (stating that "I join the opinion of the Court because at long last is overrules sub silentio Olmstead v. United States, . . . and its offspring and brings wiretapping and other electronic eavesdropping fully within the purview of the Fourth Amendment.").

\(^{189}\) 387 U.S. 294 (1967).
conviction. It stated, "The premise that property interests control the right of the government to search and seize has been discredited."\(^{190}\) To give police officers a bigger investigative power, the Court discarded prior decisions,\(^{191}\) which had limited authority to search and seize contraband, fruits, and instrumentalities of crime. Older cases considered what kind of property officials could search and seize. With the prior case law having this property focus, the Court and the dissent\(^{192}\) recast the Fourth Amendment to protect privacy, not property. It explained, "Privacy is disturbed no more by a search directed to a purely evidentiary object than it is by a search directed to an instrumentality, fruit or contraband."\(^{193}\) The Court then proceeded to find the old property distinctions to be "wholly irrational" when considered from an individual's interest in privacy.\(^{194}\)

With a privacy perspective highlighted in *Warden*, the Court continued discussing privacy in *Berger*, but ironically concluded with the property language of its prior cases, stating that a state statute unconstitutionally "permit[ted] a trespassory invasion of the home [and] office."\(^{195}\) *Berger* declared unconstitutional a state statute that failed to limit electronic

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\(^{190}\) *Warden*, 387 U.S. at 304.

\(^{191}\) Id. at 306 (stating the "premise in *Gouled* [v. United States, 255 U.S. 298 (1921)] that government may not seize evidence simply for the purpose of proving crime has likewise been discredited"). The Court also stated that even though Congress abided by *Gouled*’s property distinctions, it found such adherence "attributable more to chance than considered judgment." Id. at 308.

\(^{192}\) Id. at 313 (Douglas, J., dissenting). Justice Douglas had authored two years earlier *Griswold v. Connecticut*, 381 U.S. 479 (1965), in which he articulated a right to privacy arising from the "penumbras" of the Bill of Rights. *Griswold*, 381 U.S. at 484. In considering the emanations from the Fourth Amendment, he cited Boyd’s reference to the "sanctity of a man’s home and the *privacies* of life." Id. (citation omitted). He also discerned the emanation by considering the Court’s earlier reference to the "Fourth Amendment as creating a ‘right to privacy.’" Id. at 485 (quoting *Mapp v. Ohio*, 367 U.S. 643, 656 (1961)). When considering the mere evidence rule in *Warden*, Justice Douglas similarly reaffirmed his perspective that the Fourth Amendment protects privacy. *Warden*, 387 U.S. at 312-15. He referred to Lord Camden’s decision of 1765 as establishing a "zone of privacy which no governmental official may enter." Id. at 314-15 (citation omitted).

\(^{193}\) *Warden*, 387 U.S. at 302.

\(^{194}\) Id.

eavesdropping. The Court explicitly held that the electronic capturing of a conversation was a "search" within the meaning of the Fourth Amendment. It viewed prior precedent as having "negated" its holding in Olmstead that a wiretap of a telephone line from a home was not a "search." Even though it briefly concluded using its old property-based perspective, mentioning "trespassory invasion," it repeatedly characterized the Fourth Amendment as protecting privacy. The Court declared, "It is now well settled that 'the Fourth Amendment's right of privacy has been declared enforceable against the States." It also described the "core of the Fourth Amendment" as protecting the "security of one's privacy." In addition, it also referred to an interest mentioned in older decisions, but one not moved to the forefront: an individual's interest in "security."
In its seminal decision in \textit{Katz v. United States},\footnote{389 U.S. 347 (1967)} the Court—in five opinions\footnote{Katz v. United States, 389 U.S. 347, 347 (1967). Justice Stewart authored the opinion for the Court, which all Justices joined except dissenting Justice Black. \textit{Katz}, 389 U.S. at 359. (Justice Marshall did not participate in the decision). Three justices wrote concurring opinions (Douglas, joined by Justice Brennan, White and Harlan); these opinions in part disagreed as to whether the Fourth Amendment had a “national security” exception to the warrant requirement, an issue not before the Court but mentioned and left unresolved by Justice Stewart. \textit{Id.} at 358-64. Justice Harlan’s concurrence articulated a standard for defining a Fourth Amendment “search” later adopted by a majority of the Court. \textit{Id.} at 361; see, \textit{e.g.}, Smith v. Maryland, 442 U.S. 735, 740 (1979) (applying Harlan’s two-part inquiry for a Fourth Amendment “search”).} explicitly acknowledged a shift in paradigms for interpreting what constitutes a Fourth Amendment “search.” At issue was governmental officials’ attachment of an “electronic listening and recording device to the outside of a public telephone booth.”\footnote{Id. at 348.} In writing for the Court, Justice Stewart discarded the “trespass’ doctrine” from \textit{Olmstead} and \textit{Goldman}\footnote{Katz, 389 U.S. at 347.} and stated that the “Fourth Amendment protects people—and not simply ‘areas’—against unreasonable searches and seizures.”\footnote{Id. at 353.} The Court held that the officials had conducted a Fourth Amendment “search.”\footnote{Id.} In doing so, the Court looked to modern practices in examining the technology at issue—telephones. The Court stated, “To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.”\footnote{Id. at 352.}

The Court found unhelpful how the parties had framed the “search” issues: “[w]hether a public telephone booth is a constitutionally protected area” and whether “physical penetration of a constitutionally protected area” is necessary for the Court to hold that a “search” occurred.\footnote{Id. at 349, 353.} A “search” had occurred because Katz, in using the telephone, had shut the door behind

as recognized by countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.” \textit{Camara}, 387 U.S. at 528.

him, excluding the "uninvited ear."\(^{212}\) The Court articulated a theory that questioned whether the person had "exposed" the information: "What a person knowingly exposes to the public, even it his own home or office, is not subject of Fourth Amendment protection."\(^{213}\)

When defining a "search" from this reference, Justice Stewart distinguished between two types of privacy: "a general right of privacy" and a privacy interest protected by the Fourth Amendment. The Court stated that "the protection of a person's general right to privacy—his right to be let alone by other people—is like the protection of his property and of his very life, largely left to the law of the individual States."\(^{214}\) The Fourth Amendment, in contrast protected "privacy," as well as other interests.\(^{215}\) As an example, Justice Stewart offered that a person has a Fourth Amendment interest in property, whether officials seize it publicly or privately.\(^{216}\)

In elaborating on this new "search" doctrine, Justice Harlan in a concurrence articulated the modern Court's "search" inquiry: whether the person had a subjective expectation of privacy and whether this expectation is "one that society is prepared to recognize as 'reasonable.'"\(^{217}\) He did not, however, discard examining the "place" under consideration. He explained that a person's "home is, for most purposes, a place where he expects privacy."\(^{218}\) In addition, he recast the physical penetration inquiry to include "electronic invasion,"\(^{219}\) stating that requiring "physical penetration" is "bad physics as well as bad law."\(^{220}\)

In contrast, Justice Black's dissent reflected prior case law and a different role for the Court.\(^{221}\) Not only did he not want

\(^{212}\) Id. at 352.
\(^{213}\) Id. at 351.
\(^{214}\) Id. at 350.
\(^{215}\) Id.
\(^{216}\) Id. at 350 n.4.
\(^{217}\) Id. at 361 (Harlan, J., concurring).
\(^{218}\) Id.
\(^{219}\) Id. at 360.
\(^{220}\) Id.
\(^{221}\) Id. at 364-74 (Black, J., dissenting).
to discard precedent, but he could not create a construction of the word “search” to include electronic eavesdropping. He sarcastically accused the Court of preferring “philosophical discourses” to the mundane task of reading the words of the Fourth Amendment. In addition, he constructed a framer’s intent argument to exclude this modern practice, noting that the framers had not prohibited general eavesdropping. He rejected the need to “rewrite the Amendment in order ‘to bring it into harmony with the times.’”

In examining telephone technology, the majority and the dissent in *Katz* faced the same interpretive task: how to apply the Fourth Amendment to a practice not explicitly addressed by the text, one that did not exist at the time of the framing, and one inconsistently addressed by precedent. In time, the Court adopted Justice Harlan’s two-part standard for a “search,” yet one could only know the meaning of the standard through the Court’s application of it. The progeny of *Katz* fails to provide a coherent framework for predicting when an activity is a “search,” just as a postmodernist would expect. The progeny does reveal, however, the Court’s rhetorical flourishes upon the privacy theme established in *Katz*.

III. COURT’S CONSTRUCTION OF THE RELATIONSHIP BETWEEN PRIVACY AND EMERGING TECHNOLOGY

Since *Katz v. United States*, the Court has decided numerous cases revealing its varied conceptions of privacy. The Court’s decisions sometimes have clear boundaries, but mostly what privacy means is still uncertain for a variety of reasons. Advances in technology often invite the Court to draw analogies from one investigative practice to another one. An analogy by definition is an inexact comparison, allowing the analyst to

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222 Id. at 367-72.
223 Id. at 364-65.
224 Id. at 365.
225 Id. at 366. He explained that the framers were “no doubt aware” of the practice of eavesdropping, “and if they had desired to outlaw or restrict the use of evidence obtained by eavesdropping . . . they would have used the appropriate language to do so in the Fourth Amendment.” Id.
226 Id. at 364.
see both similarities and dissimilarities. Depending upon whether the analyst emphasizes a dissimilarity or a similarity, the application is often uncertain. Privacy is also a shifting ground in society, one that eludes sharp characterization. As Professors Wayne LaFave and Tony Amsterdam have noted, deciding what constitutes a "search" is simply a "value judgment," one considering whether a particular police practice is "inconsistent with the aims of a free and open society." By highlighting those cases in which the Court considered new technology, we can discern the Court's rhetorical devices for labeling activities as implicating privacy protected by the Fourth Amendment. In doing so, we are able to view the Court's recent decision in Kyllo v. United States as meandering down another new road, but one not labeled by the Court.

Even though the Court has thematically described its "search" jurisprudence as protecting an individual's interest in privacy, the privacy theme masks the Court's numerous rhetorical devices for deciding cases, devices that give the Court great flexibility in deciding whether a "search" occurred. In examining new technology, the Court constructed the relationship between privacy and technology using several rhetorical devices: (1) declaring a police investigative practice to be sui generis, in a class by itself, because it was so nominally intrusive; (2) characterizing public and private disclosure as clearly discernible acts (i.e., not viewing privacy as being on a continuum or representing a normative judgment); (3) distinguishing between different types of sensory enhancement devices, with visual surveillance and olfactory enhancement, affording officials greatest freedom from restraints by the Fourth Amendment, but with non-enhanced, basic physical touch often implicating the Fourth Amendment.

A. Sui Generis Investigative Activity: Not a "Search"

In *United States v. Place*, the Court held that no "search" occurred because officers used nominally intrusive technology—a canine sniff for drugs—to gather incriminating information. Instead of holding that the dog sniff was "reasonable" under the Fourth Amendment, the Court declared the practice to be unique, in a class of its own, one not even implicating the Fourth Amendment. In doing so, the Court created a special category for an investigative practice. The Court first envisioned only one type of investigative practice deserving of the label *sui generis*—a canine sniff of luggage for drugs. In time, analogy allowed the Court in *United States v. Jacobsen* to extend the "no search" label to another nominally intrusive practice—field testing of a white powder to determine if it were cocaine. With two types of technological activities falling within the class, the *Jacobsen* Court did not label field testing to be *sui generis*; reasoning by analogy was sufficient for the Court. (Despite the Court's categorization, another rhetorical device would still allow the Court a way out from its "no search" conclusion—factual distinctions from case to case.)

In two cases, *Place* and the recent decision of *City of Indianapolis v. Edmond*, the Court determined that dog sniffs were not "searches" under the facts of the cases. Although

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230 *Place*, 462 U.S. at 707. Concurring in the judgment, Justice Blackmun labeled the Court's "no search" determination to be dicta, but hypothesized that "a dog sniff may be a search, but a minimally intrusive one that could be justified . . . [by] reasonable suspicion." *Id.* at 723 (Blackmun, J., concurring).
231 *Id.* at 707.
232 *Id.* The Court stated, "We are aware of no other investigatory procedure that is so limited in the manner in which the information is obtained and in the content revealed by the procedure." *Id.*
the Court's determinations in both cases were dicta, the decisions cited two aspects relevant for its conclusion: the nominal intrusion by the dog's sniffing and the limited disclosure of information.\textsuperscript{237}

In \textit{Place}, a dog sniffed an airline passenger's luggage; officers had reasonable suspicion to believe that the passenger was carrying illegal narcotics, which according to the Court, allowed the officers to briefly detain the passenger. Before concluding that the sniff of luggage was not a search, the Court made the following comment: "Obviously, if this investigative procedure is itself a search requiring probable cause, the initial seizure of [the passenger's] luggage for the purpose of subjecting it to the sniff test—no matter how brief—could not be justified on less than probable cause."\textsuperscript{238} One may infer from this statement that the Court may have seemed constrained by its prior search jurisprudence and that one way out was to declare a sniff not to be a search. Justice Blackmun, in his concurring opinion in the judgment, drew that inference, stating that the Court could have labeled the sniff to be a search, but one justified by reasonable suspicion, not necessarily requiring probable cause.\textsuperscript{239} Instead, the Court created a special category for dog sniffs because "this investigative technique is much less intrusive than a typical search\textsuperscript{240} and because the sniff produced a "limited disclosure."\textsuperscript{241} In concluding, the Court also wove in the facts of the case; the sniff was a luggage "located in a public place."\textsuperscript{242}

When the context shifted to sniffing the "exterior" of cars, the Court in \textit{City of Indianapolis} cited \textit{Place} to support its

\begin{footnotes}
\item[237] \textit{Edmond}, 531 U.S. at 53; \textit{Place}, 462 U.S. at 707. In \textit{Place}, the Court determined that officers unreasonably seized an airline passenger's luggage for ninety minutes while waiting to have a dog sniff it. \textit{Place}, 462 U.S. at 710. In \textit{City of Indianapolis}, the Court held that if the primary purpose of a roadblock was to search for drugs it was unconstitutional, but that walking a dog around an illegally stopped car did "not transform the seizure [of the car and person] into a search." \textit{Edmond}, 531 U.S. at 40.
\item[238] \textit{Place}, 462 U.S. at 706.
\item[239] \textit{Id.}, at 723 (Blackmun, J., concurring).
\item[240] \textit{Id.}, at 707.
\item[241] \textit{Id.}
\item[242] \textit{Id.}
\end{footnotes}
conclusion that no "search" occurred.\textsuperscript{243} Even though the Court held that roadblocks primarily designed to detect illegal drugs violated the Fourth Amendment,\textsuperscript{244} the Court in a single paragraph disposed of the dog-sniffing issue.\textsuperscript{245} In contrast, the dissent in \textit{City of Indianapolis} viewed the majority as relying on the officials' use of drug-detecting dogs to give the roadblocks an unconstitutional primary purpose.\textsuperscript{246} For the majority, the dogs were irrelevant because the sniffs were not searches.

The Court also extended the dog-sniff analysis to the chemical testing for drugs in \textit{United States v. Jacobsen.}\textsuperscript{247} Officers examined white powder in clear bags that Federal Express employees discovered while opening a damaged package. The officers used three test tubes to determine if the powder was cocaine. The Court explained that "[w]hen a substance containing cocaine is placed in one test tube after another, it will cause liquids to take on a certain sequence of colors."\textsuperscript{248} Again the Court cited the dual rationale of \textit{Place}--a nominally invasive procedure with limited disclosure.\textsuperscript{249} For the Court, the testing did not compromise "any legitimate interest in privacy" because it only told the officers one fact--whether the substance was cocaine.\textsuperscript{250} In justifying its conclusion, the Court noted that the test would not disclose whether the white powder was "sugar or talcum powder."\textsuperscript{251} In contrast, the dissent disagreed with the Court's "unbounded analysis," fearing that the Court was "redefin[ing] the term 'search' to exclude a broad

\begin{thebibliography}{99}
\bibitem{243} \textit{City of Indianapolis}, 531 U.S. at 40.
\bibitem{244} \textit{Id.} at 42.
\bibitem{245} \textit{Id.} at 40.
\bibitem{246} \textit{Id.} at 49 (Rehnquist, C.J., dissenting) (dissenting because the roadblocks "serve the State's accepted and significant interests of preventing drunken driving and checking for driver's licenses and vehicle registrations, and because there is nothing in the record to indicate that the addition of the dog sniff lengthens these otherwise legitimate seizures").
\bibitem{248} \textit{Id.} at 111 n.1.
\bibitem{249} \textit{Id.} at 122-24.
\bibitem{250} \textit{Id.}
\bibitem{251} \textit{Id.} at 122.
\end{thebibliography}
class of surveillance techniques. In the end, the dissent did, however, agree that the testing did not implicate privacy because the owner had not hidden the powder in a "transparent pharmaceutical vial" to make it look like "legitimate medicine." The dissent thus sought to focus on context to determine a search rather than the unique but limited testing procedure.

With the creation of a special category for dog sniffs, the Jacobsen Court thus expanded this category to include field testing for the presence of cocaine. In a related contest, the Court, again in dicta, suggested that another nominally intrusive and limited disclosure test might be valid pursuant to a lawful investigative stop—fingerprinting suspects in the field. In Hayes v. Florida, the Court explicitly left open whether officers who have reasonable suspicion of criminal activity may fingerprint suspects during a brief detention. Although the Court did not discuss the issue under its search doctrines, one may construct a parallel between Jacobsen's field drug-testing and field fingerprinting.

This categorical exclusion is just one rhetorical device for quickly ending Fourth Amendment analysis. Another rhetorical device has involved the Court's dichotomy between what is "private" and what is "public." Instead of describing privacy as falling on a broad continuum, the Court has created another category in which technological activities are surprisingly (depending on one's perspective) not "searches."

B. Using Technology to Get Information from Trusted Third Parties: Not a "Search"

The Katz Court also stated that no "search" occurs when individuals "expose" information to the public. In applying this strand of Katz, the Court constructed a rigid dichotomy

\[\text{\footnotesize{\textsuperscript{252}} Id. at 136 (Brennan, J., dissenting).}\]
\[\text{\footnotesize{\textsuperscript{253}} Id. at 142.}\]
\[\text{\footnotesize{\textsuperscript{254}} Hayes v. Florida, 470 U.S. 811, 816 (1985).}\]
\[\text{\footnotesize{\textsuperscript{255}} Hayes, 470 U.S. at 816.}\]
\[\text{\footnotesize{\textsuperscript{256}} Id.}\]
\[\text{\footnotesize{\textsuperscript{257}} Katz v. United States, 389 U.S. 347, 351 (1967).}\]
between private and public information, instead of viewing personal information as possessing different degrees of privacy. Under the Court's dichotomous construction, a person who reveals information to a trusted third-party has exposed that information to the "public." If the third-party then violates the confidence and gives officials the information, no "search" occurred because the individual "exposed" the information to the "public" by informing the trusted third person. The significance to this private and public dichotomy emerges when officials used technology to gather such "exposed" information to third parties. A case representing this construction of privacy is *Smith v. Maryland*, a case ironically relied on by the modern Court in *Kyllo v. United States*, a case reaching a different conclusion by using different rhetorical constructions.

In *Smith*, officials used a "pen register" to record the local numbers that Smith had dialed from his home. Officials had asked a telephone company to install the device in its facility, not in Smith's home. The device worked by recording the "electrical impulses" Smith made by dialing. The Court applied Harlan's two-part inquiry in *Katz* and also relied on "search" cases decided before *Katz*. The Court held that no "search" occurred when officials used this device to learn

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260 533 U.S. 27 (2001) (citing case to explain its conclusion that a "search" occurred); Kyllo, 533 U.S. at 44 (Stevens, J., dissenting) (citing case to explain his conclusion that no "search" occurred). For a discussion of *Kyllo*, see infra text in Part IV.
261 Smith, 442 U.S. at 737-38.
262 Id. at 737.
263 Id. at 736 n.1.
264 Id. at 739-40. The Court looked to cases in which the individual had told personal information to a "friend," who turned out to be an undercover official or an informant. Id. at 743-44 (citations omitted). The "friend," using technology, then transmitted the statements to others or recorded them. In these cases, the Court held before *Katz* that no "search" had occurred. See, e.g., Lopez v. United States, 373 U.S. 427 (1963) (secretly using electronic equipment to record conversation); On Lee v. United States, 343 U.S. 747 (1952) (using radio equipment to transmit conversations).
265 Smith, 442 U.S. at 745-46.
which local numbers Smith had dialed.

In applying the two-part inquiry, the Smith Court made several observations about the Katz standard. The Court explained that the first question—a person’s subjective expectation of privacy—may at times need to be replaced by a “normative inquiry.” Such circumstances, “where subjective expectations could play no meaningful role,” according to the Court, would exist if the government had announced on television that no privacy existed or where a person had been conditioned by a “totalitarian country;” the normative question of “this nations traditions” would instead be considered. The circumstances of this case, for the Court, did not raise this normative question. The Court also narrowly interpreted the second question—whether a person had a reasonable expectation of privacy by characterizing the homeowner as voluntarily disclosing his telephone numbers to the public, even though the disclosure was to the telephone company for a “limited purpose.”

Third, the Court also considered whether telephone companies had “routinely used” this technology. In doing so, the Court characterized the issue of routine use in two contrasting ways—it considered both actual practices and potential practices by telephone companies. Fourth, the Court characterized the disclosure as limited, noting that the pen register would not even indicate whether a conversation had actually occurred. And most important, the Court framed the privacy issue as an interest in the numbers dialed, not in the activity conducted in privacy of one’s home.

As characterized by the Smith Court, the homeowner had neither a subjective, nor a reasonable, expectation of privacy “that the numbers . . . dial[ed] will [be kept] secret.” To
rebut his asserted subjective expectation of privacy, the Court cited both a Baltimore and District of Columbia telephone directory which informed subscribers that the phone company can help in "identifying to the authorities the origin of unwelcome calls." This notice, for the Court, undermined a subjective expectation of privacy. Ironically, in addressing this issue, the Court stated that subscribers "must convey numerical information to the phone company." But later, in examining the second issue of reasonable expectation of privacy, the Court characterized the submission of numerical information as "voluntary;" Smith "voluntarily conveyed to [the telephone company] information that it had facilities for recording and that it was free to record." One may try to reconcile the conflict by stating that the Court only in dicta addressed the second issue of a reasonable expectation of privacy, having determined that Smith lacked a subjective expectation of privacy. Yet, this inconsistency highlights how the Court's constructions of "facts" influence the outcome.

The Court also considered how telephone companies "routinely use[]" pen registers under both Katz inquiries. Under the subjective prong of Katz, routine use meant actual practices of many telephone companies. The Court discerned routine use of pen registers in "checking billing operations, detecting fraud, and preventing violations of the law." Although the Court did not identify which violations that companies routinely detected, it did declare that "most people . . . presumably have some awareness of one common use: to aid in the identification of persons making annoying or obscene calls." But when considering the second issue, the Court looked to potential practices—whether the telephone company could have used a pen register to record local calls. The Court refused to con-

275 Id. at 742-43 (citations omitted).
276 Id. at 743.
277 Id. at 745.
278 Id. at 742, 745.
279 Id. at 742 (citing United States v. New York Tel. Co., 434 U.S. 159, 174-75 (1977)).
280 Id.
281 Id. at 745.
sidered whether the specific telephone company involved had a practice of recording local calls. The Court attempted to justify its reliance on potential practice by stating that to do otherwise would be "to make a crazy quilt of the Fourth Amendment . . . dictated by billing practices of a private corporation." In short, nationwide practices—actual and potential—contributed to determining that no "search" occurred.

The Court also viewed as undermining the homeowner's subjective expectation of privacy the limited nature of the disclosure, an aspect also of the Court's sui generis no "search" doctrine. The Court determined that there was a constitutional difference between listening to the words of a conversation, as had occurred in Katz, and in learning the numbers the homeowner dialed. The Court separated the words of a conversation from the numbers dialed, stating that "pen registers do not acquire the contents of communications." With pen registers not even recording whether a conversation had occurred, the Court concluded that the pen register had "limited capabilities." In contrast, the dissents viewed individuals as having a strong privacy interest in "avoid[irig] disclosure of their personal contacts." The conflicting characterizations may in part arise from the majority's dichotomous privacy approach and the dissent viewing privacy as falling on a spectrum.

Significantly aiding the Court's no "search" determination was its characterization of what activity was under consideration. For the majority, dialing from one's home was "immaterial for purposes of analysis in this case" because the telephone company could have gotten the same information if it had used another person's telephone. The Court's privacy frame was thus limited to revealing the numbers dialed, not what one

280 Id.
281 See supra notes 231-53 and accompanying text.
282 Smith, 442 U.S. at 741.
283 Id. at 742.
284 Id. at 751 (Marshall, J., dissenting); see also id. at 748 (Stewart, J., dissenting).
285 Id. at 749 (Marshall, J., dissenting). Justice Marshall stated, "Privacy is not a discrete commodity, possessed absolutely or not at all." Id.
286 Id. at 743.
had done in his home. In contrast, a dissent invoked a broader privacy frame that encompassed the officers' learning of what the homeowner had done in his house.289

By limiting the privacy issue to numbers dialed, the Court was able to then characterize the homeowner as putting the dialed numbers in the public arena. Here the Court relied on cases decided before Katz to support its view of the privacy risk analysis. Prior to Katz, the Court had determined that officials may use technology to secretly record the exact words a person states to them, even if the disclosure of the words would violate a confidence.290 Although these cases dealt with information given to an undercover officer or informant, the Smith Court extended this practice to the telephone company.291

The Smith Court thus constructed a "search" doctrine that allowed officials to gain access to information without any procedural steps, for the officials had not gotten a subpoena nor a search warrant.292 The telephone company's voluntary disclosure of information that it did not routinely collect did not trouble the Court because it viewed the "numbers dialed" to be in the public arena. Perhaps the Court was prescient, anticipating both the development and routine use of caller identification by the public, but at the time of Smith, recording local numbers dialed was not routine. But more importantly, the construction of the privacy issue itself—the numbers dialed versus learning about activity in the home—foreshadowed the Court's negative conclusion.

Since Smith, the Court has often decided that officials did not conduct Fourth Amendment "searches" when using technol-
ogy to aid their senses. In a series of cases, the Court shifted the rhetorical arguments to allow officials with broad investigative powers outside the restraints of the Fourth Amendment.

C. Using Technology to Enhance Officials' Senses: Often Not a "Search"

In interpreting Katz, the Court has frequently determined that no "search" occurred when officials used technology to aid four of their senses in conducting investigations. The Court has most narrowly interpreted Katz as applied to officials' use of technology enhancing visual surveillance in public. In contrast, the Court has at times broadly interpreted Katz when applied to an investigative technique not involving technology—touch. And as previously discussed, Katz held that a "search" occurred when officials used technology to aid their listening to a conversation in a public telephone booth, and Place held that no "search" occurred when officials used dogs to enhance their ability to smell drugs in luggage. In these opinions, the Court has frequently cited Katz and its progeny in contrasting and conflicting ways. In the end, what constitutes a "reasonable expectation of privacy" is a fact-driven question, one allowing the Court to use a variety of rhetorical constructions to characterize whether officials used technology to infringe constitutionally protected privacy.

When applying the Katz standard to officials' use of technology to aid vision, the Court has looked to cases decided long before Katz articulated its "public exposure" doctrine: "What a person knowingly exposes to the public, even if in his own home or office, is not subject of Fourth Amendment protection." 293 For example, in deciding that no search occurred when officers used a flashlight to look inside a car at night, 294 the Court cited a 1927 decision, that examined officials' use of a "searchlight" to gaze onto the deck of a boat. 295 It did not

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295 Brown, 460 U.S. at 740 (citing United States v. Lee, 274 U.S. 559, 563
cite Katz for this holding, but it did cite Katz with regard to the question whether officials conducted a “search” by bending “down at an angle” to look inside the car. The Court noted that the “general public could peer into the interior of” the car; thus no “search” occurred.

With this commonplace enhancement of vision not a “search,” the Court then extended the rationale to cases in which fewer members of the public would be in a position to observe what an individual wanted to keep private. In a series of three cases, a majority of the Court held that no “search” occurred when officials used airplanes and a helicopter to put themselves in a position to see better, while sometimes using sophisticated expensive equipment and sometimes just using the naked eye. In deciding that no “search” had occurred, the Court also discussed the particular area under surveillance, without explicitly invoking the “constitutionally protected area” language from its pre-Katz search paradigm.

In 1986, the Court decided the same day two cases—California v. Ciraolo and Dow Chemical v. United States. In Ciraolo, officials used their “naked eye[s]” as they flew 1,000 feet above “a fence-in backyard within the curtilage of a home” that appeared to contain marijuana; they also used a “standard 35 mm camera” to photograph the area. In Dow, officials from the Environmental Protection Agency flew at an altitude as low as 1,200 feet over a chemical plant, occupying two thousand acres, and used a $22,000 mapping camera that allowed them to magnify pictures to discern “wires as small as 1/2-inch in diameter.” Three years later the fractured Court decided Florida v. Riley, in which officials flew 400

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296 Id.
297 Id.
300 Ciraolo, 476 U.S. at 215.
301 Id. at 209.
302 Dow, 476 U.S. at 250 n.12 (Powell, J., dissenting).
303 Id. at 238.
feet above "a partially covered greenhouse in a residential backyard." No "search" occurred in any of these cases, but for different reasons.

In all three cases, the Court discussed the area observed and the privacy traditionally associated with it. In both Ciraolo and Riley, officials flew over an area generally associated with privacy—the curtilage. The Court characterized the privacy associated with curtilage as limited because the "public" could fly over the area and see what it contained. Both decisions found air travel and road travel to be similar and "routine": "In an age where private and commercial flight in the public airways is routine, it is unreasonable" to expect the public not to view the curtilage. The Court crafted a view of "public" exposure by considering whether a private person could have flown over the area and looked at it. In addition, the Ciraolo Court also hypothesized that from the ground some individuals could have seen the plants: "a power company repair mechanic on a pole" or a citizen "perched on top of a truck or a two-level bus" could have looked over the ten-foot fence the homeowner had erected to preserve privacy. For the Court, officials simply used technology to put themselves in a "public" thoroughfare—the air. In an important concurring opinion, Justice O'Connor added a gloss on what "public" meant, a view also shared by four dissenters, suggesting that regulations promulgated by the Federal Aviation Agency do not define what constitutes "public" exposure. Instead what is "public" depends upon whether the public travels with "sufficiently
regularity" at a particular altitude. The Court also nominally added that the viewing was done in a "physically nonintrusive manner" and did not reveal "intimate details" associated with the home and curtilage.

In contrast, when the Court decided Dow Chemical, it had an additional technological question before it—whether a search occurred when officials used a sophisticated, expensive camera used by mapmakers. It also had to discuss whether state trade secret laws, which might have barred private parties from taking such pictures, aided the company's claim to privacy protected by the Fourth Amendment. The Dow Court relied on Ciraolo to justify officials' flying over the plant, but had to reconstruct what it meant by "public" access when state trade laws may have barred private individuals from doing what the government did. In its reconstruction, the Court instead focused on the kind of information gathered; it noted that photographs did not reveal "intimate details," an aspect also only briefly mentioned in its later Riley decision discussing the use of a helicopter, but "central" to identifying what constitutes a "curtilage." It also attempted to shift attention to the limited use of this camera to by raising the question of much more sophisticated technology. It stated, "It may well be ... that

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311 Id. at 454 (O'Connor, J., concurring).
312 Ciraolo, 476 U.S. at 213 (stating that "observations by officers ... took place within public navigable airspace ... in a physically nonintrusive manner"); see also Riley, 488 U.S. at 449 (plurality opinion) (characterizing Ciraolo as "reasoning ... the home and its curtilage are not necessarily protected from inspection that involves no physical invasion").
313 Riley, 488 U.S. at 452 (plurality) (stating that "no intimate details connected with the use of the home or [other parts of the] curtilage were observed, and there was no undue noise, and no wind, dust, or threat of injury").
314 The majority characterized the photographs created by the camera as "essentially like those commonly used in mapmaking." Dow Chemical v. United States, 476 U.S. 227, 231 (1986). The dissent not only specified how expensive the camera was, but also labeled it as a "sophisticated aerial mapping camera." Id. at 242, 250 n.12 (Powell, J., dissenting).
315 Id. at 238.
316 United States v. Dunn, 480 U.S. 294, 300 (1987) (stating that the Court has "identified the central component of [the curtilage] inquiry as whether the area harbors the 'intimate activity associated with the "sanctity of a man's home and the privacies of life."') (quoting Oliver v. United States, 466 U.S. 170, 180 (1984), quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).
surveillance of private property by using highly sophisticated surveillance equipment not generally available in the public, such as satellite technology, might be constitutionally proscribed absent a warrant.\textsuperscript{317}

It also refused to look to state law to resolve the constitutional privacy issue because, for the Court, to do so would be similar to invoking state trespass laws to determine what constitutes a Fourth Amendment “search.”\textsuperscript{318} The Court also characterized the area viewed as one reflecting limited privacy interests.\textsuperscript{319} The Court explained, “We find it important that this is not an area immediately adjacent to a private home, where privacy expectations are more heightened.”\textsuperscript{320} (Yet, in Ciraolo and Dow, officials viewed curtilage, but in those opinions, the Court emphasized different facts.)

The Court has also considered officials’ enhancing their visual surveillance from the ground by using a “beeper,” a “radio transmitter, . . . which emits periodic signals that can be picked up by a radio receiver.”\textsuperscript{321} In two cases, United States v. Knotts\textsuperscript{322} and United States v. Karo,\textsuperscript{323} the Court held that when officials surreptitiously installed a beeper on property and used it to keep track of property hypothetically in public view, they did not engage in a “search.”\textsuperscript{324} Karo, however, did hold that monitoring of a beeper in a home for “a significant period” was a “search.”\textsuperscript{325}

Although the Court decided Knotts even before it heard the oral argument in Place, the decision resonates with the Court’s sui generis characterization it created for dog sniffs of property.\textsuperscript{326} In both Knotts and Place, the Court treated the use of a

\textsuperscript{317} Dow, 476 U.S. at 238.
\textsuperscript{318} Id. at 232. For a discussion of the Court’s prior use of trespass law, see supra text accompanying notes 136-71.
\textsuperscript{319} Dow, 476 U.S. at 236 (stating that the area is one “falling somewhere between ‘open fields’ and curtilage, but lacking some the critical characteristics of both”).
\textsuperscript{320} Id. at 237 n.4.
\textsuperscript{322} 460 U.S. 276 (1983).
\textsuperscript{323} 468 U.S. 705 (1984).
\textsuperscript{324} Karo, 468 U.S. at 715; Knotts, 460 U.S. at 285.
\textsuperscript{325} Karo, 468 U.S. at 715.
\textsuperscript{326} For a discussion of this case, see supra text accompanying notes 228-32,
beeper and a drug-sniffing dog to be nominal additions to the officials' investigative capacities. The Knotts Court characterized using a beeper as merely "augmenting the sensory faculties bestowed upon [officers] at birth," even though Knotts, officers had to rely on the beeper because their naked eyes failed them. For the Knotts Court, a beeper was like the searchlight it had considered in 1927; both the beeper and the search light aided visual observation. The beeper simply allowed officials to keep their eye on the car they were following, one "exposed" to the public. This construction of "public" assumes that officials and private individuals would be able to follow a person traveling in a car, no matter how long the trip may be. The Court crafted this as a "public" excursion by characterizing officials' use of the beeper as being efficient. In this decision, the Court did not ask whether the general public used this technology; instead it viewed officers as simply keeping track of that which was already exposed to the public—the car containing the property with a hidden beeper.

The Karo Court adhered to Knotts' construction of a beeper as a minor sensory augmentation, but only to the point that the object with the beeper was in the "public's" eye. In Karo, officials monitored a beeper in a home for a lengthy period. Here the Court drew the line—one surrounding the house. The Court explained that because officials could not have seen inside the house during the extended monitoring of the beeper, the use of the beeper in this context was a "search." What created a sharp division in the Court were different views concerning the monitoring of property after it left the house. For the plurality, later monitoring was not tainted by the earlier monitoring of the house; for the dissent, the house monitor-

235-39.

327 Knotts, 460 U.S. at 282.
328 Id. at 282-83 (citing United States v. Lee, 274 U.S. 559, 563 (1927)).
329 Id. at 284 (stating that "[w]e have never equated police efficiency with unconstitutionality, and we decline to do so now").
330 Id. at 285.
331 Karo, 468 U.S. 715.
332 Id.
333 Id. at 720 (stating that even if prior monitoring of "house or other place
ing “told police that the container had left the area.”

Under the Court’s constructions of a Fourth Amendment “search,” officers thus gained broad investigative powers free from Fourth Amendment constraints when the Court characterized information as already exposed to the public and when the technology they used was to nominally aid their vision. In dramatic contrast to this jurisprudence is the Court’s construction of a Fourth Amendment “search” when officials used their basic sense of touch. The Court explicitly recognized this sharp difference in *Bond v. United States*, when it held that an official had conducted a Fourth Amendment “search” when he “squeezed” a bus passenger’s soft luggage located in the overhead storage space.

The *Bond* Court described the difference as one of degree: “[P]hysically invasive inspection is simply more intrusive than purely visual inspection.” In considering whether the public routinely handles another person’s luggage when traveling, the Court characterized the “public” exposure issue narrowly. The question was not whether we have a reasonable expectation of privacy that others will not handle our personal luggage, but rather the more specific question of whether we reasonably expect others to “squeeze” our luggage or to handle it in “an exploratory manner.” The manner in which the Court constructed the public exposure issue helped to determine its result. In addition, the Court also ironically cited *Place*, which held that no “search” occurred when a dog sniffed a person’s luggage, for the proposition that “luggage” is an “effect” within the meaning of the Fourth Amendment. As a result, the dissent aptly noted that one does not expect drug-sniffing dogs hovering near luggage, but a different doctrine created the

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was illegal, that monitoring did not lead officials to discover that the property was now somewhere located in a warehouse).

Id. at 733 n.8 (Stevens, J., dissenting).


*Bond*, 529 U.S. at 337.

Id. at 338-39

Id. at 336-37; *see also* United States v. Place, 462 U.S. 696, 707 (1983).

*Bond*, 529 U.S. at 341.
no “search” conclusion in \textit{Place}.\textsuperscript{340}

The Court also construed the public exposure doctrine as providing broad protection in another way. Instead of questioning why the passenger had not used hardsided luggage, the Court described the passenger as taking steps to protect privacy by using an “opaque” bag.\textsuperscript{341} Yet in an older case, \textit{California v. Greenwood}, when officials rummaged through opaque bags on the front lawn of a homeowner, the examining of the “trash” was not a Fourth Amendment search.\textsuperscript{342} Even though the Court had in a prior decision refused to create a doctrinal distinction based on “worthy” and “unworthy” containers,\textsuperscript{343} the Court instead relied on its third-party disclosure cases and focused on the location of the garbage to justify its no “search” determination.\textsuperscript{344} After the homeowner “voluntarily” placed the bags outside the curtilage, the trash collector was free to alter his routine way of collecting trash in order to separate the homeowner's trash from everyone else's.\textsuperscript{345} The Court did not require the trash collector to act “routinely.” For the Court, the homeowner “exposed” his stuff hidden in an opaque bag to the “public” by exposing it to the trash collector and “animals, children, scavengers, snoops and other members of the public.”\textsuperscript{346} In contrast, the dissent discerned a clear reasonable expectation of privacy in the opaque bags. According to the dissent, “Scrutiny of another's trash is contrary to commonly accepted notions of civilized behavior.”\textsuperscript{347}

In describing what constitutes a “reasonable expectation of privacy” after \textit{Katz}, the Court has thus used a variety of rhetorical devices to characterize privacy. Even if an area historically

\textsuperscript{340} See \textit{Place}, 462 U.S. at 707.
\textsuperscript{341} Id. In examining the touching of personal property in \textit{United States v. Jacobsen}, 466 U.S. 107, 123-24 (1984), the Court used its \textit{sui generis} characterization to justify its no “search” determination as to the testing of white powder contained in a mail package. For a discussion of this case, see \textit{supra} text accompanying notes 247-53.
\textsuperscript{342} 486 U.S. 35, 37, 39 (1988).
\textsuperscript{343} See \textit{Greenwood}, 486 U.S. at 47 (Brennan, J., dissenting) (collecting cases).
\textsuperscript{344} \textit{Id.} at 40-41.
\textsuperscript{345} \textit{Id.} at 37.
\textsuperscript{346} \textit{Id.} at 40-41.
\textsuperscript{347} \textit{Id.} at 45 (Brennan, J., dissenting).
reflects privacy, as does the curtilage of a home, it may lose this privacy under the public exposure doctrine; personal information can become public information by disclosing it to a trusted third party; an investigative technique may be characterized as *sui generis*, revealing only a single piece of information; technological enhancement may be a search, depending upon which sense it enhances; routine use may have broad and narrow characterization under the public exposure doctrine. In the end, the public-private dichotomy has given the Court a means to label its conclusions. For example, an investigative practice gathered private information (a search) or it collected public information (no search). These shifting constructions of privacy are consistent with postmodernist perspectives, which rejects the idea of a grand theory to explain these search cases.

What these decisions do offer to the Court is a variety of rhetorical devices for constructing what constitutes a Fourth Amendment “search” when addressing the use of emerging technology. In *Kyllo v. United States*, the Court used several rhetorical devices to broadly protect the home from officials’ use of a heat detection device, a nonphysically invasive investigatory practice. As the latest chapter on officials’ use of technology, this sharply divided opinion readily reveals the justices offering dramatically different interpretations of the technology under consideration and the selective use of precedents.

IV. THE KYLLO COURT’S RHETORICAL STRATEGIES: CHARACTERIZING TECHNOLOGY AND PRECEDENT

In *Kyllo*, the Court held that officials’ use of a thermal imager on public streets to detect heat emissions from a home constituted a “search” because, for five justices, this information was an “intimate detail” arising from the home’s interior and because the “general public” did not use this technology. The Court characterized its decision as one creating a bright-line rule, one needed to “take . . . the original meaning

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349 Id.
350 Id. at 2046.
of the Fourth Amendment forward. The majority opinion, authored by Justice Scalia, characterized this case as controlled by a blend of history and a fear of modern technology intruding into the home. The dissenting opinion, authored by Justice Stevens, relied on precedent never mentioned by the majority opinion. To reach sharply conflicting conclusions and unusual alliances, the justices in Kyllo explicitly challenged the other's characterization of what was at issue in the case and which precedent offered guidance. In the end, these dueling opinions offer a panoply of rhetorical strategies for constructing what activity does or does not constitute a Fourth Amendment "search."

Justice Scalia implicitly admitted that the Court in its "search" jurisprudence has at times reasoned backwards, deciding that an activity was not a "search" because other Fourth Amendment doctrines would then apply. He stated, "[w]e have held that visual observation is no 'search' at all—perhaps in order to preserve somewhat more intact our doctrine that warrantless searches are presumptively unconstitutional." In light of this admitted conclusory reasoning, Justice Scalia was then able to move away from his prior statement that "a search is a search" to the statement that the Katz standard applies when "assessing when a search is not a search." Being a Justice fond of citing dictionaries to give meaning to the Constitution's text, he realized that relying on a dictionary for guidance would not support the Katz construction of a "search" because of its public exposure strand. In short, a Fourth Amendment "search" is a legal construction, one created by the justices in numerous cases, at times offering different paradigms for a Fourth Amendment "search" and shifting con-

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351 Id.
352 Joining Justice Scalia's majority opinion were Justices Souter, Thomas, Ginsburg, and Breyer. Id. at 28. Joining Justice Steven's dissenting opinion were Chief Justice Rehnquist and Justices O'Connor and Kennedy. Id. at 41.
353 Id. at 32.
355 Kyllo, 533 U.S. at 32.
357 Kyllo, 533 U.S. at 32 n.1.
structions of what precedents mean in application.

Unsurprisingly, the majority and dissenting opinions offered different characterizations of many issues: (1) whether the thermal imager detected information outside or inside the home; (2) whether heat emissions levels are intimate or nonintimate information; (3) whether the general public had access to a thermal imager and whether access was relevant for determining a Fourth Amendment "search"; (4) whether labeling the use of a thermal imager to be a "search" was protecting our society from the slippery slope of allowing officers to use highly sophisticated sense-enhancing equipment (that is, whether to offer a broad or narrow ruling); (5) whether the framers of the Constitution intended to guard against release of this type of information; (6) whether the "public" exposure doctrine applied; (7) whether the Court's sui generis doctrine applied, as articulated in Place and followed in Jacobsen; and (8) whether the pre-Katz "search" paradigm—with its focus on common law trespass—still had some vitality after Katz. When discussing these aspects of the case, the majority and dissenting opinions at times disagreed head-on and at other times simply offered different constructions.

In Kyllo, an officer sat in the passenger seat of his companion officer's car on a public street, both in front of and behind Kyllo's house. The officer pointed the thermal imager at the house, which revealed that "the roof over the garage and the side wall of [Kyllo's] home were relatively hot compared to the rest of the home and substantially warmer than neighboring homes in the triplex." As described by Justice Scalia, a thermal imager is a device that converts the infrared radiation emitted by all objects into "images based on relative warmth—black is cool, white is hot, and shades of gray connote relative differences." For Justice Scalia, the device was like a "video camera showing heat images"; for Justice Stevens,
the device produced "vague" images,\textsuperscript{363} which he included in his appendix.

Although the Justices did not dispute that the officers sat outside the house, they did disagree as to whether the thermal imager acquired information emanating from the house or information that was inside the house. Justice Scalia first characterized the imager as coming inside the house; and then he characterized heat levels as "intimate" information because, under his bright-line construction, any information about the house that is "safe from the prying government eyes" constitutes "intimate" information.\textsuperscript{364} In contrast, Justice Stevens viewed the heat levels as nonintimate information available outside the house and thus in the public arena.\textsuperscript{365} One way of understanding these contrary characterizations is to look at the precedents that the Justices cited and discussed as well as those that they failed to cite and discuss.

To support his characterization of heat levels as nonintimate information arising outside the house, Justice Stevens' cited three cases never mentioned by Justice Scalia—\textit{Place}, the drug-sniffing dog case, \textit{Jacobsen}, the field-testing of a white power case, and \textit{Greenwood}, the trash case.\textsuperscript{366} In each of these cases, the Court held that no "search" occurred.\textsuperscript{367} As previously discussed, one may view both \textit{Place} and \textit{Jacobsen} as cases falling within the \textit{sui generis} paradigm, a perspective not applied by Justice Scalia probably because of his strong litany, "this is the home under surveillance," evidencing a distinction of constitutional magnitude for Justice Scalia. Justice Stevens compared "heat waves" to "aromas" arising "in a kitchen, or in a laboratory, or opium den."\textsuperscript{368} For Justice Stevens, a person could not have a subjective expectation of privacy in the air in these circumstances.\textsuperscript{369} Just as in

\textsuperscript{363} \textit{Id.} at 50 (Stevens, J., dissenting).
\textsuperscript{364} \textit{Id.} at 38-39.
\textsuperscript{365} \textit{Id.} at 41-43 (Stevens, J., dissenting).
\textsuperscript{366} For a discussion of these cases, see \textit{supra} text accompanying notes 342-46, 357.
\textsuperscript{367} \textit{Id.}
\textsuperscript{368} \textit{Kyllo}, 533 U.S. at 43-44 (Stevens, J., dissenting).
\textsuperscript{369} \textit{Id.} (Stevens, J., dissenting).
Place, where a drug-detecting dog sniffed the air in an area historically imbued with privacy, the officers used a thermal imager to capture what was in the air. Justice Stevens also referred to Jacobsen for the proposition that the Fourth Amendment is not applicable when “the countervailing privacy interest is at best trivial.” The homeowner, according to Justice Stevens, could have simply made sure that his home was “well insulated.” Justice Stevens also invoked Greenwood to compare heat loss to discarded trash bags—both are simply waste.

In contrast, the precedent framing Justice Scalia’s analysis was the “search” jurisprudence decided before Katz, a case that Justice Scalia had previously criticized as providing “a notoriously unhelpful test,” a “self-indulgent test” that allowed the justices to subjectively decide what was “reasonable privacy.” For Scalia, history and the common law were important, but not dispositive, references in determining whether a “search” had occurred. Scalia extensively cited and discussed the pre-Katz trespass paradigm, yet he admitted that the Court had “decoupled” trespass doctrines with resolution of the Fourth Amendment “search” issue. He nevertheless invoked the old cases to support his view that the home was a “constitutionally protected area.” To this old doctrine, he explicitly added a factor that could erode privacy in the home, questioning whether the technology used by the government was generally available to the public. Because he characterized the imager as not in general public use and the information as coming from inside the home, the officials violated the homeowner’s privacy.

Considering whether the public used a particular type of technology was not a new topic for the Court, but rather one

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370 Id. at 44-45 (Stevens, J., dissenting).
371 Id. (Stevens, J., dissenting).
372 Id. at 43-45 (Stevens, J., dissenting).
374 Kyllo, 533 U.S. at 31-32.
375 Id. at 34 (citing Silverman v. United States, 365 U.S. 505, 512 (1961)).
376 Id.
377 Id. at 39.
made as an explicit factor by Justice Scalia. Determining that
the general public did not have access to this technology, Jus-
tice Scalia declared that he was "quite confident[]" in his as-
seSSment;378 Justice Stevens, in contrast, roughly estimated
the number of thermal imagers already in the stream of com-
merce.379 He also questioned the wisdom of creating "general
use" as an explicit factor, one with the potential to seriously
erode privacy each year in light of emerging technologies.380

With different degrees of concern about emerging technolo-
gies, Justices Scalia and Stevens also wrote opinions with dra-
matically different breadths. Justice Scalia offered a con-
struction of the Fourth Amendment quite protective of the home as
long as the Court characterizes the general public as not hav-
ing access to the technology employed by the officials. He cited
new technologies that could destroy privacy in the home by
"seeing" through walls.381 Justice Stevens instead offered a
new, but narrower, construction for safeguarding the home; he
distinguished between information derived from "off-the-wall'
surveillance" and "through-the-wall" surveillance.382 For Jus-
tice Stevens, the officers in this case received information out-
side the house by "off-the-wall" surveillance. The integrity of
the home was not in issue because the thermal imager did not
see through the wall. Justice Stevens sought to support his
dichotomy between off- and through-the walls by citing the
view of what the Framers intended. He viewed the Framers as
chiefly concerned with the "evil" of "physical entry into the
home."383 Because he did not view the thermal imager as in-
volving anything inside the house, he concluded that there was
no "search."384

378 Id. at 39 n.6.
379 Id. at 50 n.5 (Stevens, J., dissenting).
380 Id. at 47.
381 Id. at 35-36.
382 Id. at 46 (Stevens, J., dissenting).
383 See also id. (stating that the "interest in concealing the heat escaping from
one's house pales in significance to the 'chief evil against which the wording of
the Fourth Amendment is directed,' the 'physical entry of the house'") (quoting
United States v. United States Dist. Court for E. Dist. of Mich., 407 U.S. 297,
313 (1972)).
384 Id. (Stevens, J., dissenting).
Both Justices also invoked classic slippery slope arguments to support their construction of what constitutes a Fourth Amendment "search" when officials use new technology. Justice Scalia characterized the thermal imager as being able to disclose "at what hour each night the lady of the house takes her bath." This image, when combined with his reference to technology that may someday allow a person to "see" through walls, invokes fear that the home will no longer be private. In contrast, Justice Stevens invoked the fear of not being able to allow officials to use sense-enhancing equipment to "detect the odor of deadly bacteria or chemicals for making a new type of high explosive" or to protect communities from "radioactive emissions." For him, the air analysis in *Place* was an appropriate model for understanding the thermal imager and emerging technology. He explicitly declared "a strong public interest" in allowing officials to detect harmful emissions without Fourth Amendment restraints in order to protect communities.

With these contrasting characterizations of what was at issue in *Kyllo*, ironically both opinions cited the important public exposure decision of *Smith v. Maryland*, the pen register case. Justice Scalia briefly described it for the proposition that governmental officials do not necessarily engage in a "search" when they view information about the home or curtilage. He then cited *Ciraolo* and *Riley*, cases in which officials did not conduct a "search" by flying over a home and its curtilage to visually observe the area. For Justice Stevens, the information that officials get from a pen register (or a thermal imager in this case) is "indirect." Because

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385 Id. at 38.
386 Id. at 48 (Stevens, J., dissenting).
387 Id. at 45.
388 Id. at 47-48.
389 Id. at 45.
390 See id. at 33; see also id. at 44.
391 Id. at 34.
394 *Kyllo*, 533 U.S. at 33.
395 Id. at 44-45 (Stevens, J., dissenting).
Justice Scalia did not overrule Smith, officials will still argue that the information they gathered from the home was “exposed” to a third party. Like the general public use question, the issue of “public exposure” is a malleable one, for one could view the homeowner as exposing his heat to the public just as he allegedly “exposed” his numbers to the public by allowing the telephone company to record this information. In short, one can easily argue that great tension exists between the analysis in Kyllo and Smith.

In the end, the numerous contrasting characterizations in Kyllo give the Court many options for writing future Fourth Amendment decisions as to the government’s use of technology. The possibility of multiple constructions of what constitutes a Fourth Amendment “search” resonates with postmodern perspectives, particularly the perception that no grand theory exists to unify the legal arena. The Kyllo decision—perhaps like few others—so easily allows us to view the shifting constructions of the Fourth Amendment.

V. CONCLUSION

Since the adoption of the Fourth Amendment in 1791, the United States Supreme Court has repeatedly faced the question of how to interpret the Fourth Amendment when officials use new technology. The Court initially looked to property law when considering whether officials had acted unlawfully in listening to telephone conversations. In 1967, the Court in Katz explicitly declared a new paradigm for its “search” doctrine because it could no longer “ignore the vital role that the public telephone [had] come to play in private communication.” It instead questioned whether the use of technology in the form of attaching an electronic bug to a public telephone booth invaded privacy. The Court’s declared shift from a property to a privacy perspective mirrored the Court’s shifting characterizations of which facts matter in a case. In time,

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396 Id. at 31-32.
398 See, e.g., Maclin, supra note 114, at 405 (characterizing the “Court’s method” for determining a “search” to be a “malleable, ad hoc test”).
Fourth Amendment scholars (and some Supreme Court justices) complained that the Fourth Amendment jurisprudence was simply a "mess." 399

One way to comprehend this "mess" is through the lens of postmodernism, which offers multiple perspectives on a given issue. In short, postmodernism anticipates the interpretive shifts, turns and "about-faces" in constructed legal doctrines. It also questions constructed doctrinal boundaries. For example, one may view an individual's interest in property, privacy, and personal security as encompassed by a single large circle. The "mess" may reflect the Court's selective highlighting (or selectively ignoring) certain aspects or issues within this broad sphere. 400 On the other hand, the "mess" may suggest that no "sphere" exists, except for the one constructed in a particular case. Under this view, the Court's "search" jurisprudence appears as a (constructed) fact-bound inquiry. Although the "mess" may reflect the Court's construction of an implicit spectrum for privacy, the Court's determination that no "search" occurred may signify that the officials' invasion of an individual's interest (whether in property, privacy or personal security) was at one end of the spectrum, representing nominal intrusions. Under this spectrum construction, the Court could later characterize a similar act to be a "search" because of how it characterizes additional factors, with the Court viewing the individual's interest as on another part of the spectrum. Other

399 In his essay for this symposium issue, Professor Clancy highlighted the malleability of the Court's "search" jurisprudence:

The Court's expectation of privacy analysis has many flaws... It accordingly leaves the fluid concept of privacy to the vagaries of shifting Court majorities, which are able to manipulate the concept to either expand or contract the meaning of the word at will. Indeed, it is difficult—if not impossible to say exactly what the word means. Thus, while a liberal Court substituted privacy in lieu of property analysis to expand protected interests, a conservative Court has employed privacy analysis as a vehicle to restrict Fourth Amendment protection.


400 For example, even when the Katz Court announced a privacy focus for a Fourth Amendment "search," it nevertheless added in a footnote that the Fourth Amendment protects property as well as privacy. Katz, 389 U.S. at 350 n.4.
metaphorical constructions of the Court’s “search” jurisprudence are possible because postmodernism allows us to view the Court’s “search” jurisprudence from many perspectives, as it rejects the notion of a grand legal theory that acts as a restraint in decisionmaking.

The *Katz* “search” standard questioned whether a person subjectively and reasonably expected privacy. In applying this standard, the Court constructed several different views for officials’ using sensory-enhancing devices. For example, it declared that officials’ enhancing their visual capacities did not constitute a “search” unless the device recorded the presence of an object in the home for a lengthy period. Contrasting this wide breadth for technically enhanced visual surveillance was the Court’s narrow view for officials’ using their hands to “squeeze” luggage, a “search” not using technology. Tactile observation such as “squeezing” soft-sided luggage, was a “search” in part because the Court characterized it as more invasive than visual surveillance.

The Court also framed the public exposure strand of *Katz* differently, distinguishing between “private” information and “public” information. To illustrate, few people have access to an expensive map making camera; yet, for the Court, when officials flew over an industrial complex, the Court characterized map making technology as in the public domain, undermining an individual’s expectation of privacy. In contrast, the Court held that a “search” occurred when officials “squeezed” soft luggage on a bus even though the traveling public routinely handles the luggage of fellow travelers. The Court created a narrower frame for tactile observation by questioning whether the public routinely touches luggage in an “exploratory manner.”

The Court also created a special category for drug-detecting dogs sniffing luggage; this enhancement of officials’ ability to smell drugs was not a “search.” The Court did not question whether the public routinely uses dogs to sniff the luggage of other passengers; instead, the Court constructed a special *sui generis* class for this type of sense enhancement, characterizing the intrusion as minor, disclosing only limited information. By constructing an analogy to this “unique” class, the Court later
extended this *sui generis* approach to the field testing of drugs.

The Court’s latest chapter in the book of “search” jurisprudence—*Kyllo v. United States*—prominently reveals the Justices’ conflicting characterizations of officials’ using technology to investigate criminal activity. With some articulated limitations, a majority of the Court returned to the notion of a “constitutionally protected area,” a prominent issue under its prior property paradigm. Five Justices held that officers conducted a “search” when using a thermal imager to scan Kyllo’s home from a vehicle on public streets in front of and behind the house.\(^\text{401}\) Although the imager measured heat loss, this emission was not “waste” or trash for the majority. (The dissent, in contrast, cited precedent that indicated that no “search” occurred when officials rummaged through opaque trash bags left outside the curtilage.)\(^\text{402}\) Nor was the emission like the aroma arising from luggage exposed to dogs at an airport. (The majority did not refer to cases involving the *sui generis* paradigm—dog sniffs or field drug testing; the dissent did discuss this precedent.)\(^\text{403}\) To protect privacy, the majority declared that all information shielded from the public’s eye in the home was intimate, subject to Fourth Amendment protection, as long as the general public did not have access to the particular technology used by officials.\(^\text{404}\) The majority viewed the thermal imager as revealing “intimate” information inside the home and characterized the public as not having access to thermal imagers.\(^\text{405}\) (The dissent characterized the information as arising outside the home, questioned the creation of “public access” as an explicit factor and viewed the public as having access to thermal imagers.)\(^\text{406}\)

The *Kyllo* majority thus built within its new “search” jurisprudence a question with an evolving response: whether the general public has access to the technology used by officials. The question of public access, when considered with the Court’s

\[^\text{401}\] *Kyllo*, 533 U.S. at 41.
\[^\text{402}\] Id. at 42 n.2.
\[^\text{403}\] See id. at 47-48 (Stevens, J., dissenting).
\[^\text{404}\] Id. at 37-38.
\[^\text{405}\] Id. at 34-35.
\[^\text{406}\] Id. at 42-43.
general public exposure cases, will keep unsettled what is "public" and what is "private" information. The difficulty of drawing analogies from precedent discussing "public" exposure still remains, particularly when one compares the Kyllo decision with Smith, a case cited by both the majority and dissenting opinions in Kyllo. In Smith, officers installed a pen register at a telephone company to record the local numbers a person dialed in his home. In Smith, the Court held that the use of the pen register was not a "search; in Kyllo, the use of the thermal imager on the public streets to detect heat loss was a "search." Even though the Kyllo majority cited Smith, the two cases seem in great tension: the Smith Court characterized the homeowner as voluntarily exposing the numbers dialed in the privacy of his home to the "public"; the Kyllo Court characterized the homeowner as retaining a privacy interest in not having officials learn of heat loss from this home. The Kyllo Court admitted that the "search" jurisprudence at times reflects backwards reasoning, determining that no "search" occurred in order to avoid applying other Fourth Amendment doctrines.

Even though the Kyllo majority explicitly identified public use as a factor, the Court could nevertheless emphasize different facts in the next "search" case involving the home. Alternatively the Court could construct a new paradigm, just as it did in Katz, when it held that its prior standard failed to consider the current role of technology in society. The modern Court may view itself as similarly situated to the Katz Court;

407 See id. at 33; see also id. at 44 (Stevens, J., dissenting).
409 Smith, 442 U.S. at 746-47.
410 Kyllo, 533 U.S. at 40.
411 See generally Bd. of Ed. v. Earls, 122 S. Ct. 2559 (2002) (upholding drug testing of students' engaging in extracurricular activities). In Earls, the Court interpreted Vernonia School Dist. 47J v. Acton, 515 U.S. 646 (1995), which upheld the public schools' drug testing of athletes. Earls, 122 S. Ct. at 2560. Even though Vernonia extensively described the special risks that athletes face when they take drugs, the Earls Court stated that the distinction between athletes and other students engaging in extracurricular activities was not "essential" to its decision in Vernonia. Id. at 2561. Instead, the Court characterized Vernonia as focusing on the schools' responsibility and custodial duties. Id. at 2569.
Katz discarded Olmstead,\textsuperscript{412} a case in which the Court held that the wiring tapping of a telephone in a home was not a "search" because no trespass occurred.\textsuperscript{413} The modern Court may implicitly (or explicitly) discard the Katz standard, again viewing changes in technology and changes in society as requiring a different paradigm for constructing a Fourth Amendment "search." Such doctrinal changes from postmodernist perspectives do not compel us to cast aspersions on the Court, but rather to reflect on the inherent nature of constructed legal doctrines and their relationship to an evolving society.

\textsuperscript{412} Olmstead v. United States, 277 U.S. 438 (1928).

\textsuperscript{413} Katz, 389 U.S. at 353.