A Liberal House Divided: How the Warren Court Dismantled the Fourth Amendment

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This article examines the decisions in which a liberal majority on the Warren Court replaced traditional theories of the Fourth Amendment with new doctrines that weakened constitutional protections of privacy, property, and liberty. The text of the Fourth Amendment prohibits unreasonable searches and seizures of persons and of three broad categories of property: papers, houses, and effects. From 1886 until the 1960s, the Supreme Court explicitly employed interpretive theories grounded in the text's emphasis upon property—although with notable inconsistency. In some contexts, these theories erected powerful limits on government power. In other contexts, the Court's constricted literalism insulated government surveillance from constitutional scrutiny. During the 1960s, liberals on the Warren Court began to dismantle the link between property law and Fourth Amendment rights, and to replace that traditional construct with a privacy-based theory of the Amendment. For several of these justices a fundamental goal was to impose constitutional constraints upon the use of intrusive modern technologies. In a series of decisions, the Court replaced traditional theories that both imposed procedural requirements and enforced property-based substantive rights with a new, if incoherent, emphasis upon "privacy" as the core Fourth Amendment value. This new approach, particularly as articulated by Justice Brennan, erroneously concluded that the procedural protections contained in the Warrant Clause and enforced by the exclusionary remedy were adequate to protect Fourth Amendment rights. The result has been an erosion of individual rights that can be directly traced to the application of these "liberal" theories.

Histories of the Supreme Court's interpretive theories of the Fourth Amendment inevitably include some version of the following claims: From the late nineteenth century until the 1960s, the Supreme Court deployed concepts linked to property law to interpret the scope and nature of the Fourth Amendment right to be free from unreasonable searches (and seizures of property). During the 1960s, the liberals on the Warren Court began to dismantle the link between property law and Fourth Amendment rights, and to replace that traditional construct with a privacy-based theory of the Amendment. One of the liberal justices' goals was to impose constitutional constraints upon the use of intrusive modern technologies, which were largely unregulated by the Fourth Amendment following the Court's famous

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Olmstead decision.[1] This effort culminated in *Katz v. United States*,[2] where the Court replaced property-based theories with a two-part expectation-of-privacy test initially articulated in Justice Harlan's concurring opinion.[3]

This conventional story has achieved totemic status in Fourth Amendment judicial decision making, in part because it has freed judges from the constraints of discretion-limiting rules. This has been an unfortunate development. In the hands of the Supreme Court justices, the so-called two-part expectation-of-privacy test has evolved into a flexible standard that allows them to rely on little more than their idiosyncratic views when deciding cases.[4] It has permitted those who reject—at least rhetorically[5]—the interpretive tradition grounded in property law to ignore the positive elements of that tradition.[6] Ironically, the "*Katz* test" has not proven to be an effective device for protecting personal privacy against technological intrusions, but has typically been applied in ways that, like the old *Olmstead* trespass and tangible property rules, permit government actors to employ technological devices to pry into the lives of the people largely unconstrained by constitutional rules.[7]

These developments have been epistemologically possible because judges (and the scholars who interpret their work) repeatedly have misconstrued the Court's opinion in *Katz*. Justice Stewart's majority opinion did not announce the simplistic two-part expectation-of-privacy standard that has been applied mechanically in subsequent cases. Instead, it should be understood as an attempt to resolve a complex theoretical debate carried on within the Court's liberal wing throughout the 1960s.

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[1] Olmstead v. United States, 277 U.S. 438 (1928).

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

[3] The sources describing this conventional wisdom are so numerous, and so well-known to the likely readers of this article, that they do not require listing here. For the reader interested in recent articles that critique this conventional wisdom and its sources, see Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801 (2004) (asserting that the Court actually relies upon property rather than privacy in deciding many cases, and arguing for legislative rather than judicial interpretation of the use of new technologies); Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307 (1998) (asserting that the Fourth Amendment's text, history, and background justifications teach that a superior analytical theory should emphasize the right to be "secure" protected by the Fourth Amendment); George C. Thomas III, *Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451 (2005) (arguing that the right to be "secure" guaranteed by the Fourth Amendment is not forfeited until an individual knowingly exposes words or property to the public at large).

[4] Minnesota v. Carter, 525 U.S. 83, 96 (1998) (Scalia, J., concurring); Morgan Cloud, *Pragmatism, Positvism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 250 (1993).

[5] Soldal v. Cook County, 506 U.S. 56 (1992); Kerr, *supra* note 3.

[6] *See* Clancy, *supra* note 3; Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555 (1996).

[7] *See* Cloud, *supra* note 4; Kerr, *supra* note 3; Thomas, *supra* note 3.

That debate is the subject of this article. The article does not focus upon how every Supreme Court justice voted in every case nor upon the outcomes of all Fourth Amendment cases decided during the 1960s. Instead, it examines competing theories asserted by four liberal justices about an interrelated set of fundamental questions of constitutional interpretation applied in the Fourth Amendment context. Each of the four justices at the center of this debate has been celebrated as a defender of individual liberties, but the analysis presented in this article leads to some surprising conclusions about the theories advocated by each of them .

Justices Black and Douglas, both of whom had been appointed during the New Deal, wrote opinions—generally in dissent—arguing in favor of competing interpretive theories that had been part of the Court's jurisprudence for much of the twentieth century, but they often advocated dramatically different positions. Justice Black *usually* advocated a theory consistent with his textualist proclivities in constitutional interpretation, particularly as expressed in his theory of total incorporation of the Bill of Rights. In the context of technological searches, Black's arguments favored the textual literalism of the *Olmstead* decision.

Justice Douglas, in contrast, attempted to preserve the theories that had prevailed in Fourth Amendment theory before *Olmstead*. These theories embraced an expansive, rights-oriented vision of the Bill of Rights that construed the Fourth and Fifth Amendments together to protect privacy and liberty. This vision, first announced in *Boyd v. United States*,[8] was one source of Justice Douglas' non-literalist approach to interpreting the constitutional text, epitomized by the penumbral rights theory he announced in *Griswold v. Connecticut*.[9]

The impact of Justice Brennan's opinions is perhaps the most unexpected. Although Justice Brennan has been one of the twentieth century justices most revered by civil libertarians, his most important Fourth Amendment opinions during the 1960s were central to the revolution in constitutional theory that led to the post-*Katz* constriction of individual rights and the concomitant expansion of government power. The first of these opinions, *Schmerber v. California*,[10] was central to the decision-making process by which the Warren Court abandoned an eighty-year-old theory of penumbral rights that linked the Fourth and Fifth Amendments, a linkage that supported the very notions of privacy Brennan typically supported. The second, *Warden v. Hayden*[11]—not *Katz*—was the opinion that actually shattered the link between property and Fourth Amendment rights, and in the process eviscerated the long held view that the Fourth Amendment protected substantive as well as procedural rights. According to Brennan, the procedural devices embodied in the warrant process supplied adequate protection

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[8] 116 U.S. 616 (1886).

[9] 381 U.S. 479 (1965).

[10] 384 U.S. 757 (1966).

[11] 387 U.S. 294 (1967).

of Fourth Amendment privacy.[12] As the Court's subsequent decisions have demonstrated, he was wrong.

Justice Stewart who, like Brennan, was a 1950s Eisenhower appointee to the Court, joined in opinions authored by other justices that advocated some of the traditional theories abandoned during the 1960s.[13] But also like Justice Brennan, his most important Fourth Amendment opinions during the 1960s were essential to the dismantling of these doctrines. His opinions for the Court in *Hoffa v. United States*[14] and *Katz v. United States*[15] confirmed that the Court had abandoned penumbral theories of the Fourth and Fifth Amendments, and in *Katz*, that privacy had supplanted property at the center of Fourth Amendment theory.

Stewart's most famous Fourth Amendment opinion is, of course, *Katz*. This is the most theoretically complex opinion discussed in this article because in many ways it represents a culmination of a debate carried on within the Court throughout the preceding decade. Stewart tried to craft a sophisticated and relatively complex formula that would vest the people with significant authority over the existence of privacy. This attempt to establish a new theoretical regime in Fourth Amendment jurisprudence was not manufactured out of whole cloth. It was a response to, and in some regards a synthesis of, competing theories articulated in earlier opinions by Justices Brennan, Douglas, Black, and Stewart himself, and undoubtedly was an attempt to craft a coherent vision of the rights protected by the Fourth Amendment in an age of technological surveillance.

To appreciate the complexity of the debate that Justice Stewart attempted to resolve in *Katz*, it is necessary to examine the opposing theories advocated by each of these justices during the 1960s. We begin with Justice Black.

I. JUSTICE BLACK: CONSTITUTIONAL TEXTUALISM AND INTERPRETIVE INCONSTANCY

Justice Black wrote two important dissenting opinions during the 1960s in which he opposed Supreme Court decisions imposing Fourth Amendment constraints upon electronic eavesdropping by government agents. In these dissents, he frequently adhered to the Court's reasoning in *Olmstead*, which was rooted in a version of textual literalism. Unlike the *Olmstead* decision and its progeny, however, Justice Black argued that a literal interpretation of constitutional

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[12] Warden v. Hayden, 389 U.S. 294 (1967). The right to "privacy" had been described as a Fourth Amendment value earlier in the 1960s, but in limited contexts that are not incompatible with the traditional property and penumbral theories. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 655 (1961).

[13] The discussion in this article generally focuses on the positions articulated in opinions—whether majority, dissenting, or concurring—penned by each justice. Given the variety of reasons that might motivate a justice to concur in an opinion written by another justice, the substance of opinions usually is not attributed to a justice who simply concurred in another justice's opinion.

[14] 385 U.S. 293 (1966).

[15] 389 U.S. 347 (1967).

provisions crafted to protect privacy and liberty actually enhanced individual rights. To understand Justice Black's theories of textual literalism in the Fourth Amendment context, it is helpful to discuss them within the context of his well-known theories about the relationship of the Bill of Rights to the Fourteenth Amendment Due Process Clause. He supported a theory of total incorporation by which the Fourteenth Amendment absorbed the specific provisions contained in the text of the Bill of Rights, while he rejected the idea that due process also incorporated unenumerated fundamental rights.

The clearest statement of Justice Black's total incorporation theory is his dissent in *Adamson v. California*,[16] where he claimed that the Fourteenth Amendment's framers intended to incorporate the full Bill of Rights into the meaning of due process.[17] Defining due process in terms of the rights specifically defined in the text of the original Amendments served important instrumental functions in Black's theory. In particular, it constrained the power of judges to impose their subjective preferences upon the polity.

> [T]he "natural law" formula which the Court uses to reach its conclusion in this case should be abandoned as an incongruous excrescence on our Constitution. I believe that formula to be itself a violation of our Constitution, in that it subtly conveys to courts, at the expense of legislatures, ultimate power over public policies in fields where no specific provision of the Constitution limits legislative power.[18]

Black's theory was animated by more than an aversion to the unlimited exercise of judicial discretion. He argued that the text of the Bill of Rights—rather than the subjective preferences of the justices—supplied more effective mechanisms for protecting individual rights.

> I cannot consider the Bill of Rights to be an outworn 18th Century "strait jacket". . . . Its provisions may be thought outdated abstractions by some. And it is true that they were designed to meet ancient evils. But they are the same kind of human evils that have emerged from century to century wherever excessive power is sought by the few at the expense of the many. In my judgment the people of no nation can lose their liberty so long as a Bill of Rights like ours survives and its basic

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[16] Adamson v. California, 332 U.S. 46, 71–72 (1947).

[17] See *Adamson*, 332 U.S. at 71–72 (Black, J., dissenting):

> My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states.

[18] *Id.* at 75.

> purposes are conscientiously interpreted, enforced and respected so as to afford continuous protection against old, as well as new, devices and practices which might thwart those purposes. I fear to see the consequences of the Court's practice of substituting its own concepts of decency and fundamental justice for the language of the Bill of Rights as its point of departure in interpreting and enforcing that Bill of Rights. . . . To hold that this Court can determine what, if any, provisions of the Bill of Rights will be enforced, and if so to what degree, is to frustrate the great design of a written Constitution.
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> Since *Marbury* v. *Madison*, was decided, the practice has been firmly established, for better or worse, that courts can strike down legislative enactments which violate the Constitution. This process, of course, involves interpretation, and since words can have many meanings, interpretation obviously may result in contraction or extension of the original purpose of a constitutional provision, thereby affecting policy. But to pass upon the constitutionality of statutes by looking to the particular standards enumerated in the Bill of Rights and other parts of the Constitution is one thing; to invalidate statutes because of application of "natural law" deemed to be above and undefined by the Constitution is another. "In the one instance, courts proceeding within clearly marked constitutional boundaries seek to execute policies written into the Constitution; in the other, they roam at will in the limitless area of their own beliefs as to reasonableness and actually select policies, a responsibility which the Constitution entrusts to the legislative representatives of the people."[19]

Black's rationale for relying on the specific provisions of the Bill of Rights, rather than the "fundamental rights" approach adopted by Supreme Court majorities during the first six decades of the twentieth century, was motivated in part by concerns about unconstrained judicial power, and in part by concerns about the preservation of individual liberty.[20] He expressed these same concerns when

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[19] *Id*. at 89–92 (citations omitted).

[20] One also hears loud echoes of the debate over substantive due process theory, a debate that reached its penultimate moment with President Roosevelt's Court-packing scheme, a scheme hatched the year after Black's appointment to the Supreme Court. Justice Black raised the specter of the *Lochner* era directly in his dissenting opinion in *Griswold v. Connecticut*:

> The Due Process Clause with an "arbitrary and capricious" or "shocking to the conscience" formula was liberally used by this Court to strike down economic legislation in the early decades of this century, threatening, many people thought, the tranquility and stability of the Nation. *See, e.g.*, *Lochner* v. *New York*. That formula, based on subjective considerations of "natural justice," is no less dangerous when used to enforce

interpreting the Fourth Amendment during the 1960s. Black's textualism sometimes led him to favor restrictions on government power, but in the context of technological searches his theory permitted the unrestrained government power first sanctioned by the Court in *Olmstead*.

Justice Black dissented in both *Katz* and *Berger v. New York*,[21] the two 1967 decisions imposing new Fourth Amendment standards to electronic monitoring of conversations. Black's most extensive analysis was presented in *Berger*, and the discussion here will focus on that opinion.

In *Berger*,[22] the Court found, in facial violation the Fourth Amendment,[23] a New York "eavesdropping statute which permits its judges to authorize state officers to place on other people's premises electronic devices that will overhear and record telephonic and other conversations for the purpose of detecting secret crimes and conspiracies and obtaining evidence to convict criminals in court."[24] The majority decision assumed that the Fourth Amendment protected conversational privacy from electronic eavesdropping. This is noteworthy for two reasons relevant to this article. First, because *Berger* was decided a term earlier than *Katz*, it is clear that *Katz* was not the opinion in which the Warren Court liberals established that privacy was the Fourth Amendment value implicated by electronic eavesdropping. Second, the majority's reliance upon privacy provoked a lengthy dissent from Justice Black, in which he advocated a Fourth Amendment textualism that would have left *Olmstead* undisturbed. He embraced *Olmstead* explicitly and argued that the text of the Amendment did not regulate eavesdropping—electronic or otherwise:

> While the electronic eavesdropping here bears some analogy to the problems with which the Fourth Amendment is concerned, I am by no means satisfied that the Amendment controls the constitutionality of such eavesdropping. As pointed out, the Amendment only bans searches and seizures of "persons, houses, papers, and effects." This literal language imports tangible things, and it would require an expansion of the

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> this Court's views about personal rights than those about economic rights. I had thought that we had laid that formula, as a means for striking down state legislation, to rest once and for all in cases like *West Coast Hotel Co.* v. *Parrish*, *Olsen* v. *Nebraska ex rel. Western Reference & Bond Assn.*, and many other opinions. . . .
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> . . . [My concurring Brethren] . . . would reinstate the *Lochner*, *Coppage*, *Adkins*, *Burns* line of cases, cases from which this Court recoiled after the 1930s, and which had been I thought totally discredited until now.

Griswold, 381 U.S. at 522–24 (Black, J., dissenting) (citations omitted).

[21] 388 U.S. 41 (1967).

[22] *Id.*

[23] *Id.* at 43.

[24] *Id.* at 70 (Black, J., dissenting).

> language used by the framers, in the interest of "privacy" or some equally vague judge-made goal, to hold that it applies to the spoken word. It simply requires an imaginative transformation of the English language to say that conversations can be searched and words seized.[25]

The Court's opinion in *Olmstead* held that the Fourth Amendment only applied to searches and seizures of tangible things. This aspect of the *Olmstead* opinion had effectively insulated electronic eavesdropping of conversations from constitutional scrutiny,[26] at least if the surveillance was accomplished without a physical trespass upon someone's property. According to the analysis in *Olmstead*, a trespass into a constitutionally protected area could convert an otherwise constitutional technological surveillance into a Fourth Amendment violation, but the converse was true, as well. Absent a physical trespass, electronic surveillance could be used indiscriminately. Black argued that this restriction on the scope of the Fourth Amendment should be preserved.

> This case deals only with a trespassory eavesdrop, an eavesdrop accomplished by placing "bugging" devices in certain offices. Significantly, the Court does not purport to disturb the *Olmstead-Silverman-Goldman* distinction between eavesdrops which are accompanied by a physical invasion and those that are not. . . . [A]t least certain types of electronic eavesdropping, until today, were completely outside the scope of the Fourth Amendment. . . . In failing to distinguish between types of eavesdropping . . . the Court's opinion leaves the definite impression that all eavesdropping is governed by the Fourth Amendment. Such a step would require overruling of almost every opinion this Court has ever written on the subject.[27]

Finally, Justice Black opposed the majority's reliance on "privacy" to define the scope of Fourth Amendment rights. To him, this represented the kind of unconstrained judicial action that his textualist theories ostensibly restrained.[28]

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[25] *Id*. at 78 (Black, J., dissenting).

[26] Black quoted a passage directly from *Olmstead* to make this point:

> Justice Bradley in the *Boyd* case, and Justice Clark[e] in the *Gouled* case, said that the Fifth Amendment and the Fourth Amendment were to be liberally construed . . . . But that can not justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight.

Id. at 78 (Black, J., dissenting) (quoting *Olmstead*, 277 U.S. at 465).

[27] *Id.* at 81–82 (Black, J., dissenting).

[28] Black repeatedly stressed his concerns about the exercise of judicial power. For example:

> As I see it, the differences between the Court and me in this case rest on different basic beliefs as to our duty in interpreting the Constitution. This basic charter of our

Black was particularly contemptuous of the idea that "the wise Framers of the Fourth Amendment would ever have dreamed about drafting an amendment to protect the 'right of privacy.'" [29] Importing notions of privacy into Fourth Amendment theory was pernicious, because privacy

> like a chameleon, has a different color for every turning. In fact, use of "privacy" as the keyword in the Fourth Amendment simply gives this Court a useful new tool, as I see it, both to usurp the policy-making power of the Congress and to hold more state and federal laws unconstitutional when the Court entertains a sufficient hostility to them.[30]

For nearly four decades, Black's version of textualism had represented the Court's position on the relationship—or lack of it—between the Fourth Amendment and government use of technology to obtain information, but by 1967 privacy had emerged as an organizing principle in Fourth Amendment theory. A

> Government was written in few words to define governmental powers generally on the one hand and to define governmental limitations on the other. I believe it is the Court's duty to interpret these grants and limitations so as to carry out as nearly as possible the original intent of the Framers. But I do not believe that it is our duty to go further than the Framers did on the theory that the judges are charged with responsibility for keeping the Constitution "up to date."

Id. at 87.

[29] *Id*. at 77.

[30] *Id*. Of course, Black's claim that the text provides explicit guidance for interpreters of the Constitution is suspect. The terms of the specific provisions of the Bill of Rights are themselves sufficiently ambiguous to permit different interpretations of their meaning. Consider Justice Harlan's rejoinder in *Griswold v. Connecticut*:

> While I could not more heartily agree that judicial "self restraint" is an indispensable ingredient of sound constitutional adjudication, I do submit that the formula suggested for achieving it is more hollow than real. "Specific" provisions of the Constitution, no less than "due process," lend themselves as readily to "personal" interpretations by judges whose constitutional outlook is simply to keep the Constitution in supposed "tune with the times". . . .
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> Judicial self-restraint will not, I suggest, be brought about in the "due process" area by the historically unfounded incorporation formula long advanced by my Brother Black, and now in part espoused by my Brother Stewart. It will be achieved in this area, as in other constitutional areas, only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms. *See Adamson* v. *California*, (Mr. Justice Frankfurter, concurring). Adherence to these principles will not, of course, obviate all constitutional differences of opinion among judges, nor should it. Their continued recognition will, however, go farther toward keeping most judges from roaming at large in the constitutional field than will the interpolation into the Constitution of an artificial and largely illusory restriction on the content of the Due Process Clause.

Griswold, 381 U.S. at 501–02 (Harlan, J., concurring) (citation omitted).

few months after its decision in *Berger*, the Court re-emphasized this point in its famous *Katz* decision.[31] Most of Justice Black's dissenting opinion in *Katz* simply reiterated the main themes of his *Berger* dissent,[32] and do not warrant repeating here.[33] What does warrant repeating is the historical significance of the position staked out by Black. He had made himself the 1960s champion of a theory of constitutional interpretation that shrank the "zone of privacy" protected by the Fourth Amendment to its conceptual minimum, at least when the government monitored one type of oral communication: conversations.

This contrasts sharply with Black's interpretation of the Fifth Amendment privilege against self-incrimination, which he was willing to extend to its conceptual maximum. Black's Fifth Amendment theories are relevant here for two reasons. First, the contrast between his Fourth Amendment and Fifth Amendment theories emphasizes the complexity of the debate about rights carried on within the liberal wing of the Warren Court. Each justice advocated different and sometimes conflicting constitutional theories in different settings. Second, it highlights the importance of the eighty-year-old link between the Fourth and Fifth Amendments that was terminated by Justice Brennan's opinion in *Schmerber v. California*[34] and Justice Stewart's opinion in *Hoffa v. United States*.[35]

Before *Schmerber* and *Hoffa* were decided in 1966, the Supreme Court had frequently interpreted the two clauses together to create a zone of constitutional

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[31] Katz v. United States, 389 U.S. 347 (1967).

[32] *Id.* at 365 (Black, J., dissenting):

> The first clause protects "persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." These words connote the idea of tangible things with size, form, and weight, things capable of being searched, seized, or both. The second clause of the Amendment still further establishes its Framers' purpose to limit its protection to tangible things by providing that no warrants shall issue but those "particularly describing the place to be searched, and the persons or things to be seized." A conversation overheard by eavesdropping, whether by plain snooping or wiretapping, is not tangible and, under the normally accepted meanings of the words, can neither be searched nor seized. In addition the language of the second clause indicates that the Amendment refers not only to something tangible so it can be seized but to something already in existence so it can be described. Yet the Court's interpretation would have the Amendment apply to overhearing future conversations which by their very nature are nonexistent until they take place.

[33] Black did add a wrinkle to his interpretation of *Olmstead*'s progeny. He argued that the post-*Olmstead* opinions upholding electronic eavesdropping had rested entirely on the Fourth Amendment's text, which only restricted intrusions upon tangible property and not listening to intangible conversations. The trespass doctrine was, therefore, at most dicta in the Court's opinions upholding electronic eavesdropping in the four decades preceding *Katz*. The trespass doctrine was relevant in other contexts, he acknowledged, but not in the Supreme Court opinions affirming the legality of electronic eavesdropping. *Katz*, 389 U.S. at 368–69 (Black, J., dissenting).

[34] 384 U.S. 757 (1966).

[35] 385 U.S. 293 (1966).

liberties broader than those protected by either amendment standing alone.[36] As we will see in more detail later,[37] *Schmerber* and *Hoffa* cleaved the two amendments, establishing that they were to be construed separately. Justice Black dissented in *Schmerber*, and it is not surprising that Justice Douglas, the most ardent advocate of penumbral theories of rights among the Warren Court liberals, joined this dissent, which argued for interpretive links between the Fourth and Fifth Amendments. Black began by addressing the narrower Fifth Amendment issue, and rejecting

> the Court's holding that California did not violate petitioner's constitutional right against self-incrimination when it compelled him, against his will, to allow a doctor to puncture his blood vessels in order to extract a sample of blood and analyze it for alcoholic content, and then used that analysis as evidence to convict petitioner of a crime.[38]

Justice Brennan's opinion for the Court reasoned that the Fifth Amendment protected only testimonial communications, and not tangible evidence like Schmerber's blood.

To reach the opposite conclusion, Black had to push the limits of the logic of the Fifth Amendment's language in ways he was unwilling to do with the Fourth Amendment only a year later in his *Berger* and *Katz* dissents. Compulsory blood testing was testimonial and communicative, according to Black, but not because the suspect was forced to testify against himself. The derivative testimony by prosecution witnesses served that function.

> In the first place it seems to me that the compulsory extraction of petitioner's blood for analysis so that the person who analyzed it could give evidence to convict him had both a "testimonial" and a "communicative nature." The sole purpose of this project which proved to be successful was to obtain "testimony" from some person to prove that petitioner had alcohol in his blood at the time he was arrested. And the purpose of the project was certainly "communicative" in that the analysis of the blood was to supply information to enable a witness to communicate to the court and jury that petitioner was more or less drunk.[39]

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[36] *See* Boyd v. United States, 116 U.S. 616 (1886); Weeks v. United States, 232 U.S. 383 (1914); Cloud, *supra* note 6.

[37] *See infra* notes 102–120 and accompanying text.

[38] *Schmerber*, 384 U.S. at 773 (Black, J., dissenting).

[39] *Id*. at 774 (Black, J., dissenting).

Black's objection to Justice Brennan's analysis rested in large part upon a lengthy panegyric to the *Boyd* decision.[40] This passage is remarkable because—less than a year before his defense of textualism in his *Berger* and *Katz* dissents—Black praised the *Boyd* opinion's rejection of textual literalism in its application of the Fifth Amendment to a civil proceeding. He began by asserting that "[t]he liberal construction given the Bill of Rights' guarantee in *Boyd* v. *United States* . . . makes that one among the greatest constitutional decisions of this Court;" then he emphasized that "*[o]bviously the Court's interpretation was not completely supported by the literal language of the Fifth Amendment. Recognizing this, the Court announced a rule of constitutional interpretation that has been generally followed ever since, particularly in judicial construction of Bill of Rights guarantees . . . .* " Finally, Black explicitly noted that the *Boyd* opinion applied the "s*ame constitutional interpretation to the search and seizure provisions of the Fourth Amendment . . . .*"[41]

Life is too variable to permit an intelligent judge to apply any interpretive theory with slavish consistency. But Justice Black's inconstancy boggles even the most flexible mind. In opinions separated by less than a year, he first urged judges to protect individual liberty by eschewing textual literalism when interpreting the Fourth and Fifth Amendments,[42] then urged with equal vigor that judges are bound by an extremely narrow textualism that restricts their power to enforce personal rights.[43] Perhaps the explanation for his extreme inconstancy lies in the realm of some pop gerontology that examines the justice's age, long tenure on the Court, and the regular rotation of a justice's law clerks. But there are more rational explanations for Justice Black's blatantly inconsistent positions.

For example, in his *Schmerber* dissent, Justice Black expressed a profound aversion to the direct use of physical power by the government to forcibly extract evidence from a person, evidence that would be used to deprive him of liberty, property, or even life. In contrast, the surreptitious gathering of information by eavesdropping (even when enhanced by twentieth century technologies not contemplated by the Framers) at issue in *Berger* did not involve government agents overbearing the will of the suspect. The criminal may have been foolish to speak about his crimes, but the government did not compel his words—or his blood—to be produced. He was convicted by evidence found as a result of his own voluntary acts of speaking, not by any form of government compulsion.

Although the distinction between voluntary acts and coercion may explain the inconsistencies discussed so far, another element of Black's *Schmerber* dissent

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[40] Boyd v. United States, 116 U.S. 616 (1886).

[41] *Schmerber*, 384 U.S. at 776–77 (Black, J., dissenting) (emphasis added).

[42] *See, e.g.*, *id.* at 778 (Black, J., dissenting) ("Believing with the Framers that these constitutional safeguards broadly construed by independent tribunals of justice provide our best hope for keeping our people free from governmental oppression, I deeply regret the Court's holding.").

[43] *See supra* text accompanying note 19.

defies this explanation. He endorsed *Boyd*'s penumbral theory linking the Fourth and Fifth Amendments together, which logically created the greatest protection for the manifestation of ideas, whether spoken or written. This may have been merely a rhetorical device to emphasize his objection to a system that permitted the forcible extraction of blood over the suspect's objection but prohibited the compulsory production of private papers:

> [The majority] concedes, as it must so long as *Boyd* v. *United States* stands, that the Fifth Amendment bars a State from compelling a person to produce papers he has that might tend to incriminate him. It is a strange hierarchy of values that allows the State to extract a human being's blood to convict him of a crime because of the blood's content but proscribes compelled production of his lifeless papers. Certainly there could be few papers that would have any more "testimonial" value to convict a man of drunken driving than would an analysis of the alcoholic content of a human being's blood introduced in evidence at a trial for driving while under the influence of alcohol. In such a situation blood, of course, is not oral testimony given by an accused but it can certainly "communicate" to a court and jury the fact of guilt.[44]

Black later quoted *Boyd* to emphasize that the penumbral theory logically protected papers from compulsory production:

> The Court went on to say that to require "an owner to produce his private books and papers, in order to prove his breach of the laws, and thus to establish the forfeiture of his property, is surely compelling him to furnish evidence against himself." The Court today departs from the teachings of *Boyd*. Petitioner Schmerber has undoubtedly been compelled to give his blood "to furnish evidence against himself," yet the Court holds that this is not forbidden by the Fifth Amendment. With all deference I must say that the Court here gives the Bill of Rights' safeguard against compulsory self-incrimination a construction that would generally be considered too narrow and technical even in the interpretation of an ordinary commercial contract.[45]

On one level, Black was merely contrasting the Court's conflicting treatment of the compulsory production of a person's blood and his personal papers. But this does not express his full argument. Black did not object to Boyd's non-literalism. To the contrary, he extolled *Boyd* as "among the greatest constitutional decisions

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[44] *Schmerber*, 384 U.S. at 775 (Black, J., dissenting) (citation omitted).

[45] *Id*. at 777 (Black, J., dissenting) (citation omitted).

of this Court." [46] Despite his advocacy of a narrow textualism for some constitutional issues, Black explicitly supported a penumbral theory of the Fourth and Fifth Amendments. Not surprisingly, this was consistent with Justice Douglas's arguments favoring a structural interpretation linking the constitutional provisions adopted to preserve individual liberty from government action.

II. JUSTICE DOUGLAS: PENUMBRAL THEORIES, PRIVACY, AND SUBSTANTIVE FOURTH AMENDMENT RIGHTS

From a civil libertarian perspective, Justice Douglas is a hero of the constitutional history explored in this article. During the 1960s, he was the most consistent and most articulate advocate of theories that interpreted the Fourth Amendment expansively to impose restrictions upon government intrusions into the lives of the people [47] The penumbral theories of the Fourth and Fifth Amendments that he espoused were first applied eight decades earlier in the Court's seminal opinion in *Boyd v. United States*.[48]

As we did with Justice Black, our discussion begins with a well-known opinion addressing issues of constitutional theory not related directly to searches and seizures. The best-known example of Justice Douglas' penumbral[49] theory of constitutional interpretation is his opinion for the Court in *Griswold v. Connecticut*,[50] decided on the eve of the three-year period in which the Warren Court liberals rewrote the essentials of Fourth Amendment theory.[51]

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[46] *Id*. at 776 (Black, J., dissenting).

[47] Unlike Brennan, Black, and Stewart, for example, he dissented from Chief Justice Warren's majority opinion in *Terry v. Ohio*, 392 U.S. 1 (1968), which permitted police officers to conduct limited searches and seizures without probable cause or a warrant.

[48] 116 U.S. 616 (1886).

[49] *See, e.g.*, THE AMERICAN HERITAGE DICTIONARY (3d ed. 1992): "pe·num·bra . . . . 3. An area in which something exists to a lesser or an uncertain degree. . . . 4. An outlying, surrounding region; a periphery."

[50] 381 U.S. 479 (1965). Justice Goldberg, who was joined by Chief Justice Warren and Justice Brennan, wrote a concurring opinion, which joined both the judgment and Justice Douglas' opinion. Justices Harlan and White wrote separate opinions concurring only in the judgment. Justices Black and Stewart each wrote dissenting opinions, and joined in each other's dissents. Except for Douglas, only Justice Clark joined in neither a concurring nor dissenting opinion.

[51] Many of the critical cases decided by the Court during this three-year period, 1966–1968, are discussed in this article. They include *Schmerber v. California*, 384 U.S. 757 (1966); *Lewis v. United States*, 385 U.S. 206 (1966); *Hoffa v. United States*, 385 U.S. 293 (1966); *Osborn v. United States*, 385 U.S. 323 (1966); *Berger v. New York*, 388 U.S. 41 (1967); *Warden v. Hayden*, 387 U.S. 294 (1967); and *Katz v. United States*, 389 U.S. 347 (1967). During the same three-year time frame, the Court rendered decisions that reworked other fundamental issues in Fourth Amendment theory beyond the scope of this article, most notably *Camara v. Municipal Court*, 387 U.S. 523 (1967), and *Terry v. Ohio*, 392 U.S. 1 (1968), in which the Court explicitly embraced new forms of Fourth Amendment balancing, extended its power of constitutional judicial review over conduct previously unregulated by the Fourth Amendment (housing inspections, stops and frisks), and created a new

Griswold invalidated a Connecticut statute that decreed: "Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."[52] The appellants had been convicted as accessories to violations of this law. In light of subsequent decisions, it appears almost self-evident that the Supreme Court would declare that the Connecticut statute violated the Constitution. On the other hand, the penumbral theory of constitutional rights Justice Douglas articulated in his opinion for the Court has been severely criticized, largely because it employs a method that is inconsistent with the dominant interpretive method in our legal culture, which commands that judicial decisions must at least purport to rest upon the interpretation of specific texts.[53]

Perhaps because his *Griswold* opinion enforced privacy rights not literally defined in any individual constitutional provision, Douglas expressly attempted to distance himself from *Lochner* era substantive due process decision-making by citing several judicial opinions rejecting these theories in the years following the failure of Roosevelt's 1937 Court-packing scheme.[54] Despite his rejection of substantive due process analysis, Douglas nonetheless cited other judicial opinions[55] to support the conclusion that:

> specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.

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standard for judging the constitutionality of some searches and seizures (reasonable suspicion, located somewhere between probable cause and a hunch). .

[52] *Griswold*, 381 U.S. at 480.

[53] The classic 1960s scholarly defense of interpretation based upon reference from structure and relationship in the Constitution is CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

[54] *See Griswold*, 381 U.S. at 481–82 (citations omitted):

> Coming to the merits, we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. New York* should be our guide. But we decline that invitation as we did in *West Coast Hotel Co. v. Parrish*, *Olsen v. Nebraska*, *Lincoln Union v. Northwestern Co*., *Williamson v. Lee Optical Co*., and *Giboney v. Empire Storage Co*. We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.

[55] *See Griswold*, 381 U.S. at 482–83, citing numerous cases to support the following assertion:

> The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.

> Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one. . . . The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[56]

Douglas expressly relied upon the penumbral theory that had survived in Fourth and Fifth Amendment theory since the Court first announced it eight decades earlier: "The Fourth and Fifth Amendments were described in *Boyd* v. *United States* as protection against all governmental invasions 'of the sanctity of a man's home and the privacies of life.'"[57]

These privacy rights were implicated directly by the statute in *Griswold* because only intrusive searches could uncover violations of a statute prohibiting the use—not the manufacture, sale, or purchase—of contraceptives. "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."[58] But the opinion's ultimate concern was that the law authorized government invasion upon a fundamental *natural* right:

> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[59]

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[56] *Id*. at 484 (citations omitted).

[57] *Id*. at 484–85 (citation omitted).

[58] *Id*. at 485–86.

[59] *Id*. at 486.

Unlike Justice Black, Justice Douglas was consistent in his support of penumbral theories in Fourth and Fifth Amendment jurisprudence.[60] One year after *Griswold*, he re-asserted these theories in several cases involving different kinds of searches.

As we will see in the next section of this article, Justice Brennan's opinion in *Schmerber v. California*[61] refused to interpret the Fourth and Fifth Amendments together, treating them as dichotomous provisions.[62] Interpreting the Amendments

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[60] It is noteworthy that Justices Black and Stewart wrote dissenting opinions, and each was the sole justice joining the other's dissent. Black's dissent echoed the textualist arguments he had lodged during the incorporation debates, and anticipated his dissents in *Berger* and *Katz* two years later. Black complained, as one would expect, that the Court acted as if the Constitution contained a provision enacting a broad right of privacy. Black conceded—in terms echoed in Stewart's opinion for the Court two years later in *Katz*—that:

> [t]here are, of course, guarantees in certain specific constitutional provisions which are designed in part to protect privacy at certain times and places with respect to certain activities. Such, for example, is the Fourth Amendment's guarantee against "unreasonable searches and seizures." But I think it belittles that Amendment to talk about it as though it protects nothing but "privacy." To treat it that way is to give it a niggardly interpretation, not the kind of liberal reading I think any Bill of Rights provision should be given. . . . [A] person can be just as much, if not more, irritated, annoyed and injured by an unceremonious public arrest by a policeman as he is by a seizure in the privacy of his office or home.
>
> One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning. This fact is well illustrated by the use of the term "right of privacy" as a comprehensive substitute for the Fourth Amendment's guarantee against "unreasonable searches and seizures." "Privacy" is a broad, abstract and ambiguous concept which can easily be shrunken in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things other than searches and seizures. . . . I get nowhere in this case by talk about a constitutional "right of privacy" as an emanation from one or more constitutional provisions. I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision. For these reasons I cannot agree with the Court's judgment and the reasons it gives for holding this Connecticut law unconstitutional.

Griswold, 381 U.S. at 508–10 (Black, J., dissenting).

[61] 384 U.S. 757 (1966).

[62] Arguably, Justice Brennan was as inconsistent as Justice Black in his treatment of theories of unenumerated penumbral rights. Justice Goldberg, joined by Chief Justice Warren and Justice Brennan, wrote an opinion concurring in both the opinion and judgment in *Griswold*. Goldberg's concurring opinion endorsed the theory "that the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights." *Griswold*, 381 U.S. at 486 (Goldberg, J., concurring). It specifically embraced the theory that "the right of marital privacy is protected, as being within the protected penumbra of specific guarantees of the Bill of Rights" and the Ninth Amendment, *id*. at 487 (Goldberg, J., concurring), and asserted that the Supreme Court had "never held that the Bill of Rights or the Fourteenth Amendment protects only those rights that the Constitution specifically mentions by name." *Id*. at 517 n.1. Justice Goldberg's concurring opinion in *Griswold* described an expansive theory of unenumerated penumbral rights,

separately, Brennan's opinion concluded that neither the forcible extraction of blood from the suspect's body, nor the testing of that blood for alcohol, nor the introduction of the results of that testing as evidence against him violated Schmerber's rights under either. Justice Douglas' brief dissent reaffirmed that the penumbral theories applied in *Griswold* produced a different result.

> We are dealing with the right of privacy which . . . we have held to be within the penumbra of some specific guarantees of the Bill of Rights. Thus, the Fifth Amendment marks "a zone of privacy" which the Government may not force a person to surrender. Likewise the Fourth Amendment recognizes that right when it guarantees the right of the people to be secure "in their persons." No clearer invasion of this right of privacy can be imagined than forcible bloodletting of the kind involved here.[63]

Six months later, Douglas reasserted the penumbral theory of the two Amendments when he issued a single dissent in a set of companion cases involving "various aspects of the constitutional right of privacy."[64] In this dissent, however, Douglas emphasized not the penumbral links between the two Amendments, but rather the right to privacy embodied in the old *Lochner* era theories from which the doctrine arose.

Lewis v. United States[65] involved "the breach of the privacy of the home by a government agent posing in a different role for the purpose of obtaining evidence from the homeowner to convict him of a crime."[66] In *Osborn v. United States*,[67] Douglas defined the issue as being "whether the Government may compound the

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concluding that "the right of privacy is a fundamental personal right, emanating 'from the totality of the constitutional scheme under which we live.'" *Id*. at 494 (Goldberg, J., concurring). Justice Goldberg quoted from Justice Brandeis' famous dissent in *Olmstead*, which he asserted "comprehensively summarized the principles underlying the Constitution's guarantees of privacy," which in turn were enshrined in the penumbral linkage between the Fourth and Fifth Amendments. *Id.* (quoting Olmstead v. United States, 277 U.S. at 478) (Brandeis, J., dissenting). By joining this concurring opinion, Justice Brennan aligned himself with a vigorous penumbral theory of unenumerated rights, at least in the context of marital privacy relating to sexual activity. Only a year later, he would write a majority opinion that rejected an interpretive approach based on unenumerated Fourth and Fifth Amendment rights in the context of a different physical act—the forcible extraction of a person's blood to search for evidence of criminal conduct.

63 *Schmerber*, 384 U.S. at 778–79 (Douglas, J., dissenting) (citations omitted).

64 Lewis v. United States, 385 U.S. 206 (1966); Osborn v. United States, 385 U.S. 323, 341 (1966) (Douglas, J., dissenting). Douglas concurred with Justice Clark in a third companion case, Hoffa v. United States, 385 U.S. 293 (1966), arguing for a dismissal of certiorari as improvidently granted.

65 385 U.S. 206 (1966).

66 *Id.* at 340 (Douglas, J., dissenting).

67 385 U.S. 323 (1966).

invasion of privacy by using hidden recording devices to record incriminating statements made by the unwary suspect to a secret federal agent."[68] Douglas asserted that the constitutional right of privacy prohibited both types of investigation. He quoted at length from his recent opinion in *Griswold* to support the argument that "[p]rivacy, though not expressly mentioned in the Constitution, is essential to the exercise of other rights guaranteed by it."[69] He then turned directly to the Fourth Amendment.

In *Lewis*, an undercover federal narcotics agent posing as a drug purchaser entered Lewis' home to obtain evidence against him.[70] Douglas argued that the warrantless intrusion into Lewis' home, was "a 'search' that should bring into play all the protective features of the Fourth Amendment."[71] He argued that because "[a]lmost every home is at times used for purposes other than eating, sleeping, and social activities," the privacy rights protected by the Constitution within the home should survive even when on occasion "it is used for business,"[72] apparently even an illegal business. Douglas did not claim that the government was barred from entering the home, but that it must obtain a search warrant before conducting an investigation within the home. Douglas' reliance upon the procedural protections of the warrant process, and his focus upon the subjective expectations of the homeowner, seem precursors to significant elements of the majority opinion issued a year later in *Katz*:

> A home is still a sanctuary, however the owner may use it. There is no reason why an owner's Fourth Amendment rights cannot include the right to open up his house to limited classes of people. And, when a homeowner invites a friend or business acquaintance into his home, he opens his house to a friend or acquaintance, not a government spy.
>
> This does not mean he can make his sanctuary invasion-proof against government agents. The Constitution has provided a way whereby the home can lawfully be invaded, and that is with a search warrant. Where, as here, there is enough evidence to get a warrant to make a search I would not allow the Fourth Amendment to be short-circuited.
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> . . . .
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> A householder who admits a government agent, knowing that he is such, waives of course any right of privacy. One who invites or admits

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68 *Id.* at 340 (Douglas, J., dissenting).

69 *Id.* at 341.

70 *Id.* at 345.

71 *Id.*

72 *Id.* at 346.

> an old "friend" takes, I think, the risk that the "friend" will tattle and disclose confidences or that the Government will wheedle them out of him. The case for me, however, is different when government plays an ignoble role of "planting" an agent in one's living room or uses fraud and deception in getting him there. These practices are at war with the constitutional standards of privacy which are parts of our choicest tradition.[73]

This passage confirms what the discussion in this article already has suggested: the themes integral to the Court's decision in *Katz* were percolating in the justices' debates long before the decision in that famous case. Douglas argued: (1) not that government-initiated investigations within the home were prohibited, but that this type of intrusion must be authorized in advance by a search warrant; (2) that the Fourth Amendment was implicated because of the person's subjective expectation of privacy; (3) implicitly, this is a protectable (objectively reasonable) interest because it occurs within the home; and (4) the expectation of privacy can be forsaken by intentional disclosure to government agents. Like Stewart's opinion for the Court in *Katz*, Douglas would have enforced the privacy right by suppressing evidence.[74] One critical difference between his critique and the

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[73] *Id*. at 346–47.

[74] And like Stewart's opinion in *Katz*, Douglas concluded that the Fourth Amendment regulated the use of non-trespassory electronic surveillance techniques because they intruded upon protected privacy rights—even when the people being investigated were outside the home. Douglas listed examples of offensive surveillance techniques, including some (peepholes) employed long before the advent of electronic technologies:

> We are rapidly entering the age of no privacy, where everyone is open to surveillance at all times; where there are no secrets from government. The aggressive breaches of privacy by the Government increase by geometric proportions. Wiretapping and "bugging" run rampant, without effective judicial or legislative control.
>
> Secret observation booths in government offices and closed television circuits in industry, extending even to rest rooms, are common. Offices, conference rooms, hotel rooms, and even bedrooms are "bugged" for the convenience of government. Peepholes in men's rooms are there to catch homosexuals. Personality tests seek to ferret out a man's innermost thoughts on family life, religion, racial attitudes, national origin, politics, atheism, ideology, sex, and the like. Federal agents are often "wired" so that their conversations are either recorded on their persons or transmitted to tape recorders some blocks away. The Food and Drug Administration recently put a spy in a church organization. Revenue agents have gone in the disguise of Coast Guard officers. They have broken and entered homes to obtain evidence.
>
> Polygraph tests of government employees and of employees in industry are rampant. The dossiers on all citizens mount in number and increase in size. Now they are being put on computers so that by pressing one button all the miserable, the sick, the suspect, the unpopular, the offbeat people of the Nation can be instantly identified.
>
> These examples and many others demonstrate an alarming trend whereby the privacy and dignity of our citizens is being whittled away by sometimes imperceptible steps. Taken individually, each step may be of little consequence. But when viewed as a

Court's subsequent decisions was that Douglas distinguished between intentional disclosure to private citizens and to government agents. To him, the former did not defeat the privacy expectation protected by the Fourth Amendment, while the latter did.[75]

From the perspective of contemporary Fourth Amendment theory, this is a remarkably expansive vision of a constitutional right of privacy that repels government intrusions. Even more remarkable to one familiar only with current theory is that Douglas went further, and would have banned some intrusions entirely—even if the government acted pursuant to a judicial warrant. Most remarkably of all, this old New Deal activist relied upon theories with a *Lochner* era pedigree that had used property rights to define substantive rights of liberty and privacy that the government could not invade even with a warrant. Quoting from *Lochner* era decisions, Douglas argued that "what the Court overlooks is that the Fourth Amendment does not authorize warrants to issue for *any* search even on a showing of probable cause."[76]

Douglas relied upon a series of Supreme Court opinions issued over a period of more than half a century that had construed the government's right to search for and seize items in terms of property law concepts. Property could not be seized if the government only sought to use it as evidence. Unless the government could assert some legitimate property or possessory right in the item, or the government could demonstrate that the items could be classified as property in which a private party could not assert a legitimate or superior interest, even a valid warrant could not legitimize the intrusion. The categories of seizable property included stolen or forfeited property, property concealed to avoid payment of duties, required records, counterfeit currency, and various criminal instrumentalities, including burglars' tools, weapons, and gambling implements. Each type was seizable because of its legal status as property in which the current possessor either had no protected interest or an interest inferior to that possessed by the government or some other private citizen.[77]

Douglas concluded that the result of these decisions was that "today a 'search' that respects all the procedural proprieties of the Fourth Amendment is nonetheless unconstitutional if it is a 'search' for testimonial evidence," because "if the barriers erected by the Fourth Amendment were not strictly honored, serious invasions of

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> whole, there begins to emerge a society quite unlike any we have seen—a society in which government may intrude into the secret regions of man's life at will.

385 U.S. at 341–43 (Douglas, J., dissenting).

[75] *See, e.g.*, Smith v. Maryland, 442 U.S. 735 (1979); California v. Ciraolo, 476 U.S. 207 (1986); Florida v. Riley, 488 U.S. 445 (1989).

[76] *Osborn*, 385 U.S. at 349–50 (Douglas, J., dissenting).

[77] *Id.* at 350–51 (Douglas, J., dissenting) (citing Boyd v. United States, 116 U.S. 616 (1886); Gouled v. United States, 255 U.S. 298, 309 (1921); United States v. Lefkowitz, 285 U.S. 452, 465 (1932); Harris v. United States, 331 U.S. 145, 154 (1947); and United States v. Rabinowitz, 339 U.S. 56, 64 (1950)).

the Fifth Amendment might result."[78] The link between traditional property and penumbral theories produced a view of constitutional rights as expansive as any ever articulated by the Supreme Court, and one that precluded the use of electronic techniques for capturing a person's words to use against him:

> I would adhere to *Gouled* and bar the use of all testimonial evidence obtained by wiretapping or by an electronic device. The dangers posed by wiretapping and electronic surveillance strike at the very heart of the democratic philosophy. A free society is based on the premise that there are large zones of privacy into which the Government may not intrude except in unusual circumstances. As we noted in *Griswold* v. *Connecticut*, various provisions of the Bill of Rights contain this aura of privacy, including the First, Third, Fourth, Fifth, and the Ninth Amendments. As respects the Fourth, this premise is expressed in the provision that the Government can intrude upon a citizen's privacy only pursuant to a search warrant, based upon probable cause, and specifically describing the objects sought. And, the "objects" of the search must be either instrumentalities or proceeds of the crime. But wiretapping and electronic "bugging" invariably involve a search for mere evidence. The objects to be "seized" cannot be particularly described; all the suspect's conversations are intercepted. The search is not confined to a particular time, but may go on for weeks or months. The citizen is completely unaware of the invasion of his privacy. The invasion of privacy is not limited to him, but extends to his friends and acquaintances—to anyone who happens to talk on the telephone with the suspect or who happens to come within the range of the electronic device. Their words are also intercepted; their privacy is also shattered. Such devices lay down a dragnet which indiscriminately sweeps in all conversations within its scope, without regard to the nature of the conversations, or the participants. A warrant authorizing such devices is no different from the general warrants the Fourth Amendment was intended to prohibit.[79]

Douglas would reassert these arguments the following year in dissent from an opinion by Justice Brennan that sounded the death knell for the venerable property-based theories Douglas embraced.

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[78] *Osborn*, 385 U.S. at 351 (Douglas, J., dissenting).

[79] *Id*. at 352–53 (Douglas, J., dissenting).

III. JUSTICE BRENNAN AND THE DECONSTRUCTION OF FOURTH AMENDMENT THEORY

As the Warren Court liberals of the 1960s left the Court[80] to be replaced by justices selected in part because of their perceived conservatism, Justice Brennan (together with Justice Marshall) took on the mantle of great civil libertarian dissenter in case after case in which the decisions expanded the search and seizure powers of government agents. For those of us who remember Brennan in this role, it is more than a bit surprising to realize that his majority opinions in two important cases decided in the 1960s were critical steps in establishing the constitutional theories later used by conservative majorities to expand government power and to restrict individual liberty and privacy. The most important, and perhaps most overlooked,[81] of these opinions attempted to eradicate property law concepts as a source of Fourth Amendment rights.

The constitutional rule at issue in *Warden v. Hayden*[82] was the "mere evidence rule," which had been implicit in Fourth Amendment theory as early as 1886, and adopted explicitly in 1921 in *Gouled v. United States*.[83] In *Hayden*, the government challenged

> the validity of the proposition that there is under the Fourth Amendment a "distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime."[84]

The Circuit Court reversed Hayden's conviction for armed robbery because evidence seized from his home and introduced against him at trial included clothing that "had evidential value only," and therefore could not be lawfully

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[80] The justices discussed throughout this article retired from the Supreme Court during the following years: Warren (1969); Black (1972); Goldberg (1965); Fortas (1970); Brennan (1990); Douglas (1975); Marshall (1991); Stewart (1981); Harlan (1972). 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1384 (3d ed., 2000).

[81] Overlooked as to this issue in contemporary commentary, *Hayden* is best-known today as the case explicitly adopting the "hot pursuit" exception to the warrant preference rule.

[82] 387 U.S. 294 (1967).

[83] 255 U.S. 298 (1921).

[84] *Hayden*, 387 U.S. at 295–96 (1947) (quoting Harris v. United States, 331 U.S. 145, 154 (1947)). In addition to *Gouled*, Brennan cited a number of cases affirming the mere evidence rule: Harris v. United States, 331 U.S. 145, 154 (1947); United States v. Lefkowitz, 285 U.S. 452, 465–66 (1932); United States v. Rabinowitz, 339 U.S. 56, 64 n.6 (1950); and Abel v. United States, 362 U.S. 217, 234–35 (1960).

seized under the Fourth Amendment.[85] The Supreme Court reversed. Superficially, Justice Brennan's opinion merely struck down the mere evidence rule.[86] But the implications of his reasoning and holding ran much deeper, because they also struck down the basis for the rule: the historic link between property, privacy, and liberty in Fourth Amendment theory.

The Court found that the exigencies of the circumstances justified the warrantless entry and search in Hayden's home. The pursuing officers had ample probable cause to believe that the man who had committed an armed robbery only moments before had fled into the house they searched. But under traditional Fourth Amendment theory, this satisfied only the procedural requirements derived from the Warrant Clause. The substantive right against seizure of (and therefore search for) property in which the government could not assert a colorable property or possessory interest dictated that the government could not seize clothing to use as evidence against Hayden. The gun and ammunition found in the house were instrumentalities by which the crime was committed, and could be seized. Stolen money was the proceeds of a crime, and the wrongful possessor had no legitimate claim of possession. But clothing that could be used only for evidentiary (identification) purposes was another matter. Justice Brennan did not attempt to disguise the fact that the mere evidence rule was part of an eighty-year-old tradition in Fourth Amendment jurisprudence, but concluded that it was "based on premises no longer accepted as rules governing the application of the Fourth Amendment."[87] His analysis only served to emphasize how recent and sparse was the authority for this conclusion.

Justice Brennan affirmed that the mere evidence rule ultimately was derived from *Boyd*, a case he frequently cited with favor:

> In *Gouled* . . . the Court said that search warrants "may not be used as a means of gaining access to a man's house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding . . . ." The Court derived from *Boyd* v. *United States* the proposition that warrants "may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise

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[85] *Hayden*, 387 U.S. at 296–97.

[86] At various points in the opinion, Justice Brennan endeavored to demonstrate that "[t]he premise . . . that government may not seize evidence simply for the purpose of proving crime has . . . been discredited." *Id.* at 306. Brennan argued that the rule was not mandated by the Fourth Amendment's text, could not survive the demise of litigation based on common law writs, the emergence of the exclusionary rule, changes in constitutional theory over time, and the mere evidence rule's own internal illogic, which "has spawned exceptions so numerous and confusion so great, in fact, that it is questionable whether it affords meaningful protection." *Id*. at 309.

[87] *Id*. at 300–01.

> of the police power renders possession of the property by the accused unlawful and provides that it may be taken"; that is, when the property is an instrumentality or fruit of crime, or contraband. Since it was "impossible to say, on the record . . . that the Government had any interest" in the papers involved "other than as evidence against the accused . . . ," "to permit them to be used in evidence would be, in effect, as ruled in the *Boyd Case*, to compel the defendant to become a witness against himself."[88]

Perhaps most remarkably to the modern reader conditioned by the contemporary debate about originalist theories of constitutional interpretation, Brennan appears to have conceded that the *Boyd* opinion and its progeny embodied the views of the Framers of the Fourth Amendment, in part by citing the pre-Revolutionary English case upon which *Boyd* relied so heavily:

> The Fourth Amendment ruling in *Gouled* was based upon the dual, related premises that historically the right to search for and seize property depended upon the assertion by the Government of a valid claim of superior interest, and that it was not enough that the purpose of the search and seizure was to obtain evidence to use in apprehending and convicting criminals. The common law of search and seizure after *Entick* v. *Carrington* reflected Lord Camden's view, derived no doubt from the political thought of his time, that the "great end, for which men entered into society, was to secure their property." Warrants were "allowed only where the primary right to such a search and seizure is in the interest which the public or complainant may have in the property seized." Thus stolen property—the fruits of crime—was always subject to seizure. And the power to search for stolen property was gradually extended to cover "any property which the private citizen was not permitted to possess," which included instrumentalities of crime (because of the early notion that items used in crime were forfeited to the State) and contraband. No separate governmental interest in seizing evidence to apprehend and convict criminals was recognized; it was required that some property interest be asserted. The remedial structure also reflected these dual premises. Trespass, replevin, and the other means of redress for persons aggrieved by searches and seizures, depended upon proof of a superior property interest. And since a lawful seizure presupposed a superior claim, it was inconceivable that a person could recover property lawfully seized. As Lord Camden pointed out in *Entick* v. *Carrington*, a general warrant enabled "the party's own property [to be] seized before and without conviction, and he has no

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[88] *Id*. at 302 (citations omitted).

> power to reclaim his goods, even after his innocence is cleared by acquittal."[89]

After linking the property-based theories of the Fourth Amendment to one of the most prominent judicial opinions on the topic of searches and seizures at the time of the framing, Brennan blithely asserted that "[t]he premise that property interests control the right of the Government to search and seize has been discredited. Searches and seizures may be 'unreasonable' within the Fourth Amendment even though the Government asserts a superior property interest at common law."[90] He could only cite two Supreme Court cases for authority, both from early in the 1960s, neither of which had abandoned the link between property and Fourth Amendment rights for those who benefited from that connection. Both decisions extended some Fourth Amendment rights to those not protected by property-based theories, while preserving those rights for those who were.

In *Jones* v. *United States*,[91] the Supreme Court extended standing to someone who was neither the owner nor renter of an apartment, but who had a key to the apartment and sometimes spent the night there when the owner was away. The opinion did not diminish the property-based Fourth Amendment rights of the lessor or lessee, but simply included someone "legitimately on the premises" within the class of people with standing to challenge the government search of the residence where he resided, if only temporarily.

The other case on which Brennan relied was *Silverman* v. *United States*,[92] where the Supreme Court had firmly rejected one of the property-based ideas by which the 1928 *Olmstead* opinion had shrunk Fourth Amendment limits on electronic surveillance techniques. *Silverman* rejected the idea that only the seizure of tangible things was regulated by the Amendment, indirectly establishing that intangible conversations also could be seized. Once again, the opinion did nothing to derogate the rights of those whose tangible property had been seized, but instead extended the Amendment's protections to other situations not already covered by the Amendment.

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[89] *Id*. at 303–04 (citations omitted).

[90] *Id*. at 304.

[91] 362 U.S. 257 (1960).

[92] 365 U.S. 505 (1961).

Yet based upon these slim Fourth Amendment precedents,[93] Brennan boldly proclaimed a principle commonly attributed to the *Katz* decision issued later that year: "We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts."[94] Abandoning these property-based theories also meant abandoning the idea that protected the Fourth Amendment.

This did not bother Brennan, because he concluded that privacy would be adequately protected by the procedural mechanisms contained in the Warrant Clause after the substantive protections offered by property rights and the mere evidence rule were abandoned:

> But if its rejection does enlarge the area of permissible searches, the intrusions are nevertheless made after fulfilling the probable cause and particularity requirements of the Fourth Amendment and after the intervention of "a neutral and detached magistrate . . . ." The Fourth Amendment allows intrusions upon privacy under these circumstances, and there is no viable reason to distinguish intrusions to secure "mere evidence" from intrusions to secure fruits, instrumentalities, or contraband.[95]

In his dissent, Justice Douglas demonstrated that the larger significance of the majority's decision to overrule the mere evidence rule—to excise property rights from Fourth Amendment doctrine, and to rely solely upon procedural protections of rights—must have been debated within the Court. Justice Douglas began his dissent by explaining that the guarantee of rights found in the Fourth Amendment

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[93] Later in the opinion Brennan attempted to bolster the conclusion that the Court's opinions had emphasized privacy, not property since early in the twentieth century. Again, most of the discussion focused upon *Jones* and *Silverman*, as well as another opinion from the 1960s, *Wong Sun v. United States*, 371 U.S. 471 (1963), where the Court had applied the fruit of the poisonous tree doctrine to suppress intangible statements obtained as a result of searches and seizures that flagrantly violated the Fourth Amendment. Inexplicably, he also cited a number of cases in which "we have given recognition to the interest in privacy despite the complete absence of a property claim by suppressing the very items which at common law could be seized with impunity: stolen goods, instrumentalities, and contraband." *Hayden*, 387 U.S. at 305–06 (citations omitted). This statement is inexplicable because at least since the opinions in *Weeks* and *Gouled*, the Supreme Court had established that evidence would be suppressed if obtained in violation of the *procedural* requirements of the Fourth Amendment, particularly the requirements of probable cause and a warrant or warrant exception. Someone in possession of contraband was entitled to have that property suppressed if was obtained during a search of his home that violated those requirements. The *substantive* limits on government power linked to property law only became significant if the search and seizure first satisfied those *procedural* rules. *See* Cloud, *supra* note 6.

[94] *Hayden*, 387 U.S. at 304.

[95] *Id*. at 309–10 (citation omitted).

> has been thought, until today, to have two faces of privacy:
> (1) One creates a zone of privacy that may not be invaded by the police through raids, by the legislators through laws, or by magistrates through the issuance of warrants.
> (2) A second creates a zone of privacy that may be invaded either by the police in hot pursuit or by a search incident to arrest or by a warrant issued by a magistrate on a showing of probable cause.[96]

The Fourth Amendment "face of privacy" eliminated by Brennan's opinion was the first, the substantive prohibition of some seizures and searches of property, even if authorized by a warrant. Much of Douglas' dissenting opinion was devoted to establishing that this "face" of the right of privacy "has been recognized from early days in Anglo-American law."[97] Focusing upon events relevant to identifying the Framers' intent, including the debates over the text of what would become the Fourth Amendment, Douglas concluded that this history established that the Fourth Amendment has these "two faces of privacy."[98]

Douglas stressed, even more emphatically than would Justice Stewart only months later in *Katz*, that whether to preserve or forsake privacy was a choice for the individual to make.[99]

> I would . . . leave with the individual the choice of opening his private effects (apart from contraband and the like) to the police or keeping their contents a secret and their integrity inviolate. The existence of that

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[96] *Id*. at 313 (Douglas, J., dissenting).

[97] Douglas examined Lord Camden's famous opinion in *Entick* v. *Carrington*, 19 How. St. Tr. 1029, 1067 (1765), as well as earlier English law, to support his argument that the Framers intended to enforce such a substantive limit on the power of government actors to search and seize. *Hayden*, 387 U.S. at 313–31 (Douglas, J., dissenting).

[98] *Id*. at 317.

[99] Douglas emphasized the individual's control over the choice about whether property was protected from government intrusion more than once in his dissent. *See, e.g.*, *Hayden*, 387 U.S. at 323–24 (Douglas, J., dissenting):

> The constitutional philosophy is, I think, clear. The personal effects and possessions of the individual (all contraband and the like excepted) are sacrosanct from prying eyes, from the long arm of the law, from any rummaging by police. Privacy involves the choice of the individual to disclose or to reveal what he believes, what he thinks, what he possesses. The article may be a nondescript work of art, a manuscript of a book, a personal account book, a diary, invoices, personal clothing, jewelry, or whatnot. Those who wrote the Bill of Rights believed that every individual needs both to communicate with others and to keep his affairs to himself. That dual aspect of privacy means that the individual should have the freedom to select for himself the time and circumstances when he will share his secrets with others and decide the extent of that sharing. This is his prerogative not the States'. The Framers, who were as knowledgeable as we, knew what police surveillance meant and how the practice of rummaging through one's personal effects could destroy freedom.

> choice is the very essence of the right of privacy. Without it the Fourth Amendment and the Fifth are ready instruments for the police state that the Framers sought to avoid.[100]

As this passage makes clear, the tradition that Justice Douglas invoked established a potent individual right of privacy not only by tying privacy to property, but also by deploying a penumbral theory in which the Fourth and Fifth Amendments amplify one another. Douglas argued that the combination of these two interconnected doctrines dictated that the government could be excluded from that zone of privacy. Douglas also acknowledged that, with Hayden rejecting the "mere evidence" rule, the Supreme Court had now rejected both bases for the expansive privacy rights he favored. Substantive Fourth Amendment rights arising from property rights were jettisoned in *Hayden*.

As for the zone of privacy that the Supreme Court had found in the overlapping penumbras of the Fourth and Fifth Amendments in earlier decisions, Douglas conceded that "[w]e have, to be sure, breached that barrier, *Schmerber* v. *California* being a conspicuous example."[101] *Schmerber*, like *Hayden*, was authored by Justice Brennan.

Schmerber was arrested at a hospital for driving an automobile while intoxicated (DUI). Despite Schmerber's objections, the police directed a doctor at the hospital to withdraw blood from Schmerber's body. Chemical analysis revealed a blood-alcohol level demonstrating intoxication, and the report of this analysis was admitted into evidence at Schmerber's trial, where he was convicted of DUI. He argued that the government conduct violated various constitutional provisions, including the Fourth and Fifth Amendments.[102]

Justice Brennan's opinion was notable for what it did not do in deciding the Fourth and Fifth Amendment issues. It is hard to imagine a more appealing locus for a "zone of privacy" protected by the confluence of the Fourth and Fifth Amendments than the interior of a person's body, yet the opinion in *Schmerber* was constructed as if no penumbral links existed between the two Amendments. Although conceding in a single passage that "[t]he values protected by the Fourth Amendment thus substantially overlap those the Fifth Amendment helps to protect," particularly insofar as "'the security of one's privacy against arbitrary intrusion by the police'" is "'basic to a free society,'"[103] Brennan simply ignored the long line of Supreme Court decisions that construed the two Amendments together, signaling that the Court was decoupling the two Amendments in a *sub silentio* process of jettisoning the old penumbral theories.

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[100] *Hayden*, 387 U.S. at 325 (Douglas, J., dissenting).

[101] *Id*. at 320 (citation omitted).

[102] Schmerber v. California, 384 U.S. 757, 758–59 (1966). He also cited his Fourteenth Amendment right to due process and his Sixth Amendment right to counsel. *Id.* The Supreme Court rejected his arguments raised under all four amendments.

[103] *Id*. at 767 (citations omitted).

Brennan concluded that the Fifth Amendment was not violated, although the government had forcibly compelled production of Schmerber's blood from his body for the purpose of conducting scientific tests, to produce evidence that would convict him of a crime.[104] The decision rested on a narrow conception of the information protected under the privilege, holding "that the privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of blood and use of the analysis in question in this case did not involve compulsion to these ends."[105] The Fourth and Fifth Amendments did not establish an expansive zone of privacy that protected a person from being forced to give up part of his body for use as evidence against him. Rather, standing alone, the Self-Incrimination Clause did not require that "the human body in all circumstances to be held inviolate against state expeditions seeking evidence of crime."[106]

Brennan's justification for this conclusion emphasized the chasm lying between his interpretive theory and the penumbral theories applied in earlier cases:

> If the scope of the privilege coincided with the complex of values it helps to protect, we might be obliged to conclude that the privilege was violated. In *Miranda* v. *Arizona*, the Court said of the interests protected by the privilege: "All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government—state or federal—must accord to the dignity and integrity of its citizens. To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load' . . . to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth." The withdrawal of blood necessarily involves puncturing the skin for extraction, and the percent by weight of alcohol in that blood, as

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[104] *See, e.g.*, *id.* at 761:

> It could not be denied that in requiring petitioner to submit to the withdrawal and chemical analysis of his blood the State compelled him to submit to an attempt to discover evidence that might be used to prosecute him for a criminal offense. He submitted only after the police officer rejected his objection and directed the physician to proceed. The officer's direction to the physician to administer the test over petitioner's objection constituted compulsion for the purposes of the privilege.

[105] *Id.* at 761.

[106] *Id.* Justice Brennan conceded "that the protection of the privilege reaches an accused's communications, whatever form they might take" including subpoenas compelling production of private papers, but analogized the forcible extraction of Schmerber's blood to techniques like forcing a suspect to be fingerprinted, photographed, write or speak for identification, which he characterized as "compulsion which makes a suspect or accused the source of 'real or physical evidence,'" not testimonial communications. *Id.* at 763–64.

> established by chemical analysis, is evidence of criminal guilt. Compelled submission fails on one view to respect the "inviolability of the human personality." Moreover, since it enables the State to rely on evidence forced from the accused, the compulsion violates at least one meaning of the requirement that the State procure the evidence against an accused "by its own independent labors."[107]

In the hands of Justice Douglas, or the justices deciding earlier cases like *Boyd* and *Gouled*, or even Justice Black in his dissent in *Schmerber*,[108] this passage would lead ineluctably to the conclusion that the Fourth and Fifth Amendments enforced zones of privacy against this kind of government intrusion. But Justice Brennan rejected this broad, rights-enforcing theory, asserting instead that "the privilege has never been given the full scope which the values it helps to protect suggest."[109] Whatever the full scope of these values, to Brennan the compulsory production of body parts did not transgress those he was willing to enforce under the Fifth Amendment.

Like the Fifth, the Fourth Amendment stood alone for analytical purposes; and like the Fifth, it received a curiously bifurcated treatment. Justice Brennan began by acknowledging that even "if compulsory administration of a blood test does not implicate the Fifth Amendment, it plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment." This was so obvious that "[i]t could not reasonably be argued . . . that the administration of the blood test in this case was free of the constraints of the Fourth Amendment. Such testing procedures plainly constitute searches of 'persons.'" [110]

But they were not searches governed by the traditional analytical theories. Brennan avoided direct reference to longstanding penumbral theories by distinguishing searches of persons from searches for and seizures of property.

> Because we are dealing with intrusions into the human body rather than with state interferences with property relationships or private papers—"houses, papers, and effects"—we write on a clean slate. Limitations on the kinds of property which may be seized under warrant, as distinct from the procedures for search and the permissible scope of search, are not instructive in this context. We begin with the assumption that once the privilege against self-incrimination has been found not to bar compelled intrusions into the body for blood to be analyzed for alcohol content, the Fourth Amendment's proper function is to constrain,

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[107] *Id*. at 762 (citation omitted).

[108] *See supra* notes 38–46 and accompanying text (discussing Justice Black's dissent in *Schmerber*).

[109] *Schmerber*, 384 U.S. at 762.

[110] *Id*. at 767.

> not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner. In other words, the questions we must decide in this case are whether the police were justified in requiring petitioner to submit to the blood test, and whether the means and procedures employed in taking his blood respected relevant Fourth Amendment standards of reasonableness.[111]

Based on the facts observed by the police, they had probable cause to support the warrantless arrest,[112] and reason to believe that "the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence,'" because "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system."[113] Justice Brennan decided, therefore, that the forcible "attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest,"[114] and did not require prior authorization by a judicial warrant.

Justice Brennan also found that even a forcible extraction of blood was reasonable, in part because blood tests have become a routine part of modern life, and this procedure was performed by a doctor in a hospital setting. Schmerber was subjected to a search, but it was a reasonable search, one not violating his Fourth Amendment rights.

In none of these passages did the Court expressly overrule the longstanding penumbral theories. But Justice Black's dissent,[115] in which Justice Douglas concurred, advocated these theories as vigorously as Douglas would the following year when *Hayden* severed the conceptual link between property and privacy. Justice Brennan's refusal to apply these theories to the intrusive search in *Schmerber* could not have been inadvertent. By interpreting each Amendment separately, and narrowly, the fundamental message was clear. Penumbral theories were, indeed, a thing of the past.

IV. JUSTICE STEWART: PENUMBRAS? PRIVACY? PROPERTY?

Justice Stewart's dissenting opinion in *Griswold v. Connecticut* exhibited an open distaste for the penumbral theories Justice Douglas used in his opinion for the

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[111] *Id*. at 767–68. This passage also reveals the manner in which the Warren Court liberals began the gradual process of substituting the malleable standard of reasonableness for the more rule-driven requirements of the Warrant Clause.

[112] Despite the lawful arrest, the search was not justified by the justifications for the search incident to arrest exception to the warrant preference rule which had "little applicability with respect to searches involving intrusions beyond the body's surface." *Id.* at 769.

[113] *Id*. at 770.

[114] *Id*. at 771.

[115] *See supra* notes 38–46 and accompanying text.

Court,[116] and the following year Stewart had the chance to write an opinion that mirrored Justice Brennan's interpretive approach in *Schmerber* by treating the Fourth and Fifth Amendments as separate and distinct, if not mutually exclusive, texts. *Hoffa v. United States*[117] was decided less than six months after *Schmerber*, and it confirmed that most members of the Warren Court's liberal majority would not interpret the Fourth and Fifth Amendments together to create a zone of privacy against government intrusions.

Hoffa argued that his rights under the Fourth and Fifth Amendments had been violated[118] when a federal undercover informer infiltrated his circle of associates and advisors, including his attorneys, and gathered information for law enforcers while Hoffa was on trial on federal criminal charges. Many of the discussions overheard by the informer occurred in Hoffa's hotel room. It is easy to imagine how Douglas' penumbral interpretive theory could be applied to these facts. The government agent had seized private conversations,[119] some between attorney and client, in a constitutionally protected space—the hotel room—and had used Hoffa's own words to convict him.

Instead, Justice Stewart analyzed rights arising under each constitutional amendment separately, and never suggested that any other approach was available. The statements were voluntary, not compelled, and thus were not obtained in violation of the Fifth Amendment. The statements were seized because Hoffa had misplaced confidence in his associates and not because he had relied upon the security and privacy of his constitutionally protected hotel room; thus the seizure of the statements did not violate the Fourth Amendment. Stewart did not even hint

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[116] *See, e.g.*, *Griswold*, 381 U.S. at 527–30 (Stewart, J., dissenting):

> In the course of its opinion the Court refers to no less than six Amendments to the Constitution: the First, the Third, the Fourth, the Fifth, the Ninth, and the Fourteenth. But the Court does not say which of these Amendments, if any, it thinks is infringed by this Connecticut law. . . . As to the First, Third, Fourth, and Fifth Amendments, I can find nothing in any of them to invalidate this Connecticut law, even assuming that all those Amendments are fully applicable against the States. . . . There has been no search, and no seizure. Nobody has been compelled to be a witness against himself. . . . What provision of the Constitution, then, makes this state law invalid? The Court says it is the right of privacy "created by several fundamental constitutional guarantees." With all deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court.

[117] 385 U.S. 293 (1966).

[118] As in *Schmerber*, the defendant also claimed his Sixth and Fourteenth Amendment rights had been violated.

[119] Justice Stewart's opinion five years earlier in *Silverman v. United States*, 365 U.S. 505 (1961), reversed a conviction in which the evidence was obtained by "seizing" intangible conversations. This is viewed as the opinion overruling *Olmstead*'s holding that only tangible things, and not intangibles like conversations, could be seized within the meaning of the Fourth Amendment. Stewart was able to finesse ruling upon the constitutionality of *Olmstead*'s trespass doctrine, because the federal investigators in *Silverman* had committed an actual physical trespass into the most constitutionally protected area, the home.

at the possibility that there could be a zone of privacy existing within the penumbras of the two Amendments. The links between the two Amendments had been rent irrevocably, but so casually that the cleaving was not even noted in the opinion.

In the context of the Fourth Amendment, however, Justice Stewart did note constitutional principles that would be pivotal in his subsequent *Katz* opinion. In both opinions, his Fourth Amendment analysis focused upon what the citizen expected—and could reasonably expect—to be preserved as private in light of his own conduct. In *Hoffa*, however, Stewart emphasized that "[w]hat the Fourth Amendment protects is the security a man relies upon when he places himself or his property within a constitutionally protected area, be it his home or his office, his hotel room or his automobile."[120] A year later his opinion in *Katz v. United States*[121] would treat the idea of a "constitutionally protected area" as a relic of a bygone era.

Katz was convicted of violating a federal statute by engaging in interstate gambling activities by telephone. The government's evidence included Katz's "end of telephone conversations, overheard by FBI agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which he had placed his calls."[122] Applying Supreme Court decisions extending back nearly forty years to *Olmstead*, the federal appellate court approved this use of technology because the FBI agents had not committed a physical trespass into the interior of the telephone booth.

In a sweeping rejection of traditional theories, the *Katz* opinion announced that property law and penumbral theories had been displaced from the center of Fourth Amendment doctrine. Justice Stewart's treatment of the parties' presentation of the issues in the case signaled that the Court would no longer politely finesse traditional doctrines. Pity Katz's poor attorney who had mistakenly relied on decades of precedents (not to mention the Court of Appeals' opinion in this very case) in preparing his petition for certiorari. According to Justice Stewart, the poor dolt simply misunderstood the issues in his case:

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

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[120] *Hoffa*, 385 U.S. at 301.

[121] 389 U.S. 347 (1967).

[122] *Id*. at 348.

> *We decline to adopt this formulation of the issues. In the first place, the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase "constitutionally protected area." Secondly, the Fourth Amendment cannot be translated into a general constitutional "right to privacy."* That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But 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, left largely to the law of the individual States.[123]

The rejection of penumbral theories was indirect but unmistakable. In footnotes within this passage, Stewart cited not only the Fourth, but also the First, Third, and Fifth Amendments as protectors of some aspects of privacy, and even quoted from Justice Black's dissent in *Griswold*—without mentioning the majority opinion or penumbral theories. Instead, to emphasize the Court's rejection of those theories, he noted that "[v]irtually every governmental action interferes with personal privacy to some degree. The question in each case is whether that interference violates *a command* of the United States Constitution."[124] Not only would the Court approach each of these Amendments as a distinct text, but if any general right of privacy of the sort protected by penumbral theories even existed, it would be "left largely to the law of the individual States."

Having disposed of penumbral rights, Justice Stewart then turned to property. Once again he appeared to try to mask the significance of the doctrines he was announcing by leveling a gratuitous insult at the lawyers in the case—although this time he disparaged the competence of the government's attorneys as well as the defendant's:

> *Because of the misleading way the issues have been formulated, the parties have attached great significance to the characterization of the telephone booth from which the petitioner placed his calls.* The petitioner has strenuously argued that the booth was a "constitutionally protected area." The Government has maintained with equal vigor that it was not. But this effort to decide whether or not a given "area," viewed in the abstract, is "constitutionally protected" deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment

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[123] *Id*. at 349–51 (emphasis added) (footnotes omitted).

[124] *Id*. at 350 n.5 (emphasis added).

> protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[125]

As I wrote earlier, it is unfair to hold judges to a standard of perfect consistency in their opinions. Life and litigation are much too variable, and we should hope that our judges have the intelligence and experience to recognize this. But inconsistency becomes at least irritating, and even suggests hypocrisy, when judges attempt to obfuscate their inconstancy, and we can legitimately conclude that this portion of Justice Stewart's opinion exhibits such judicial "duplicity." For example, as if to blunt the insinuation that the parties' attorneys were incapable of even understanding the issues in a case they had litigated to the nation's highest court, he acknowledged *in a footnote* that "[i]t is true that this Court has occasionally described its conclusions in terms of 'constitutionally protected areas,'" citing only three of the Supreme Court's decisions for authority.[126] He failed to acknowledge, however, that barely twelve months earlier his opinion for the Court in *Hoffa* had expressly utilized this property-based doctrine.[127]

This passage quoted above is a critical passage because it expressed the theoretical justification for what has become known as the expectation of privacy test. The two-part "test" applied in subsequent cases was, of course, derived from Justice Harlan's concurrence that described a subjectively held expectation of privacy that is viewed by society as reasonable.[128] But a close reading of Justice Stewart's language reveals that while his phraseology provided a foundation for Harlan's "test," it really articulated a more complex set of concepts consistent with the positions that he and other justices had taken over the years. [129]

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[125] *Id*. at 351–52 (emphasis added) (citation omitted).

[126] *Id*. at 352 n.9 (citing Silverman v. United States, 365 U.S. 505 (1961); Lopez v. United States, 373 U.S. 427 (1963); and Berger v. New York, 388 U.S. 41 (1966)). Justice Stewart was the author of the 1961 opinion in *Silverman*.

[127] *See supra* note 120 and accompanying text.

[128] *Katz*, 389 U.S. at 361 (Harlan, J., concurring) ("My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy, and second that the expectation be one that society is prepared to recognize as 'reasonable.'")

[129] In a short concurring opinion Justice White distinguished several earlier opinions:

> In previous cases, which are undisturbed by today's decision, the Court has upheld, as reasonable under the Fourth Amendment, admission at trial of evidence obtained (1) by an undercover police agent to whom a defendant speaks without knowledge that he is in the employ of the police, *Hoffa* v. *United States*; (2) by a recording device hidden on the person of such an informant, *Lopez* v. *United States*; *Osborn* v. *United States*; and (3) by a policeman listening to the secret micro-wave transmissions of an agent conversing with the defendant in another location, *On Lee* v. *United States*. When one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he has heard. The Fourth Amendment does not protect against unreliable (or law-abiding) associates. *Hoffa* v. *United States*. It is but a logical and reasonable extension of this principle that a man take the risk that his

Stewart wrote: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."

This language obviously ascribes significance to subjectively held expectations by focusing on what the individual "knowingly exposes" or "seeks to preserve." But Stewart's focus upon the individual's purposes is not the simplistically applied first prong of the contemporary *Katz* test, which I have described elsewhere as "[c]onceptually . . . perhaps the most nonsensical premise in fourth amendment law."[130] As applied by the Supreme Court, the subjective expectations prong has offered little protection for individual privacy because the Court's decisions invariably have turned on whether these expectations match the individual Justices' subjective views of what is reasonable.[131]

Justice Stewart appears to have intended to cede to the individual significant authority over his own personal privacy. By decreeing that what a person "seeks to preserve as private," even in public places, may warrant Fourth Amendment protection, Stewart's conception seems intended to give the individual fundamental control over those matters he would preserve as private from government inspection. By placing an item in luggage, the trunk of an automobile, or a pocket, he preserves his constitutional right to exclude the government—unless the government can satisfy the procedural requirements of the Warrant Clause—probable cause plus a warrant or adequate exception.[132]

By decreeing that the Fourth Amendment did not protect what the individual knowingly exposed to the public, Justice Stewart emphasized that the individual's subjective choices dictated the scope of the privacy he gave up. And the meaning of Stewart's statement that Fourth Amendment privacy rights do not apply to what the individual knowingly exposes to the public, even in his home or office, can only be understood in the context of the Court's earlier opinions.

Justice Stewart's opinion in *Silverman*, for example, established that conversations sought to be kept private were protected by the Fourth Amendment,[133] while his opinion in *Hoffa* confirmed that even conversations conducted in a private place were not private if knowingly exposed to someone who turned out to be a government informer. Stewart was deliberately dismissing

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> hearer, free to memorize what he hears for later verbatim repetitions, is instead recording it or transmitting it to another. The present case deals with an entirely different situation, for as the Court emphasizes the petitioner "sought to exclude . . . the uninvited ear," and spoke under circumstances in which a reasonable person would assume that uninvited ears were not listening.

Katz, 389 U.S. at 363, n.* (White, J., concurring) (citations omitted).

[130] Cloud, *supra* note 4, at 250

[131] *Id.* at 223–38.

[132] *See infra* notes 134–38 and accompanying text.

[133] *See supra* note 119.

the notion that Fourth Amendment rights are defined primarily by where the events occur—that is, by whether they occurred in a constitutionally protected area like a home or hotel room, or in some more public place, like a public telephone booth.

This was why he went to great lengths to reject the government's arguments that a glass telephone booth was not a place where privacy was protected from non-trespassory electronic surveillance. The individual's expectation that he had acted to exclude a particular kind of intrusion gave rise to Fourth Amendment protection against that type of intrusion:

> The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was as visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.[134]

Logically, if the scope of Fourth Amendment rights was not tied to constitutionally protected places, then the individual's privacy rights could be violated without a physical trespass. Justice Stewart employed this reasoning to achieve two interrelated goals. Most narrowly, *Katz* overruled the *Olmstead* trespass doctrine. More fundamentally, the opinion used this holding to confirm the primacy of privacy over property in Fourth Amendment theory. Stewart acknowledged that "at one time" the Court's opinions had dictated that a physical trespass was necessary for there to be a search, and that only tangible items could be searched for and seized. Stewart cited only two cases as authority for his declaration that these ideas were flawed relics of the past, Justice Brennan's opinion in *Hayden* and his own opinion in *Silverman*:

> But "the premise that property interests control the right of the Government to search and seize has been discredited." *Warden* v. *Hayden*. Thus, although a closely divided Court supposed in *Olmstead* that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, we have since

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[134] *Katz*, 389 U.S. at 352 (footnotes omitted).

> departed from the narrow view on which that decision rested. Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, overheard without any "technical trespass under . . . local property law." *Silverman* v. *United States*. Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people—and not simply "areas"—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.[135]

By rejecting the requirements of trespass, protected area, and tangible property, the Court was able to conclude that the non-invasive "electronic[] listening to and recording of the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment."[136]

The Court held that the search and seizure violated the Fourth Amendment, but not because the agents' acts were egregious. Indeed, Justice Stewart concluded that "[i]t is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer."[137] The agents' error was not obtaining a judicial warrant authorizing what was otherwise a circumspect investigation.

Thus, the narrow holding in the case follows Justice Brennan's conclusion in *Hayden* that the procedures embodied in the Warrant Clause adequately protect Fourth Amendment rights. Even a carefully circumscribed monitoring of Katz's telephone conversations, conducted by him in a manner that attempted to preserve his conversational privacy, was unconstitutional unless authorized by a warrant.[138]

With the hindsight provided by nearly four decades of decisions applying *Katz*, the faith Justice Stewart's opinion placed in the warrant process as an

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[135] *Id*. at 353 (citations omitted).

[136] *Id*.

[137] *Id*. at 356. The agents:

> did not begin their electronic surveillance until investigation of the petitioner's activities had established a strong probability that he was using the telephone in question to transmit gambling information to persons in other States, in violation of federal law. Moreover, the surveillance was limited, both in scope and in duration, to the specific purpose of establishing the contents of the petitioner's unlawful telephonic communications. The agents confined their surveillance to the brief periods during which he used the telephone booth, and they took great care to overhear only the conversations of the petitioner himself.

Id. at 354.

[138] The opinion explained in some detail the requirements for a valid warrant for electronic surveillance. *Id*. at 355–56.

effective mechanism for protecting individual rights seems hopelessly naïve.[139] If we interpret *Katz* as defining Fourth Amendment rights in terms of a malleable notion of privacy lacking any core of substantive rights (such as those linked to property rights), and protected solely by the procedural rules contained in the Warrant Clause, then it is easy to understand why the Fourth Amendment has become such a porous barrier to government intrusions. As the Court has repeatedly demonstrated, if a bare majority[140] of justices concludes that even a vigorously exercised subjective expectation of privacy is unreasonable, government surveillance is not a Fourth Amendment search, and the Warrant Clause becomes irrelevant.[141]

This explains why the concept of substantive Fourth Amendment rights, rooted in property theories, enforced by expansive penumbral theories of constitutional interpretation first adopted by the Supreme Court over a century ago and espoused by Justice Douglas during the 1960s, has been the most potent set of theories for protecting privacy yet articulated by the Supreme Court. These theories relied upon the Warrant Clause to provide a general set of procedural protections for privacy and liberty. But they went further, and attempted to employ substantive legal concepts to identify areas of life so fundamental to freedom that even a warrant could not justify intrusions upon them.[142]

Justice Stewart's attempt to replace these hoary doctrines with a new set of theories that would effectively preserve Fourth Amendment privacy rights failed, but not because he posed the simplistic two-part test that has come to stand for his opinion. His effort failed because ultimately Justice Black was correct. Amorphous standards of privacy lack the sinew necessary to withstand what Justice Douglas once referred to as the "hydraulic pressures" favoring expansive police power at the expense of privacy and liberty.[143]

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[139] Justice Stewart stressed that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions," *id.* at 357, a rule cited regularly in Supreme Court opinions authorizing searches and seizures conducted without complying with the procedures required under the Warrant Clause. *See, e.g.*, Skinner v. Ry. Labor Executive's Ass'n, 489 U.S. 602, 619–20 (1989).

[140] Actually, a plurality will suffice in some cases. *See, e.g.*, Florida v. Riley, 448 U.S. 445 (1989).

[141] *See, e.g.*, Oliver v. United States, 466 U.S. 170 (1984) (finding no Fourth Amendment protection even though defendant encircled his entire farm with a fence, posted "keep out" signs, and locked the gate to the property); California v. Ciraolo, 476 U.S. 207 (1986) (finding no Fourth Amendment protection even though defendant encircled his yard with a six-foot exterior fence and a ten-foot interior fence); Dow v. United States, 476 U.S. 227 (1986) (finding no Fourth Amendment protection even though corporation enclosed 2,000 acre property within a fence, had armed guards patrol the fence line and actively investigated suspicious planes flying over the property).

[142] Because rights are not absolute, it is possible to defend the concept of such indefeasible rights while still acknowledging that in some circumstances the need for intrusion is so great that the intrusion is justified.

[143] Terry v. Ohio, 392 U.S. 1, 35 (1968) (Douglas, J., dissenting).

Many of the theories supported by various justices in the 1960s debate over the meaning of the Fourth Amendment discussed in this article survive in some form. Most lawyers, judges, scholars, and law makers at least pay lip service to some version of textual interpretation akin to the theories espoused by Justice Black. Legal professionals also commonly pay lip service to the importance of warrants as devices for protecting privacy and liberty, as did Justices Brennan and Stewart.[144] And the expectation of privacy test is used universally to define not only when government intrusions are Fourth Amendment searches, but even who has standing to challenge those searches.[145]

Only the penumbral theories that implicitly incorporate substantive rights tied to property law advocated by Justice Douglas seem to have lost all currency in contemporary judicial and scholarly discourse about the meaning of the Fourth Amendment. They were discarded by a liberal majority operating at the height of its powers on the Supreme Court. Perhaps in this era of conservative majorities in the courts, the legislatures, and the executive branches of Federal and State governments, these ideas deserve to be reconsidered.

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[144] Justice Scalia's majority opinion in *Kyllo v. United States*, 533 U.S. 27 (2001), demonstrates how property law concepts ostensibly jettisoned by *Katz* and its progeny might reinvigorate contemporary theory. The Court found that a federal agent's warrantless use of a thermal imaging device violated the Fourth Amendment because it allowed the government to obtain "information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area.'" *Id.* at 34. For a discussion of this opinion, see Morgan Cloud, *Rube Goldberg Meets the Constitution: The Supreme Court, Technology and the Fourth Amendment*, 72 MISS. L.J. 5, 41–50 (2002).

[145] *See, e.g.*, Rakas v. Illinois, 439 U.S. 128 (1978); Rawlings v. Kentucky, 448 U.S. 98 (1980); Minnesota v. Carter, 525 U.S. 83 (1998).