

PROPERTY IS PRIVACY: LOCKE AND BRANDEIS IN THE TWENTY-FIRST CENTURY

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INTRODUCTION

For fifty years, *Katz v. United States*¹ has played a central role in defining both how the Fourth Amendment regulates electronic surveillance by the government and the nature of the links between the Fourth Amendment and property rights—links established by the Amendment’s eighteenth century text. In *Katz*, the Supreme Court attempted to create a theory for resolving both issues by ostensibly disavowing the traditional property-based foundations of Fourth Amendment rights and replacing them with an analytical process that has come to be known as the reasonable expectation of privacy test.

The central theme of this article is that the decision to abandon the property basis for rights embodied in the Fourth Amendment was unnecessary. In *Katz*, the Supreme Court overruled a narrow concept of property rights first adopted in *Olmstead v. United States*.² The theories introduced in *Olmstead* were, in fact, inconsistent with the Fourth Amendment’s legal, political, and philosophical origins, as well as more than forty years of Supreme Court decisions using a very different theory of property rights to interpret the Fourth Amendment.

Before *Olmstead*, Fourth Amendment rights were tied closely to a broad definition of property articulated by John Locke in the seventeenth century. A broad Lockean theory of property was embedded in the Fourth Amendment’s eighteenth century text and history and was a fundamental element of the Supreme Court’s interpretation of the Amendment for almost half a century. In this paper, I explore this “broad” theory of property and propose that it could provide robust tools for protecting privacy and liberty from many technological intrusions, particularly intrusions upon digital information.

The broad concept of property can apply to digital information because that theory protects more than tangible things. As understood during the century leading up to the Founding, the broad concept of property included a person’s rights, ideas, beliefs, and the creative products of her labor. It provided robust

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1. *Katz v. United States*, 389 U.S. 347 (1967).

2. *Olmstead v. United States*, 277 U.S. 438 (1928).

protection for the contents of expressive property including, but not limited to, private papers. And courts applying broad theories of property regularly employed flexible interpretive methods that protected liberty, even if this obstructed the efficient exercise of government power.

The Article next turns from Locke to Brandeis, finding that Louis Brandeis's seminal theories about the legal right to privacy shared core values with broad Lockean property theories. The values underlying privacy and property theories produced similar results in actual disputes, particularly when the government used technology to conduct searches and seizures.

Finally, the Article explains how recent Supreme Court opinions regulating searches of both physical property and expressive digital information are consistent with broad property theories. In fact, in each case property theory may provide a better explanation for the Supreme Court's decisions than does the *Katz* expectation of privacy test.

The discussion proceeds in the following order. Part I of this Article offers an overview of how *Katz* replaced *Olmstead*'s narrow theory of property with a mercurial concept of privacy.

Part II discusses the broad Lockean theory of property and its influence on the development of the Whig theories of liberty that were central to the creation of the United States. The protection these theories provided to expressive property, like papers, is central to understanding why the Fourth Amendment distinguishes papers from all other personal property.

Part III explains how the seminal Supreme Court opinion interpreting the Fourth Amendment, *Boyd v. United States*,³ embodied a broad Lockean theory of property.

Part IV employs the broad property theory to provide new perspectives on the arguments for a legal right to privacy made in the famous law review article written by Samuel Warren and Louis Brandeis. It then examines Brandeis's later arguments for using privacy to interpret the Fourth Amendment. Readers may be surprised to learn that the broad concept of property prominent in search and seizure law, both before 1928 and in Brandeis's seminal theories about privacy, produced similar results—particularly when applied in disputes over the contents of expressive property like private papers.

In Part V, I propose that recent Supreme Court opinions reveal how the broad theory of property could provide effective tools for regulating technological searches and seizures of both physical property and expressive digital information.

I do not argue that we should—or could—adopt verbatim seventeenth, eighteenth, and nineteenth century doctrines to resolve all twenty-first century disputes. Nor do I argue that broad property theories can resolve all contemporary disputes, or that we should discard privacy as a tool for defining rights in some

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

settings. Privacy theory remains the better tool for resolving a case like *Katz* itself, where government agents did not trespass upon property to install and use an electronic eavesdropping device.

Time does work changes.⁴ More than three centuries have passed since Locke published his *Second Treatise Of Government*,⁵ and more than two centuries have passed since the Revolutionary and Founding generations embraced many of his ideas. What I hope to demonstrate in this article is that although the vocabularies and intellectual constructs of liberty have changed with the passage of time, the foundational values undergirding the Fourth Amendment have not. We face different practical problems today, but concepts of liberty embedded in the phrase “persons, houses, papers, and effects”⁶ persist. Ultimately it is not theories, but rather values, that dictate how we resolve disputes, how we define rights, and how we decide whether government power will be expanded or constrained.

I. *KATZ*, PRIVACY, AND PROPERTY

In *Katz*, the Supreme Court overruled the trespass doctrine adopted in *Olmstead v. United States*⁷ and expanded upon its holding in another Warren Court decision establishing that intangible conversations as well as tangible property can be the subject of Fourth Amendment seizures.⁸ *Olmstead* decreed that warrantless wire-tapping of telephone lines was not unconstitutional because “[t]he Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants.”⁹

The majority emphasized that its opinion rested upon a concretely literal interpretation of the constitutional text:

The Amendment itself shows that the search is to be of material things—the person, the house, his papers or his effects. The description of the warrant necessary to make the proceeding lawful, is that it must specify the place to be searched and the person or *things* to be seized.¹⁰

Writing for a bare majority, Chief Justice Taft held that government surveillance carried out with technology that functioned without requiring a physical trespass into a home or other constitutionally protected area, and that only captured intangibles like telephone conversations, did not trigger Fourth Amendment protections:

4. See *infra* note 151 and accompanying text (citing to Brandeis’s *Olmstead* dissent).

5. JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* (C.B. MacPherson ed., Hackett Publ’g Co. 1980) (1690) [hereinafter *SECOND TREATISE*].

6. U.S. CONST. amend IV.

7. *Olmstead*, 277 U.S. at 438, 466.

8. *Silverman v. United States*, 365 U.S. 505, 511–12 (1961).

9. *Olmstead*, 277 U.S. at 464.

10. *Id.*

The language of the Amendment can not be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office any more than are the highways along which they are stretched.¹¹

From 1928 until the 1960s, the Supreme Court's opinions reaffirmed these rules. Under the Fourth Amendment, only a physical trespass into a constitutionally protected area was a search and only tangible things could be seized.¹² Thus, it was no surprise that in *Katz* the parties relied on the trespass doctrine to frame their arguments.¹³ Justice Stewart's majority opinion rejected those arguments—and the very idea that Fourth Amendment rights were based on property rights:

It is true that the absence of such penetration was at one time thought to foreclose further Fourth Amendment inquiry, for that Amendment was thought to limit only searches and seizures of tangible property. *But "[t]he premise that property interests control the right of the Government to search and seize has been discredited."* 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 departed from the narrow view on which that decision rested.¹⁴

The Court's interpretive arguments for the abandonment of property rules should make even nontextualists cringe. Justice Stewart's opinion asserted that "the Fourth Amendment protects people, not places."¹⁵

This is at best, only partially correct. The Fourth Amendment does protect "the right of the people," but it explicitly defines many of its protections in relationship to property. The Fourth Amendment text states:

The right of the people to be secure in their *persons, houses, papers, and effects*, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and *particularly describing the place to be searched, and the persons or things to be seized.*¹⁶

The Fourth Amendment explicitly protects one place—*houses*—a category that has been interpreted to encompass other spaces, including hotel rooms, offices, and a home's curtilage.¹⁷ It also protects two categories of property, *papers and*

11. *Id.* at 465.

12. See *Silverman*, 365 U.S. at 509 (affirming the trespass doctrine and implicitly holding that a conversation could be seized); *Goldman v. United States*, 316 U.S. 129, 135 (1942).

13. See *Katz v. United States*, 389 U.S. 347, 349–52 (1967).

14. *Id.* at 352–53 (emphasis added) (citations omitted) (quoting *Warden v. Hayden*, 387 U.S. 294, 304 (1967)).

15. *Id.* at 351.

16. U.S. CONST. amend. IV (emphasis added).

17. See *Florida v. Jardines*, 569 U.S. 1, 6 (2013).

effects.¹⁸ To the extent that papers and effects are not being carried on the person, they must be kept somewhere, *in some place*. To the extent that unreasonable searches for papers and effects are prohibited, so too are intrusions into the *places* in which they are kept.¹⁹

The *Katz* opinion misconstrued the plain meaning of the text, but it did not stop there. It also implied that the Court was not forging a fundamental change in constitutional law. Although Justice Stewart had relied upon the trespass doctrine when writing a majority opinion *only one year earlier*,²⁰ in *Katz* he characterized the trespass rule as a long abandoned and moribund doctrine.²¹ To support this claim, he criticized the parties' lawyers for relying on the Court's precedents, as well as the Court of Appeals opinion in *Katz* itself.²² By relying on precedent, he asserted, these lawyers demonstrated that they did not understand the constitutional issues at stake.

Katz's lawyer had phrased the issues before the Court as "[w]hether a public telephone booth is a constitutionally protected area," and "[w]hether 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."²³ The Court complained that the way the issues were formulated was "misleading."²⁴ It replaced the concept of a constitutionally protected area with a new and ambiguous standard, stating:

[The] 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 protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.*²⁵

The Court's attempt to define its new model for Fourth Amendment rights failed to achieve one particularly important goal: creating a workable legal rule for use in future cases. How does the Fourth Amendment protect "people not places?" Did the Court mean that the Fourth Amendment does not protect houses? If that were

18. *Id.*

19. *See Hayden*, 387 U.S. at 313, 321 (Douglas, J., dissenting) (explaining that the substantive—property-based—"face" of Fourth Amendment rights relied on this understanding to restrict the scope, intrusiveness, and frequency of searches).

20. *See Hoffa v. United States*, 385 U.S. 293, 300–03 (1966).

21. *Katz v. United States*, 389 U.S. 347, 353 (1967).

22. *See id.* at 349–52. The Court of Appeals for the Ninth Circuit applied the Supreme Court's precedents and approved the FBI's use of a "bug" to listen to and record Katz's end of telephone conversations because the agents had not committed a physical trespass into the interior of the telephone booth. *Id.* at 348–49.

23. *Id.* at 349–50.

24. *Id.* at 351.

25. *Id.* at 351–52 (emphasis added) (citations omitted).

correct, the Amendment's text is meaningless. Although the text explicitly protects personal property, the language used by the *Katz* majority suggests that if a person "knowingly exposes" some chattel in public, it receives no constitutional protection, although it is clear that at least some *seizures* of these objects would be unlawful. Even if the person instead "seeks to preserve" her property (and her person?) "as private," the Court decreed that the Fourth Amendment *may not* protect it.

The Court's attempt in *Katz* to articulate a new definition of Fourth Amendment rights that spurned the operational terms actually contained in the Constitution was so incoherent that the Supreme Court soon abandoned it in favor of a two part test adapted from Justice Harlan's concurring opinion in *Katz*.²⁶ Harlan asserted that the Court's precedents established that a Fourth Amendment right existed when two conditions were met: "[F]irst[,] 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.'"²⁷

Harlan's two-part "expectations" formula became the keystone of Fourth Amendment privacy analysis in the following years.²⁸ Its shortcomings as a device for protecting privacy and liberty are well-documented,²⁹ and need not be examined here. What is relevant is that the Court could have avoided this error by reclaiming prominent seventeenth, eighteenth, and nineteenth century theories consistent with the Fourth Amendment's text and history.

II. PROPERTY AND FOURTH AMENDMENT RIGHTS

A. *The Fourth Amendment Text and the Whig Vocabulary of Liberty*

The Fourth Amendment defines liberty and what we now define as privacy rights in terms of personhood and property—the right to be secure in our “persons, houses, papers, and effects.”³⁰ The word privacy appears nowhere in the constitutional text because it was not part of the political vocabulary of the time. Instead, liberty and privacy rights were understood largely in terms of property rights. Property stood as a primary bulwark against improper government intrusions into

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

27. *Id.* The two part expectations test quickly ossified into a formula that was so ineffective at protecting privacy, that Harlan himself protested its use only four years later. *See United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting).

28. *See, e.g., California v. Ciraolo*, 476 U.S. 207, 211 (1986).

29. The literature detailing *Katz*'s failures is voluminous. For this author's arguments, *see, e.g., Morgan Cloud, A Liberal House Divided: How the Warren Court Dismantled the Fourth Amendment*, 3 OHIO STATE J. CRIM. L. 33 (2005); Morgan Cloud, *Rube Goldberg Meets the Constitution: The Supreme Court, Technology and the Fourth Amendment*, 72 MISS. L.J. 5 (2002); Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555 (1996) [hereinafter Cloud, *The Lochner Era*]; Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199 (1993).

30. U.S. CONST. amend. IV.

the lives of the people.

This choice was not made in an intellectual vacuum. The idea that private property was an essential device for protecting individual freedoms had been evolving for centuries in English political theory,³¹ and was a core element in Whig doctrines used to justify the Revolution and later incorporated into the constitutional text.³²

The Whig conception of property undoubtedly included the idea that property includes tangible things we can own, modify, control, and from which we can exclude others. This surely is the most common understanding of the meaning of private property today and was a common element of property theory in eighteenth century England and America. For example, Blackstone opined that property was “that sole and despotic dominion which one . . . claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”³³ A famous English search and seizure case that influenced the Revolutionary and Founding generations concluded that “No man can set his foot upon my ground without my licence.”³⁴

But the Whig theory of property that animated the Revolution and the Founding also articulated a more expansive theory of property.³⁵ This conception of property will likely strike the twenty-first century reader as odd—perhaps even mystifying—because it asserted that rights and liberties were a person’s property and that property also was an expression of personhood.

31. See, e.g., JAMES W. ELY, JR., *THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS* 28 (1992). The author stated:

American thinking about the constitutional significance of private property was in no sense original or distinctive. Clearly, the revolutionary attitude toward economic issues was partly molded by self-interested considerations. However, the colonial leaders drew heavily on the time-honored English Whig philosophy that regarded protection of private property as crucial to the preservation of freedom.

Id.

32. See *id.* at 28–29 (describing how “the Declaration of Independence illustrated this tie between political liberty and private property”). Both the original Constitution and the Bill of Rights use property to affirm some rights. See, e.g., U.S. CONST. art. 1, § 10 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .”); *id.* amend. IV (“The right of the people to be secure in their . . . houses, papers, and effects . . .”); *id.* amend. V (“No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation.”).

33. 2 WILLIAM BLACKSTONE, *COMMENTARIES*, *2.

34. *Entick v. Carrington*, (1765) 95 Eng. Rep. 807; 19 How. St. Tr. 1029, 1066.

35. See, e.g., Laura S. Underkuffler, *On Property: An Essay*, 100 *YALE L.J.* 127, 128–29 (1990).

The contemporary impulse toward equating the sphere of absolute individual autonomy with the concept of property is, in fact, a radical narrowing of the historical understanding of property. During the American Founding Era, property included not only external objects and people’s relationships to them, but also all of those human rights, liberties, powers, and immunities that are important for human well-being, including: freedom of expression, freedom of conscience, freedom from bodily harm, and free and equal opportunities to use personal faculties.

Id.

B. Locke's Broad Theory of Property

The most influential source of this broader theory of property³⁶ was John Locke's *Second Treatise of Government*.³⁷ Locke's critique of the nature of property defined a person's property as more than the *objects* he possessed. In Locke's theories, for example, a person's *rights were his property*. This was not Locke's idiosyncratic theory but was a core idea during the American revolutionary era.³⁸ As Jack Rakove noted:

[T]here was a deeper sense in which their attachment to the rights of property identified a value that all Americans shared. For *property* was one of the strongest words in the Anglo-American political vocabulary. Its security from unlawful taxation had been a dominant value of their common constitutional culture since the previous century. John Locke had grounded an entire theory of government—and the right to resist tyranny—on the concept of property in his *Second Treatise of Government*. But Locke only gave philosophical rigor to a belief that already permeated Anglo-American law and politics.

For Locke, as for his American readers, the concept of property encompassed not only the objects a person owned but also the ability, indeed the right, to acquire them. Just as men had a right to their property, so they held a property in their rights. Men did not merely *claim* their rights, but also *owned* them, and their title to their liberty was as sound as their title to the land or to the tools with which they earned their livelihood.³⁹

Rights were a person's property, possessed as surely as physical property and secured against violation as much as any physical trespass onto land or against the possession of tangible personal property. Characterizing rights as property pushes that term beyond common twenty-first century categories, but these Lockean property concepts diverge from contemporary ideas about property even more dramatically than Rakove's description suggests.

Locke employed both "narrow" and "broad" concepts of property.⁴⁰ The narrow conception is consistent with the common understanding that a person's property

36. See ELY, *supra* note 31, at 16–17 ("The most significant of these Whig theorists was John Locke, who asserted in his famous *Second Treatise on [sic] Government* that legitimate government was based on a compact between the people and their rulers. The people gave allegiance to the government in exchange for protection of their inherent natural rights.")

37. See SECOND TREATISE, *supra* note 5.

38. See, e.g., Jennifer Nedelsky, *American Constitutionalism and the Paradox of Private Property*, in CONSTITUTIONALISM AND DEMOCRACY 241, 270 (Jon Elster & Rune Slagstad eds., 1988) ("[T]raditional conceptions of property—either constitutional or Common Law—have [not] been simple or exclusively material. But they have had a clear material base which is the core of both the legal and popular conceptions.") (citation omitted).

39. JACK RAKOVE, *REVOLUTIONARIES: A NEW HISTORY OF THE INVENTION OF AMERICA* 78 (2010).

40. See, e.g., C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM* 198, 230, 247–50 (Oxford Univ. Press 2011) (1962); A. JOHN SIMMONS, *THE LOCKEAN THEORY OF RIGHTS* 227 (1992).

includes her “estates”⁴¹ and her “possessions”⁴² including land,⁴³ goods, and chattels which she has a right to own. The broad theory incorporated concrete forms of property external to the person, but was not limited to them.

This broad conception of property was a cornerstone of Locke’s complex theories about the nature of human beings, individual rights, society, and government. Locke wrote famously that a man’s property is “*his life, liberty and estate*.”⁴⁴ This definition was not a mistake or merely a rhetorical flourish. It was central to his arguments justifying the creation of both private property and societies. Indeed, Locke argued that the ultimate reason people abandon the freedom of nature and accept the constraints inherent in living in society, is “*for the mutual preservation of their lives, liberties and estates, which I call by the general name, property*.”⁴⁵

Rights, often won at great cost, were *property* possessed by people as surely as their physical property and secured against violation as much as any physical trespass onto land or against possession of personal property.

A second element of Locke’s theory lays the groundwork for understanding common law rules governing expressive property—like papers.⁴⁶ That element is his labor theory of private property, a theory that rested upon the transformative power of human labor and its divine origins.

Locke’s broad theory of property included a man’s *person*, his *labor*, and the *products* of that labor:

Though the earth, and all inferior creatures, be common to all men, *yet every man has a property in his own person*: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state nature placed it in, it hath by this labour something annexed to it, that excludes the common right of other men: for this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for others.⁴⁷

A man’s property includes his own person, his labor, and the products of that labor. When the products of his labor incorporate external objects, they are transformed into his property as well. These products of his labor are not merely

41. See, e.g., SECOND TREATISE, *supra* note 5, § 123.

42. *Id.* §§ 36, 38.

43. *Id.* § 32 (“But the chief matter of property being now . . . the earth itself . . .”).

44. *Id.* § 87 (emphasis added).

45. *Id.* § 123 (emphasis added).

46. See *infra* Part III.B (discussing expressive property).

47. SECOND TREATISE, *supra* note 5, § 27 (emphasis added).

things that he now owns. They are extensions of his being, expressions of his very personhood.⁴⁸

Although a person's efforts might remove physical property from the natural bounty God created for all to share in common, according to Locke, this private appropriation of physical property was also part of God's plan.⁴⁹ It did not harm others but instead benefitted them by increasing the value of the earth and its products for everyone.⁵⁰ "[H]e who appropriates land to himself by his labour,

48. See *id.* § 87 (This helps inform Locke's famous definition of a man's property as "his life, liberty, and estate").

Locke's theories did not, however, treat everyone's productive labor as equal. Viewed from the twenty-first century, Locke's social theories integrating property, rights, and liberty are incompatible with human slavery. Yet a century before the Revolution, Locke did not reach that conclusion. Like the irreconcilable conflict between the Founders' declaration "that all men are created equal," possessing the God-given "unalienable Rights [of] Life, Liberty and the pursuit of Happiness," and the reality that many owned slaves, Locke's written expositions of individual rights did not apply equally to all people.

Locke's acceptance of slavery is explicit in The Fundamental Constitutions of Carolina, (March 1, 1669), available at http://avalon.law.yale.edu/17th_century/nc05.asp, visited November 27, 2017. Locke wrote: "Every freeman of Carolina shall have absolute power and authority over his negro slaves, of what opinion or religion soever." *Id.*, § 110. Locke even reconciled his vision of religious toleration in a class-based society with slavery. Slaves should be entitled to "enter themselves, and be of what church . . . any of them shall think best, and, therefore, be as fully members as any freeman." *Id.*, § 107. But choosing a faith did not lead to freedom because "no slave shall hereby be exempted from that civil dominion his master hath over him, but be in all things in the same state and condition he was In before." *Id.*

The title of Chapter IV of Locke's Second Treatise of Government is "Of Slavery," Second Treatise, *supra* note 5, but here his treatment of the subject expresses incompatible ideas, some rejecting arbitrary power over people, and others apparently asserting that a lawful legislature could authorize human bondage. He wrote, for example, that "freedom from absolute, arbitrary power is so necessary to, and closely joined with, a man's preservation, that he cannot part with it but by what forfeits his preservation and life together." *Id.*, § 23. Nonetheless, the "liberty of man in society is under the legislative power . . . established by consent in the commonwealth." *Id.*, § 22. In a chapter devoted to the topic of slavery, Locke seemed to assert that a properly selected legislature could lawfully subject people to servitude.

49. See *id.* § 34. Locke wrote:

God gave the world to men in common; but since he gave it them for their benefit, and the greatest conveniences of life they were capable to draw from it, it cannot be supposed he meant it should always remain common and uncultivated. He gave it to the use of the industrious and rational, (and labour was to be his title to it); not to the fancy or covetousness of the quarrelsome and contentious.

Id.

50. At least when private property was initially created out of nature, Locke argued that appropriation of property would not harm others. For example,

[N]o man's labour could subdue, or appropriate all [property of nature]; nor could his enjoyment consume more than a small part; so that it was impossible for any man, this way, to intrench upon the right of another, or acquire to himself a property, to the prejudice of his neighbour, who would still have room for as good, and as large a possession (after the other had taken out his) as before it was appropriated. This measure did confine every man's possession to a very moderate proportion, and such as he might appropriate to himself, without injury to any body, in the first ages of the

does not lessen, but increase the common stock of mankind”⁵¹ In fact, to fulfill God’s designs for humanity, it was necessary that people create private property. “[T]he condition of human life, which requires labour and materials to work on, necessarily introduces private possessions.”⁵²

One need not share Locke’s vision of a divine plan to recognize that his theory of productive labor offers a provocative model for understanding the meaning of the Fourth Amendment’s protection of papers as expressive property. If a person’s property includes the products of his labor, then papers should be protected *as* property. And these protections were not limited to the physical paper containing a writing. The belief that the contents of papers were a person’s protected property emerged as an important theme in Whig theories of liberty in the second half of the eighteenth century.

C. Locke and the Whig Ideology of Liberty

Property-based theories of liberty helped define eighteenth century democratic ideology in England and America.⁵³ Locke was but one of many influences,⁵⁴ but he was one of the most important.

It is difficult to overstate the impact of the Lockean concept of property. Strongly influenced by Locke, the eighteenth-century Whig political tradition stressed the rights of property owners as the bulwark of freedom from arbitrary government. Property ownership was identified with the preservation of political liberty Whig political thought profoundly shaped public attitudes in colonial America Consequently, both their circumstances and philosophical heritage induced the colonists to affirm the sanctity of property rights.⁵⁵

Once we are familiar with Locke’s theories of property, it is easy to recognize them in the literature of the Revolution and the Founding. One of the most interesting examples is an essay titled *Property* that James Madison published only three months after the ratification of the Bill of Rights.⁵⁶ Madison’s definition of property is similar to Locke’s. If anything, Madison expresses the Lockean theories of property—both broad and narrow—more clearly than had Locke.

world, when men were more in danger to be lost, by wandering from their company, in the then vast wilderness of the earth, than to be straitened for want of room to plant in Nay, the extent of ground is of so little value, without labour

Id. § 36.

51. *Id.* § 37.

52. *Id.* § 35.

53. See, e.g., JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 27 (1986) (“[T]here was no right more changeless and timeless than the right to property.”).

54. See BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967).

55. ELY, *supra* note 31, at 17.

56. Ratification of the Bill of Rights was completed on December 15, 1791. Madison’s essay *Property* was published in the *National Gazette* on March 29, 1792. The essay can be found in various sources, including James Madison, *Property*, in 6 THE WRITINGS OF JAMES MADISON 101 (Gaillard Hunt ed., 1906).

Madison described the narrow theory of property as “that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual,” and listed “land, or merchandize, or money” as examples.⁵⁷

Madison also espoused a grander definition of property, which was more important than material possessions. “In its larger and juster meaning, it [property] embraces every thing to which a man may attach a value and have a right; and *which leaves to every one else the like advantage.*”⁵⁸ He then devoted the majority of the essay to describing this broad species of property.

Madison embraced Locke’s broad understanding of the nature of property. A man’s ideas,⁵⁹ beliefs,⁶⁰ abilities, and the opportunity to exercise them⁶¹ were his most treasured property.⁶² For example, “a man has property in his opinions and the free communication of them,” and also “has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them.”⁶³ The “safety and liberty of his person” is “property very dear to him.”⁶⁴ And a “man is said to have a right to his property, he may be equally said to have a property in his rights.”⁶⁵

Madison’s definition of government’s fundamental function could have been penned by Locke. “Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses.”⁶⁶ Therefore, the only “*just government . . . impartially*

57. *Id.*

58. *Id.*

59. *Id.* at 101–103.

60. Religious beliefs and rights were natural rights requiring the greatest protection. Madison argued:

More sparingly should this praise be allowed to a government, where a man’s religious rights are violated by penalties, or fettered by tests, or taxed by a hierarchy. *Conscience is the most sacred of all property; other property depending in part on positive law, the exercise of that, being a natural and unalienable right.* To guard a man’s house as his castle, to pay public and enforce private debts with the most exact faith, can give no title to invade a man’s conscience which is more sacred than his castle, or to withhold from it that debt of protection, for which the public faith is pledged, by the very nature and original conditions of the social pact.

Id. at 102 (emphasis added).

61. *Id.* at 101 (“He has an equal property in the free use of his faculties and free choice of the objects on which to employ them.”).

62. Locke’s labor theory of the creation of private property was a form of property that governments have a duty to protect:

That is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies *deny to part of its citizens that free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called.*

Id. at 102 (emphasis added).

63. *Id.* at 101.

64. *Id.*

65. *Id.*

66. *Id.* at 102.

secures to every man, whatever is his *own*.”⁶⁷

Madison emphasized that the most important kinds of property government must protect were not tangible things, but rather a person’s thoughts, opinions, and rights.

“[T]he praise of affording a just securing to property, should be sparingly bestowed on a government which, however scrupulously guarding the possessions of individuals, does not protect them in the *enjoyment and communication of their opinions, in which they have an equal, and in the estimation of some, a more valuable property*.”⁶⁸

These principles applied to all governments, including the nascent United States:

“If the United States mean to obtain or deserve the full praise due to wise and just governments, *they will equally respect the rights of property, and the property in rights*: they will rival the government that most sacredly guards the former; and by repelling its example in violating the latter, will make themselves a pattern to that and all other governments.”⁶⁹

Madison, like Locke, defined property to include the common understanding of things, tangible and intangible, which people can own. But property also included rights, the safety and liberty of one’s person, the freedom to form opinions—particularly about religion—and to express those opinions.⁷⁰ This broad theory of property “was intimately related to the development of the human personality, to

67. *Id.*

68. *Id.* (emphasis added). Madison demanded that the new United States must protect property in both its broad and narrow meanings:

If there be a government then which prides itself on maintaining the inviolability of property; which provides that none shall be taken *directly* even for public use without indemnification to the owner, and yet *directly* violates the property which individuals have in their opinions, their religion, their persons, and their faculties; nay more, which *indirectly* violates their property, in their actual possessions, in the labor that acquires their daily subsistence, and in the hallowed remnant of time which ought to relieve their fatigues and sooth their cares, the influence will have been anticipated, that such a government is not a pattern for the United States.

Id. at 103 (emphasis added).

69. *Id.* (emphasis added).

70. Madison’s clarity is a particularly useful in defining the differences between the narrow and broad theories of property during the founding era. Professor Underkuffler has described the confusion about this difference in contemporary scholarship, using her analogous (if not identical) categories of “absolute” and “comprehensive” property theories. See Underkuffler, *supra* note 35, at 128–29. In another passage she describes the dual nature of property:

[D]uring the Founding Era, “property” retained its narrow as well as its broad meaning; it is therefore difficult to tell, in the absence of explicit usage, which meaning was intended in any particular context. The fact that the term had multiple meanings leads to a difficult question. If both conceptions existed during the Founding Era, why (in contemporary interpretations of that Era) is the comprehensive approach often overlooked? Why is it generally assumed that the absolute conception was the exclusive understanding during that period? *Id.* at 141 (citations omitted).

the exercise of independent thought and creative powers.”⁷¹

Madison and Locke argued that governments existed in large part to protect each person’s property in all of these manifestations.⁷² The Fourth Amendment, ratified along with the other nine Amendments only a dozen weeks before publication of Madison’s essay, embodied such an attempt to protect property in both its narrow and broad meanings.

III. LOCKEAN THEORY APPLIED

It is not necessary to create a property-based interpretive theory of the Fourth Amendment out of whole cloth because the Supreme Court adopted such a theory more than 130 years ago. In its first great Fourth Amendment opinion, *Boyd v. United States*,⁷³ the Supreme Court defined individual rights with a broad property theory inherited from Locke and eighteenth century Whigs. When *Boyd*’s reasoning is compared with the seminal arguments for a legal right to privacy published by Warren and Brandeis only four years later, and with Brandeis’s famous dissent in *Olmstead*,⁷⁴ it is apparent that robust theories of property rights and privacy rights can be harmonized.

A. *Boyd*

Ninety-five years after ratification of the Bill of Rights, the Supreme Court issued its first opinion offering comprehensive interpretive theories of the Fourth Amendment. In *Boyd*, the government sought civil forfeiture of thirty-five cases of plate glass, alleging that the Boyds had imported the glass without paying the required duties.⁷⁵ As part of its case, the government served the Boyds with a subpoena directing them to produce an invoice for an earlier shipment of imported glass it wished to use as evidence in support of forfeiture.⁷⁶ The Boyds complied with the subpoena under protest, arguing that the compelled production of documents to be used as evidence against them violated the Fourth Amendment prohibition of unreasonable searches and seizures and the Fifth Amendment

71. *Id.* at 138. More than one hundred and thirty years later, Brandeis’s dissent in *Olmstead*, which argues for a Fourth Amendment right to privacy, rephrases but repeats these Madisonian, and Lockean, descriptions of property. *See infra* note 151 and accompanying text.

72. *See* Underkuffler, *supra* note 35, at 142 (“During the Founding Era . . . [m]any of these newer theories [of property systems] held individual rights to be of extraordinary importance—indeed, such rights were viewed as shields against royal authority and other arbitrary power.”).

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

74. *See infra* note 151 and accompanying text.

75. *See Boyd*, 116 U.S. at 617–18. The Boyds had supplied plate glass for a new federal building erected in Philadelphia. *Id.* They had paid import duties for the glass actually used in the project, which was taken from their existing inventory. *Id.* Their agreement with the federal government permitted the Boyds to import replacement glass without paying duties. *Id.* The government asserted that the Boyds had attempted to defraud it by importing more glass than the agreement permitted. *Id.*

76. *Id.* at 618.

privilege against self-incrimination.⁷⁷

The Supreme Court decided for the Boyds under both Amendments.⁷⁸ Three elements of this complex opinion are of particular relevance here.⁷⁹ First, it confirmed that Fourth Amendment rights were directly related to private property rights.⁸⁰

Second, it implemented robust protections for private papers that amounted to a ban on most searches for papers. This special treatment of papers was not a nineteenth century innovation by the Court. It was derived from English cases decided a decade before the Revolution that had influenced ideas about unreasonable searches and seizures in America during the founding period and after. In *Boyd*, the Court embraced the reasoning in one of those pre-Revolutionary English decisions, *Entick v. Carrington*,⁸¹ declaring that this opinion defined the “very essence of constitutional liberty.”⁸²

77. *Id.* at 618, 621. After the invoice was introduced into evidence over the Boyds’ objections, the jury decided in favor of the government. *Id.* at 618. The Circuit Court affirmed the judgment forfeiting the plate glass to the government. *Id.* The trial evidence provided factual support for the jury verdict. *Id.* The Boyds’ depended upon the suppression of the information gleaned from their business papers to reverse the verdict. *Id.*

78. *See id.* at 634–35. Arguably, neither Amendment applied. The Fourth Amendment only regulates searches and seizures. *See* U.S. CONST. amend. IV. The subpoena commanded the Boyds to bring the papers to court and did not amount to a physical search of the Boyds’ business or the literal seizure of their papers. *Boyd*, 116 U.S. at 618. Yet the majority concluded that the Fourth Amendment applied because the purpose and effect of the disputed subpoena were equivalent to those produced by a literal search and seizure—searches and seizures are conducted to discover evidence to be used by the government against suspected wrongdoers, the same purpose served by a subpoena for documents. *Id.* at 634–35. The intrusions upon liberty and privacy caused by the two methods differed only in degree, not kind. *Id.* The Fifth Amendment commands that no person “shall be compelled in any criminal case to be a witness against himself.” U.S. CONST. amend. V. On its face, the privilege against self-incrimination applies to criminal prosecutions only. *Boyd*, 116 U.S. at 633–34. Although the Boyds were not compelled to testify in court and the *civil* forfeiture action was not a criminal case, the Justices agreed that by compelling the Boyds to produce papers supporting the forfeiture claims, the government had violated the Boyds’ Fifth Amendment rights. *Id.* at 634–35.

79. For a discussion of other jurisprudential attributes of the opinion, *see* Cloud, *The Lochner Era*, *supra* note 29; *see also* Donald A. Dripps, “Dearest Property”: *Digital Evidence and the History of Private “Papers” as Special Objects of Search and Seizure*, 103 J. CRIM. L. & CRIMINOLOGY 49, 83 (2013) (presenting an interesting discussion of the procedural history of the case).

80. *See Boyd*, 116 U.S. at 630.

81. *Entick v. Carrington*, (1765) 95 Eng. Rep. 807; 19 How. St. Tr. 1029.

82. *Boyd*, 116 U.S. at 630. The Boyd opinion embraced *Entick* as a statement of fundamental law that was vital to the Revolutionary generations, and to the Framers of the Fourth Amendment:

[T]he law as expounded by [Lord Camden] has been regarded as settled from that time to this, and his great judgment on that occasion is considered as one of the landmarks of English liberty. It was welcomed and applauded by the lovers of liberty in the colonies, as well as in the mother country. It is regarded as one of the permanent monuments of the British Constitution, and is quoted as such by the English authorities on that subject down to the present time.

As every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment to the Constitution, and were considered as sufficiently explanatory of what was meant by unreasonable searches and seizures. We think,

Third, the *Boyd* opinion employed a value-based interpretive theory that embodies the connections between broad Lockean theories property and Brandeis's seminal theories of privacy.⁸³ This value-based interpretive theory demonstrates how property and privacy rights are compatible in Fourth Amendment theory.⁸⁴

1. Property Rights

Boyd confirmed that Fourth Amendment rights were grounded in private property rights. This meant that a person's property erected a barrier to exclude others, including the government, from intruding. But *Boyd* held that property law established a second limit on searches and seizures that will seem less obvious to the contemporary reader. A search and seizure of property was illegal unless the government could demonstrate its own right to possess it under property law.⁸⁵

The categories of property for which the government could claim an interest were limited to contraband, imported goods on which duties had not been paid, certain required records, and stolen property.⁸⁶ The government could establish no property claim in the Boyd's business records, which it sought only for use as evidence against them.⁸⁷ The Fourth Amendment, therefore prohibited the government from searching for and seizing the Boyds' papers.⁸⁸

These property-based limits on government search and seizure powers were categorical but not absolute. Government agents *were* authorized to search for and seize property a person had no legal right to possess (stolen property, contraband), or for which property law gave the government a superior claim (imported goods upon which taxes were not paid), or when the property fell within certain areas of police powers (required records).⁸⁹ Property rights were not absolute, but the *Boyd* decision used property rights to support a strong conception of personal liberty and a comparatively weak conception of police powers.

2. Private Papers

In the early 1760s, searches and seizures for evidence related to dissident publications criticizing the English government led to a series of lawsuits that

therefore, it is pertinent to the present subject of discussion to quote somewhat largely from this celebrated judgment.

Id. at 626–27 (citation omitted).

83. *See infra* Part IV.B.

84. *See id.*

85. *Boyd*, 116 U.S. at 623–24.

86. *Id.*

87. *Id.* at 623 (“The two things differ *toto coelo*. In the one case, the government is entitled to the possession of the property; in the other it is not.”). The Court later expanded the list of property the government was entitled to search and seize to include the instrumentalities by which crimes were committed. *See, e.g.,* *Gouled v. United States*, 255 U.S. 298, 308 (1921), *overruled by* *Warden v. Hayden*, 387 U.S. 294, 302–10 (1967).

88. *See* Cloud, *The Lochner Era*, *supra* note 29, at 578–79.

89. The list was later expanded to include property classified as criminal instrumentalities. *See Gouled*, 255 U.S. at 308.

influenced the creation of the Fourth Amendment. A majority of the plaintiffs sought tort damages for searches and seizures triggered by publication of *The North Briton*, Number 45,⁹⁰ but the lawsuit of greatest relevance to this discussion, *Entick v Carrington*,⁹¹ was the product of searches for evidence related to several issues of a different anti-government publication, *The Monitor, or British Freeholder*.⁹²

In 1762, Lord Halifax, the British Secretary of State, signed general warrants for searches and seizures of the publishers of *The Monitor* and their papers.⁹³ Eventually, John Entick and other members of *The Monitor*'s staff sued Nathan Carrington and three other "messengers" who conducted the searches.⁹⁴ The plaintiffs alleged that

the defendants . . . with force and arms broke and entered the dwelling-house of the plaintiff . . . and continued there four hours without his consent and against his . . . peaceable possession thereof, and broke open the doors to the rooms, . . . the boxes, chests, drawers, [etc.] of the plaintiff in his house, and broke the locks thereto affixed, and searched and examined all the rooms, [etc.], in his dwelling- house, and all the boxes, [etc.] so broke open, and read over, pryed into, and examined all the private papers, books, [etc.] of the plaintiff there found, whereby the secret affairs, [etc.], of the plaintiff became wrongfully discovered and made public; and took and carried away 100 printed charts, 100 printed pamphlets, [etc.] [etc.] of the plaintiff there found, and other 100 charts, [etc.] [etc.] took and carried away, to the damage of the plaintiff 2000£.⁹⁵

The *Entick* opinion addressed a number of difficult legal issues, including executive and judicial powers to issue warrants, whether the government searchers had legal immunity, and the status of general warrants under English law.⁹⁶ But the court concluded that the dispute over the Secretary of State's power to authorize

90. Most of the searches and most of the litigation resulted from publication of a specific tract, *North Briton No. 45*. The most important cases included *Money v. Leach*, (1765) 97 Eng. Rep. 1075; 19 How. St. Tr. 1001; *Wilkes v. Halifax*, (1765) 95 Eng. Rep. 797; 19 How. St. Tr. 1406; *Beardmore v. Carrington*, (1764) 95 Eng. Rep. 790; 19 How. St. Tr. 1405; *Huckle v. Money*, (1763) 95 Eng. Rep. 768; 19 How. St. Tr. 1404; and *Wilkes v. Wood*, (1763) 98 Eng. Rep. 489; 19 How. St. Tr. 1153. The Supreme Court did refer to these lawsuits in *Boyd*, 116 U.S. at 624–26.

91. *Entick v. Carrington*, (1765) 95 Eng. Rep. 807 (1765); 19 How. St. Tr. 1029.

92. The warrant directed the messengers to search for seven issues of the *The Monitor*: numbers 357, 358, 360, 373, 376, 378, and 380. *Entick*, 95 Eng. Rep. at 808.

93. *Id.* These searches were carried out months before publication of *North Briton No. 45*, which was the target of the searchers in the Wilkes affair. John Wilkes encouraged Entick and the other victims of *The Monitor* searches to sue for damages, but they refused until the plaintiffs in the Wilkes cases began to recover substantial damage awards in their lawsuits.

94. The facts of these lawsuits are discussed in numerous sources. See, e.g., Dripps, *supra* note 79, at 64; Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 VA. L. REV. 869, 880–84 (1985).

95. *Entick*, 95 Eng. Rep. at 807–808.

96. *Id.* at 812. Unlike warrants in the *Wilkes* cases, the warrant in *Entick v. Carrington* specifically named him as the person whose property was the object of the search, and therefore was not general in this sense. *Id.* at 808.

searches for papers was “not the most difficult, [but] the most interesting question in the cause.”⁹⁷ If this power were recognized, “the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger.”⁹⁸

Although the issues in *Entick* involved only the authority of the Secretary of State to order general searches for papers related to seditious libel, the rhetoric of Lord Camden’s opinion reached more broadly. The government argued that “this power is essential to government, and the only means of quieting clamours and sedition,”⁹⁹ but Lord Camden concluded that the effects of these searches were not so limited. Searches for seditious papers inevitably led to the exposure of innocent private papers and even worse, in this case “when the messengers hesitated about taking all the manuscripts, and sent to the secretary of state for more express orders for that purpose, the answer was, ‘that all must be taken, manuscripts and all.’”¹⁰⁰

Seizing all of a person’s papers then exposing them to scrutiny by others was a particularly odious transgression because papers were a unique form of property. Trespassing upon private papers violated the most “sacred” of rights protected by English law.¹⁰¹ In explaining this conclusion, Lord Camden penned a panegyric that the Supreme Court not only quoted in *Boyd*,¹⁰² but also relied upon to establish limits on searches for papers that survived in various forms for a century.¹⁰³ Lord Camden wrote:

For an analysis of the definition of general warrants in these cases, and its significance for Fourth Amendment theory, see Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 VA. L. REV. 869, 877–80 (1985).

97. *Entick*, 19 How. St. Tr. at 1063.

98. *Id.*

99. *Id.* at 1064.

100. *Id.* at 1065.

101. See *id.* at 1066. Lord Camden described the relationship between property and liberty in language that, at the very least, echoed Locke:

The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing

Id.

102. *Boyd v. United States*, 116 U.S. 616, 627–29 (1886). The Supreme Court continues to cite *Entick* and *Boyd* in its Fourth Amendment decisions. See, e.g., *United States v. Jones*, 565 U.S. 400, 405 (2012) (*Entick v. Carrington*, 95 Eng. Rep. 807 (C. P. 1765), is a “case we have described as a ‘monument of English freedom’ ‘undoubtedly familiar’ to ‘every American statesman’ at the time the Constitution was adopted, and considered to be ‘the true and ultimate expression of constitutional law’” with regard to search and seizure. *Brower v. County of Inyo*, 489 U.S. 593, 596, 109 S. Ct. 1378, 103 L. Ed. 2d 628 (1989) (quoting *Boyd v. United States*, 116 U.S. 616, 626, 6 S. Ct. 524, 29 L. Ed. 746 (1886)). See also, *Florida v. Jardines*, 569 U.S. 1, 7 (2013).

103. See, e.g., Russell W. Galloway, Jr., *The Intruding Eye: A Status Report on the Constitutional Ban Against Paper Searches*, 25 How. L.J. 367, 380–86 (1982) (discussing the “erosion” of the ban on paper searches); Note, *The Life and Times of Boyd v. United States (1886–1976)*, 76 MICH. L. REV. 184, 191 (1977) (noting the Supreme Court’s eventual displeasure with a strict application of the mere evidence rule); see also *United States v. Doe*, 465 U.S. 605 (1984). In the years following *Boyd*, a number of state courts also recognized that the limitations on both searches and seizures and the power to compel incriminating evidence coalesce when papers are the object of

Papers are the owner's goods and chattels[.] [T]hey are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and therefore it is too much for us without such authority to pronounce a practice legal, which would be subversive of all the comforts of society.¹⁰⁴

Reading the contents of papers was worse than a physical trespass because reading ideas contained in private papers enabled searchers to invade the writer's mind. Value attached not to the physical paper but to the intangible thoughts expressed in written language.

Precedents like *Entick* provide a historical explanation for the otherwise inexplicable inclusion of *papers* as a separate category of protected property in the Fourth Amendment text. Papers are, after all, a form of personal property that would be protected as "effects." Listing papers separately in the Amendment was redundant, unless Lord Camden was right. Papers were, and are, a special type of personal property.

B. *Locke's Broad Theory and Expressive Property*

Papers are expressive property. A written document is a tangible thing, but typically its value depends upon its contents. The contents, whether prepared for personal or business purposes, are the physical manifestation of the author's ideas.¹⁰⁵

This insight comports with Locke's broad theory of property. If a person's property includes the products of her labor, then her expressive writings are expressions of her being that deserve protection as property.¹⁰⁶ Whether the labor turns wild land into tillable agricultural fields, transforms raw metals into cutlery,

government attention. See, e.g., *Blum v. State*, 51 A. 26, 29–30 (Md. 1902) (tracing the *Boyd* doctrine to the opinion in *Rex v. Cornelius*, 2 Strange 1210 (1795)).

104. *Entick*, 19 How. St. Tr. at 1066 (emphasis added). Lord Camden also asserted that English common law erected a ban against paper searches:

There is no process against papers in civil causes In the criminal law such a proceeding was never heard of; and yet there are some crimes, such for instance as murder, rape, robbery, and house-breaking to say nothing of forgery and perjury, that are more atrocious than libelling. But our law has provided no paper search in these cases to help forward the convictions.

Id. at 1073.

105. As the expression of the drafter's thoughts, the contents of papers carry testimonial implications analogous to oral statements. This explains why the *Boyd* opinion concluded that the use of government power, whether by subpoena or warrant, to compel production of papers for use as evidence at trial involved both the Fourth and Fifth Amendments. When papers are the target, often both Amendments are implicated. See *Boyd*, 116 U.S. at 630.

106. See SECOND TREATISE, *supra* note 5 § 37.

or uses pigments and bristles to create a picture, the end product always embodies a person's physical exertions and mental creativity. The product is her property because it is an expression of her being.

Expressive property unquestionably includes a person's writings, whether created with pen and ink or a computer. Writings are the products of expressive labor in one of its most obvious forms. Before the emergence of the legal right to privacy, common law judges recognized that the creator of writings (and some other forms of creative expression) had a property right in the contents of the private documents she had created. This property right included the power to control who might use this private property and for what purposes.¹⁰⁷

In the nineteenth century, English and American judges employed this broad theory of property in lawsuits contesting the publication of documents against the author's will. The following discussion examines a leading case from each country.

The English case was *Gee v. Pritchard*.¹⁰⁸ The dispute involved correspondence between the widow of William Gee and their adopted son William Pritchard.¹⁰⁹ William Gee stipulated in his will that his wife was to control his estate and bequeath money to Pritchard as she saw fit.¹¹⁰ Ms. Gee later wrote letters to Pritchard disclosing private family information, including allegations that Pritchard was Mr. Gee's illegitimate son.¹¹¹ Eventually Gee and Pritchard had a falling out. He secretly copied the letters before returning the originals to her. When Gee learned that Pritchard intended to publish the letters, she filed an action seeking an injunction to prevent publication.¹¹²

The defendants, Pritchard and a book publisher named Anderson, had agreed to publish the book, *THE ADOPTED SON, OR, TWENTY YEARS AT BEDDINGTON*, which included copies of the letters between Ms. Gee and Pritchard.¹¹³ They advertised the book's publication in a newspaper. Pritchard claimed that his purpose in publishing the book was not financial gain but instead to vindicate his reputation.¹¹⁴

The court granted a prohibitory injunction, holding that the letters' author, Gee, held property rights in their contents that entitled her to prevent unwanted publication of her private letters.¹¹⁵ Citing an earlier English case as authority, the Court ruled that the recipient of a private letter did have a qualified property interest in it, but that property interest was limited to possession of the paper on

107. See, *infra*, notes 108-126 and accompanying text.

108. *Gee v. Pritchard* (1818) 36 Eng. Rep. 670, 2 Swanst. 402 (available at <http://www.commonlii.org/uk/cases/EngR/1818/605.pdf>).

109. *Id.* at 670.

110. *Id.* at 671-73.

111. *Id.* at 670.

112. *Id.* at 670-714; 703-05.

113. *Id.* at 670.

114. *Id.* at 672-734; 704-10.

115. *Id.* at 671.

which the letter was printed. The author retained ownership of the ideas expressed in writing. The author's property rights in the document's contents prevented the recipient from publishing the contents without the author's consent.¹¹⁶ The only exception to this rule was that the recipient of a letter may publish a private letter if "justice, civil or criminal, require[s] the publication."¹¹⁷

The court's analysis comports with the Lockean concept that property created by a our creative labor is an expression of our personhood. As the product of the author's labor and mental processes, the ideas contained in letters were an extension of her person, and therefore were her property. Pritchard was entitled to retain physical control over the letters Gee had sent to him, but he had no right to use its contents.¹¹⁸

Gee v. Pritchard was a relied upon as a precedent in several nineteenth century American cases decided before 1890,¹¹⁹ the year that Warren and Brandeis published their seminal article *The Right to Privacy*.¹²⁰ In these cases, the courts treated private letters as "literary property" in which the author retained the sole right to control publication of the contents. This was a property interest that permitted the author to sue for injunctive relief in courts of equity.

The most important American case was *Woolsey v. Judd*.¹²¹ Once again, the author of private letters sought an injunction to prevent their publication. In this case, an anonymous third party sent one of Woolsey's private letters to Judd—the editor, proprietor, and publisher of the *New York Chronicle*—who intended to publish it without Woolsey's consent.¹²² Judd argued that he was entitled to publish the letter's contents because the unknown person who had sent him the copy in the mail had written a note stating that Judd was free to use the letter as he pleased.¹²³

The court issued an injunction prohibiting publication of the letter, holding that "the publication of private letters, without the consent of the writer, is an invasion of an exclusive right of property which remains in the writer, even when the letters have been sent to, and are still in the possession of his correspondent."¹²⁴

116. *Id.* at 675–76, 678–79.

117. *Id.* at 676.

118. Ironically, Pritchard had returned the letters to Gee during the pendency of the litigation. Relinquishing the letters had terminated his rights to physical possession of the papers. Pritchard had never held a property interest in the contents of the letters, so this left him with no property interest at all. *Id.* at 675, 676–77.

119. *E.g.*, These included *Folsom v. Marsh*, 9 F. Cas. 342, 346 (C.C.D. Mass. 1841) (No. 4,901); *Eyre v. Higbee*, 22 How. Pr. 198, 199 (N.Y. Gen. Term 1861); and *Woolsey v. Judd*, 11 How. Pr. 49, 61 (N.Y. Sup. Ct. 1855). Readers may note that Warren and Brandeis cite to 4 Duer 379 for *Woolsey* in *The Right to Privacy*. This author cites to Howard's Practice Reports to help readers more easily locate the case.

120. Warren and Brandeis's article also cited *Gee*. See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 200–201 (1890). See *infra* Part V.A. for a discussion of this article.

121. See *Woolsey*, 11 How. Pr. 49.

122. *Id.* at 50.

123. *Id.* at 50–51.

124. *Id.* at 55.

Following common law precedents like *Gee*, the court also found that the recipient of a private letter had a property claim only for the paper on which the letter was written. The ideas expressed in the letter remained the author's property, and that property right survived regardless of who actually possessed the paper on which the letter was printed.¹²⁵ Once again the court held that a court of equity could issue an injunction to protect an author's property rights in the contents of private letters.¹²⁶

Common law property disputes like *Gee* and *Woolsey* demonstrate how, over the course of more than a century of Anglo-American litigation, papers were accorded special status and legal protection not merely from government searches and seizures, but also from private intrusions. The broad Lockean concept of property protected papers from government searchers because they were a person's most "sacred" property (*Entick*),¹²⁷ and because they were defined as a discrete category of property protected by the Fourth Amendment (*Boyd*).¹²⁸ The law prevented unauthorized publication of private letters because the author owned the contents of her writings, even if she had sent them as messages to another person (*Gee* and *Woolsey*).

The recurrence of this broad theory of property rights across time and in a variety of legal settings emphasizes the radical nature of the Supreme Court's decision in *Olmstead*. From 1886 until 1928, Supreme Court opinions interpreting the Fourth Amendment regularly employed the broad Lockean theories of property rights adopted in *Boyd*.¹²⁹ *Olmstead's* crabbed literalism rejected over 150 years of legal decisions previously viewed as foundations of constitutional liberty.

Part V examines Warren and Brandeis's seminal arguments for creation of a legal right to privacy and Justice Brandeis's later incorporation of these ideas into his classic argument for using the concept of privacy to define Fourth Amendment rights. The discussion shows that these arguments ultimately rested upon values shared with the Lockean broad theory of property rights. Viewed from this perspective, property and privacy are not dichotomous theories of rights, but are compatible. The Warren Court need not have abandoned property theories in the 1960s. It could, instead, have revived the traditional property theories of rights embodied in the Fourth Amendment.

IV. BRANDEIS AND THE RIGHT TO BE LET ALONE

The belief that we possess a legal right to privacy is embedded so deeply in contemporary culture that it can be surprising to learn that this idea is a recent

125. *See id.* at 55–59; 73–78.

126. *Id.* at 79.

127. *Entick v. Carrington* (1765) 95 Eng. Rep. 807, 817; 19 How. St. Tr. 1029, 1066.

128. *Boyd v. United States*, 116 U.S. 616, 630 (1886).

129. *See* Cloud, *The Lochner Era*, *supra* note 29, at 587–98 (discussing this group of Supreme Court opinions decided between 1886 and 1928).

addition to American law. The belief that we have a constitutional right to privacy is an even more recent development, taking root only in the second half of the twentieth century. Both the legal and constitutional rights to privacy supplanted well-established rules grounded in property law that had long been used to protect rights now regulated within fluid doctrines of privacy.

A. *The Right to Privacy*

The 1890 Harvard Law Review article published by Charles Warren and Louis Brandeis galvanized the development of a doctrine of *legal privacy rights*. In *The Right to Privacy*,¹³⁰ Warren and Brandeis argued that traditional common law doctrines were incapable of coping with unprecedented intrusions into peoples' lives, writings, and secrets made possible by emerging nineteenth century technologies.¹³¹ They argued that a new right of privacy was needed to replace these common law doctrines as a tool for resolving a variety of disputes. A central (but not exclusive) concern was protecting the individual's right to self-expression, which included rights tied to expressive property.¹³² Recognizing a new right to privacy was necessary because:

The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others. Under our system of government, he can never be compelled to express them (except when upon the witness stand); and even if he has chosen to give them expression, he generally retains the power to fix the limits of the publicity which shall be given them. The existence of this right does not depend upon the particular method of expression adopted. It is immaterial whether it be by word or by signs, in painting, by sculpture, or in music. Neither does the existence of the right depend upon the nature or value of the thought or emotion, nor upon the excellence of the means of expression. The same protection is accorded to a casual letter or an entry in a diary and to the most valuable poem or essay, to a botch or daub and to a masterpiece. In every such case the individual is entitled to decide whether that which is his shall be given to the public. No other has the right to publish his productions in any form, without his consent. This right is wholly independent of the material

130. See generally Warren & Brandeis, *supra* note 122.

131. But see Melvin I. Urofsky, LOUIS D. BRANDEIS: A LIFE 97–98, 196 (2009) (asserting that the article was written because Samuel Warren, Brandeis's friend, partner, and co-author, "began to resent what he saw as press intrusion into his private life"). This thesis is consistent with the extended discussion of the destructive effects of gossip, particularly when spread by the nineteenth century forms of mass media. See Warren & Brandeis, *supra* note 122, at 195–96 ("The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle.") . . .

132. Urofsky, *supra* note 135, at 98 ("[T]he article in some ways is a very narrow, technical, and somewhat dry analysis of the legal rights of unpublished authors and artists.").

*on which, or the means by which, the thought, sentiment, or emotion is expressed. It may exist independently of any corporeal being, as in words spoken, a song sung, a drama acted. Or if expressed on any material, as in a poem in writing, the author may have parted with the paper, without forfeiting any proprietary right in the composition itself. The right is lost only when the author himself communicates his production to the public,—in other words, publishes it.*¹³³

As we have seen, English and American property law already had been used to protect these rights, at least for thoughts and emotions reduced to writing. It is not difficult to recognize that a theory that treated intangible political rights and religious beliefs as property could incorporate incorporeal forms of expression, like “a song sung” and “a drama acted.”

This passage reveals that even while they argued that property rights were inadequate to protect against uninvited intrusions into the private realms of life,¹³⁴ Warren and Brandeis described the right to privacy in terms that echoed writings, including judicial opinions, published over the course of the prior two centuries—writings that had employed a broad concept of property—to protect an author’s control over the written expressions of personhood. Warren and Brandeis wrote, for example, that “[t]he principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an inviolate personality.”¹³⁵

The terminology is different, but the underlying values are redolent of Madison’s essay, published ninety-eight years earlier, expounding a very Lockean theory of broad property rights that encompassed tangible property and the expressions of a person’s ideas.¹³⁶ The same values supported the English and American judicial opinions preserving an author’s power to control publication of her private papers, and also those, like *Entick* and *Boyd*, prohibiting government searches and seizures of most papers. The fundamental values Warren and Brandeis announced in their seminal proclamation of the legal right to privacy

133. Warren & Brandeis, *supra* note 122, at 198–200 (emphasis added).

134. *Id.* at 200. They also recognized that other remedies existed to protect the content of documents from unauthorized uses. These included intellectual property law in disputes where it applied, although intellectual property law offered no protections for many types of expressive property. *Id.* at 200–01. They acknowledged that the law of defamation offered remedies in some cases, but again complained that this body of law was irrelevant for most of the disputes in which they were interested. *Id.* Similarly, they rejected legal claims based on breaches of confidence, of implied contracts, and trade secrets as irrelevant to protect the privacy right to be let alone. *Id.* at 211–12. They even acknowledged that a Lockean broad theory of property could supply robust protections against misuse of a person’s expressive property, but asserted that the more common narrow theory of property did not. *See id.* at 200–01, 211–13. The solution for them was not to advocate for a broad conception of property, but to abandon common law property doctrine entirely where intellectual property and defamation law were irrelevant. *Id.* at 197–98, 200–201, 211–12.

135. *Id.* at 205.

136. *Supra* note 56 and accompanying text.

aligned with the foundational values inherent in broad theories of property rights.

Warren and Brandeis acknowledged that both narrow and broad theories of property rights had been employed in different legal disputes and could produce different outcomes. “[T]he courts have asserted that they rested their decisions on the narrow grounds of protection to property, yet there are recognitions of a more liberal doctrine.”¹³⁷ The cases recognizing that “more liberal doctrine” in fact employed a broad property theory.

Warren and Brandeis did not, nor could they, dispute that cases like *Gee* and *Woolsey* had protected expressive property without resorting to this new privacy doctrine. The problem with those cases was not the results they reached; it was that they purported to rely on property theories rather than privacy to arrive at the correct outcomes.¹³⁸

Yet even while they maintained that the principle of privacy was needed to replace inadequate narrow property theories,¹³⁹ Warren and Brandeis conceded that theories of privacy and property produced the same outcomes if the word property “be used in an extended and unusual sense.”¹⁴⁰

That “extended and unusual sense” was the broad theory of property articulated in *Gee*, *Woolsey*, *Entick*, and *Boyd*.¹⁴¹ It was the notion of property as rights espoused by Madison a century earlier,¹⁴² and by Locke a century before that.¹⁴³

Warren and Brandeis claimed, nonetheless, that in cases like *Gee* and *Woolsey* “the principle which has been applied to protect these rights is in reality not the principle of private property” that was cited by the courts, but actually was the principle of privacy.¹⁴⁴ This claim was in turn supported by pointing to cases in which courts employing a *narrow* doctrine of property had not protected against publication of expressive property. “The belief that the idea of property in its *narrow* sense was the basis of the protection of unpublished manuscripts led an able court to refuse, in several cases, injunctions against the publication of private letters.”¹⁴⁵

137. Warren & Brandeis, *supra* note 122, at 204.

138. They focused instead on narrow theories of property that did not offer this protection. *Id.* at 203–04.

139. *Id.* at 204 (“Although the courts have asserted that they rested their decisions on the narrow grounds of protection to property, yet there are recognitions of a more liberal doctrine If the fiction of property in a narrow sense must be preserved”); *id.* at 203 (“The belief that the idea of property in its narrow sense was the basis of the protection of unpublished manuscripts led an able court to refuse, in several cases, injunctions against the publication of private letters, on the ground that ‘letters not possessing the attributes of literary compositions are not property entitled to protection’”) (emphasis added).

140. *Id.* at 213.

141. It is certain that Warren and Brandeis were aware of the line of cases that included *Gee* and *Woolsey*, because they discussed them in their article. *Id.* at 200 & n.3. It is almost as certain that they knew *Boyd*, which was a very recent Supreme Court opinion concerning the protection of private papers. Additionally, *Entick* was still widely known as a case that helped foster the Revolution and the Founding.

142. See *supra* note 56 and accompanying text.

143. See *supra* Part III.B.

144. Warren & Brandeis, *supra* note 122, at 213.

145. *Id.* at 203 (emphasis added).

Warren and Brandeis engaged in this review of legal precedents because “[i]t is our purpose to consider whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual; and, if it does, what the nature and extent of such protection is.”¹⁴⁶ Although they acknowledged that a broad theory of property could supply this robust protection, they condemned the results in cases where a narrow theory was applied. Their solution in 1890 was not to expand the use of broad theories of property rights, but to replace them with a new legal classification, the right to privacy.¹⁴⁷ A generation later, Brandeis would again write in favor of protecting the individual’s “right to be let alone” with the right to privacy rather than with property rights,¹⁴⁸ this time in one of the most famous dissents in constitutional history.

B. *Olmstead, Privacy, and Property*

The impact of intrusions made possible by new technologies was an issue that connected Brandeis’s 1890 law review article and his dissent in *Olmstead* thirty-eight years later. In their article, Warren and Brandeis argued that emerging technologies necessitated recognition of a legal right to privacy in the late nineteenth century because:

[r]ecent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right “to be let alone.” Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that “what is whispered in the closet shall be proclaimed from the house-tops.”¹⁴⁹

The same concerns animated Brandeis’s dissent in *Olmstead*. Wiretapping of telephone lines was the specific investigative technology at issue in the case, but Brandeis wrote more broadly about the risks that technological change posed to privacy. To preserve the right to be let alone, the law, as a social institution, needed to adapt to a changing world. “Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth.”¹⁵⁰

This was not a new interpretive theory. Recognizing “‘that it is a constitution we are expounding’ . . . this Court has repeatedly sustained the exercise of power by Congress, under various clauses of that instrument, over objects of which the

146. *Id.* at 197.

147. *Id.* at 211–13. Their critique was not limited to protections provided by the common law. They also examined the limited protections offered by the law of intellectual property, defamation, trade secrets, and legal claims based on breaches of confidence and of implied contracts. *Id.* at 197–98, 200–01, 211–12.

148. *See id.* at 193.

149. *Id.* at 195–96.

150. *Olmstead v. United States*, 277 U.S. 438, 472–73 (1928) (Brandeis, J., dissenting).

Fathers could not have dreamed.”¹⁵¹

Boyd was such a case. Even Chief Justice Taft’s majority opinion in *Olmstead* conceded that *Boyd* and its progeny had established that the Fourth and Fifth Amendments required this type of “liberal” interpretation.¹⁵² Brandeis complained that the Court should follow *Boyd* and its progeny and interpret the Fourth and Fifth Amendments liberally to preserve “the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”¹⁵³

Liberal interpretation was particularly important in cases involving technological surveillance, which made the right to be let alone more tenuous than before—although the ancient methods Brandeis described were far from benign:

When the Fourth and Fifth Amendments were adopted, “the form that evil had theretofore taken,” had been necessarily simple. Force and violence were then the only means known to man by which a Government could directly effect self-incrimination. It could compel the individual to testify—a compulsion effected, if need be, by torture. It could secure possession of his papers and other articles incident to his private life—a seizure effected, if need be, by breaking and entry.¹⁵⁴

Twentieth century investigations were not limited to direct physical confrontations and abuse. “Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.”¹⁵⁵ The *Olmstead* majority opinion, holding that searches required a physical trespass and only tangible things could be seized, failed to protect against technological invasions precisely because it ignored the capacity of technologies unimagined in the eighteenth century to gut the rights protected by the Fourth and Fifth Amendments.

Brandeis’s praise of *Boyd* reveals that property and privacy are not mutually exclusive concepts in the Fourth Amendment context. To support his arguments in favor of protecting *privacy*, Brandeis relied heavily upon the *property*-based

151. *Id.* at 472 (quoting *McCulloch v. Maryland*, 17 U.S. 316, 407 (1819)):

We have likewise held that general limitations on the powers of Government, like those embodied in the due process clauses of the Fifth and Fourteenth Amendments, do not forbid the United States or the States from meeting modern conditions by regulations which, “a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive.” *Id.* (quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926)).

152. *Id.* at 465 (Brandeis, J., dissenting) (recognizing that *Boyd* and other decisions “said that the Fifth Amendment and the Fourth Amendment were to be liberally construed to effect the purpose of the framers of the Constitution in the interest of liberty”).

153. *Id.* at 477–78 (Brandeis, J., dissenting).

154. *Id.* at 473.

155. *Id.* Brandeis and Warren had expressed similar ideas. See Warren & Brandeis, *supra* note 122, at 193 (“Political, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society.”); *id.* at 195 (calling for new legal protection against invasions of privacy caused by the invention of instantaneous photographs and increasingly invasive newspaper practices).

rationales in earlier decisions, particularly *Boyd* and *Entick*. This was possible because the values promoted in those landmark opinions overlapped with those Brandeis advocated.

Brandeis proclaimed that “*Boyd v. United States* . . . [is] a case that will be remembered as long as civil liberty lives in the United States.”¹⁵⁶ This claim did not rest upon Brandeis’s affection for property rights as the protector of liberty. Rather, it rested upon the *Boyd* opinion’s powerful assertion of liberties rooted in the Fourth and Fifth Amendments, which the Supreme Court affirmed in *Boyd* and its progeny. The lesson, Brandeis asserted, was that the contents of the papers and not their physical characteristics were protected—an idea inherent in *Boyd* and explicit in common law decisions like *Gee* and *Woolsey* that Warren and Brandeis cited in their Harvard Law Review article. As the article stated:

Decisions of this Court applying the principle of the *Boyd* case have settled these things. Unjustified search and seizure violates the Fourth Amendment, whatever the character of the paper; whether the paper when taken by the federal officers was in the home, in an office or elsewhere; whether the taking was effected by force, by fraud, or in the orderly process of a court’s procedure. From these decisions, it follows necessarily that the Amendment is violated by the officer’s reading the paper without a physical seizure, without his even touching it; and that *use, in any criminal proceeding, of the contents of the paper so examined*—as where they are testified to by a federal officer who thus saw the document or where, through knowledge so obtained, a copy has been procured elsewhere—any such use constitutes a violation of the Fifth Amendment.¹⁵⁷

Brandeis’s embrace of precedents relying upon property to protect individual rights might seem anomalous. His public fame as a practicing lawyer stemmed in no small part from his successful advocacy in favor of social welfare legislation and opposing constitutional claims based on liberty of contract, property, and related due process theories. Most obviously, his arguments for replacing property with privacy appear inconsistent with his panegyric praising *Boyd*.

Indeed, Professor Dripps has made this argument in a recent article.¹⁵⁸ Disputing the work of three scholars who have linked the *Boyd* decision to the jurisprudence of the “*Lochner* era,”¹⁵⁹ he offers Brandeis’s embrace of *Boyd* as important evidence:

There is one more reason to be skeptical of the conventional critiques of *Boyd* as *Lochner*: Louis Brandeis. The most eminent progressive jurist in American history celebrated *Boyd* as a great landmark of civil liberty in his famous

156. *Olmstead*, 277 U.S. at 474 (Brandeis, J., dissenting) (citations omitted).

157. *Id.* at 477–78 (emphasis added).

158. See Dripps, *supra* note 79, at 99.

159. See *id.* at 97–98 (“Akhil Amar, Morgan Cloud, and the late Bill Stuntz have, in somewhat different ways, linked *Boyd* with the notorious substantive due process decision *Lochner v. New York*.”).

dissent in *Olmstead v. United States*. If *Boyd* were cut from the same cloth as *Lochner*, Brandeis's *Olmstead* opinion would be utterly inexplicable.¹⁶⁰

Dripps is correct, but only if we view *Lochner* era jurisprudence through the narrow lens of political ideology.¹⁶¹ The classic liberal political criticism of the substantive due process opinions of that period has been that judges were acting politically and taking sides in a struggle between the moneyed and working classes. Conservative judges deployed doctrines of property and liberty rights to strike down social welfare legislation to help the capitalist class maintain economic autonomy and control.

This was part of the *Lochner* era jurisprudence, but it was only one part. I have argued elsewhere—I am one of the three scholars Dripps challenges—that the jurisprudence of the *Lochner* era was much more complex and nuanced than the liberal political critique suggests.¹⁶² *Boyd* exemplified constitutional decision making of that era, but not because it mirrored the *Lochner* decision (which was not decided until almost twenty years after *Boyd*).

If we view Brandeis and *Boyd* through a wider jurisprudential lens, the apparently inexplicable link between them becomes not merely explicable, but it confirms that jurisprudential labels often matter less than the fundamental values that propel judges to their decisions.

A powerful conception of personal liberty akin to that evident in formalist reasoning energized Brandeis' Fourth Amendment opinions, even though he was one of the most effective critics of substantive due process opinions like *Lochner* and an influential proponent of pragmatist theory in constitutional interpretation.

Consider, for example, Brandeis' well-known description of *Boyd v. United States*, the most important example of Fourth Amendment formalism. Brandeis wrote that *Boyd* is “a case that will be remembered as long as civil liberty lives in the United States.” His conclusion is surprising once we recognize that *Boyd* is the Fourth Amendment's analogue of *Lochner*, employing the same kind of natural law-based reasoning linking liberty and property rights to strike down a statute. Brandeis praised *Boyd* because that decision identified and preserved the values upon which the Fourth Amendment rests, values that Brandeis himself defended. These shared values provide a surprising connection between the theories of formalists and their pragmatist critics, and suggest that it is possible to integrate these seemingly disparate theories about law into a

160. *Id.* at 99.

161. Dripps' article, *id.*, should be read by anyone interested in these topics. His research is impressive, often citing original sources not commonly cited in the literature. And I concur with his core theses. For example, although recognizing possible counterarguments, Dripps concludes that “[t]he evidence presented in this Article indicates rather strongly that the Founders regarded papers as deserving greater protection than other effects.” *Id.* at 99.

162. See generally Cloud, *The Lochner Era*, *supra* note 29.

coherent interpretive theory of the Fourth Amendment. Ironically, Brandeis' value-based Fourth Amendment pragmatism supplies essential elements of the integrated theory I propose to replace the Court's contemporary pragmatism. It is ironic because his influential use of pragmatist ideas helped supplant the *Lochner* era formalism he opposed in the Fourteenth Amendment context.¹⁶³

Brandeis was no *Lochner*-style formalist.¹⁶⁴ But the values driving his theories of personal privacy were consistent with the values that animated *Boyd*, which had expressed those values in the property-based vocabulary of liberty available during the Founding era. This value driven connection between property and privacy is exemplified by another famous passage from Brandeis's *Olmstead* dissent:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.¹⁶⁵

Brandeis's paean to privacy rephrases the arguments relying upon property we find in Locke, in Madison's essay, and in judicial opinions like *Entick* and *Boyd*. Understood in its broad sense, the nature, scope, and justifications for private property as a defender of individual liberty is consistent with Brandeis's seminal arguments for a legal right to privacy.¹⁶⁶

The substantive connections between these two concepts of rights are present in recent Supreme Court opinions. Part VI examines three of those cases to illustrate that property and privacy are not mutually exclusive in Fourth Amendment theory.

163. *Id.* at 560–61.

164. For a contemporaneous examination of the links between Brandeis theory of privacy in tort law and his *Olmstead* dissent, see George Ragland, Jr., *Note and Comment, The Criminal's Right of Privacy*, 27 MICH. L. REV. 927, 929–30 (1929).

165. *Olmstead v. United States*, 277 U.S. 438, 478–79 (1928) (Brandeis, J., dissenting).

166. See generally Warren & Brandeis, *supra* note 122. It is worth noting that Warren and Brandeis objected to common law property rights not to the extent that they protected a person's thoughts and ideas, but simply because they did not go far enough, and that they acknowledged that the broad theory of property, as well as their theory of privacy, could offer similar protections.

V. FOURTH AMENDMENT PROPERTY RIGHTS IN A DIGITAL AGE

A. *Jones Resurrects the Trespass Doctrine*

By the second decade of the twenty-first century, the hegemony of the reasonable expectation of privacy technique was so complete¹⁶⁷ that a 2012 Supreme Court decision employing the pre-*Katz* trespass theory took the Fourth Amendment world by surprise. In *United States v. Jones*, a five justice majority held not only that “the Government’s installation of a GPS device on a target’s vehicle, and its use of that device to monitor the vehicle’s movements, constitutes a ‘search,’”¹⁶⁸ but also resurrected the trespass doctrine that the Court had cast aside as “discredited”¹⁶⁹ nearly half a century earlier.¹⁷⁰

Unlike *Katz*, *Jones* did not abandon one theory in favor of the other. It did not treat property and privacy as antinomies. Instead, it provided a model for employing both.¹⁷¹ Justice Scalia began by reasserting the property foundations of the Fourth Amendment:

The text of the Fourth Amendment reflects its close connection to property, since otherwise it would have referred simply to “the right of the people to be secure against unreasonable searches and seizures”; the phrase “in their persons, houses, papers, and effects” would have been superfluous.

Consistent with this understanding, our Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century.¹⁷²

Justice Scalia then opened the door for reviving property-based theories by asserting that *Katz* had merely *deviated* from the traditional understanding of the Fourth Amendment, rather than overruled it.

167. A *partial* list of opinions employing the reasonable expectation of privacy test includes: *California v. Acevedo*, 500 U.S. 565, 583 (1991); *Florida v. Riley*, 488 U.S. 445, 449 (1989); *California v. Greenwood*, 486 U.S. 35, 39–40 (1988); *O’Connor v. Ortega*, 480 U.S. 709, 715 (1987); *California v. Ciraolo*, 476 U.S. 207, 210 (1986); *New York v. Class*, 475 U.S. 106, 112 (1986); *United States v. Johns*, 469 U.S. 478, 486 (1985); *United States v. Karo*, 468 U.S. 705, 712 (1984); *Oliver v. United States*, 466 U.S. 170, 173 (1984); *United States v. Jacobsen*, 466 U.S. 109, 123 (1984); *United States v. Knotts*, 460 U.S. 276, 281 (1983); *United States v. Place*, 462 U.S. 696, 701 (1983) (dictum); *Steagald v. United States*, 451 U.S. 204, 209 (1981); *Rawlings v. Kentucky*, 448 U.S. 98 (1980); *Payton v. New York*, 445 U.S. 573, 579 (1980); *Smith v. Maryland*, 442 U.S. 735, 738 (1979); *Rakas v. Illinois*, 439 U.S. 128, 142 (1978); *United States v. Miller*, 425 U.S. 435, 442 (1976); *United States v. White*, 401 U.S. 745, 753 (1971).

168. *United States v. Jones*, 565 U.S. 400, 404 (2012). Federal agents had obtained a warrant authorizing them to install a tracking device in the District of Columbia for a period of ten days. The agents installed the GPS device while the vehicle was in Maryland and on the eleventh day. *Id.* at 402–03.

169. *See Katz v. United States*, 389 U.S. 347, 353 (1967) (quoting *Warden v. Hayden*, 387 U.S. 294, 304 (1967)).

170. *Jones* had a property interest in the vehicle, but not as its owner. “[T]he Jeep was registered to Jones’s wife. The Government acknowledged, however, that Jones was ‘the exclusive driver’ . . . [who had] at least the property rights of a bailee.” *Jones*, 565 U.S. at 404 n.2.

171. As did Justice Scalia’s majority opinion in *Florida v. Jardines*, 569 U.S. 1, 10–11 (2013).

172. *Jones*, 565 U.S. at 405.

Our later cases, of course, have deviated from that exclusively property-based approach. In *Katz v. United States*, 389 U.S. 347 (1967), we said that “the Fourth Amendment protects people, not places,” and found a violation in attachment of an eavesdropping device to a public telephone booth. Our later cases have applied the analysis of Justice Harlan’s concurrence in that case, which said that a violation occurs when government officers violate a person’s “reasonable expectation of privacy.”¹⁷³

This reinterpretation of *Katz* permitted Justice Scalia to conclude that property and privacy theories were not antinomies, but rather operated in tandem. The government’s conduct in each dispute dictated which theory governed. If government agents committed a physical trespass, property rules controlled. If there was no trespass, *Katz* provided the rules of decision. Justice Scalia pointedly noted that “unlike the concurrence, which would make *Katz* the exclusive test, we do not make trespass the exclusive test. Situations involving merely the transmission of electronic signals without trespass would remain subject to *Katz* analysis.”¹⁷⁴

The opinion specifically rebuffed the government’s argument that no search had occurred because no reasonable expectation of privacy held by Jones had been violated. The claim was irrelevant in this case:

[B]ecause Jones’s Fourth Amendment rights do not rise or fall with the *Katz* formulation. At bottom, we must “assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.” As explained, for most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas (“persons, houses, papers, and effects”) it enumerates. *Katz* did not repudiate that understanding.¹⁷⁵

It is noteworthy that in this passage Justice Scalia confirms that the Fourth Amendment employs property concepts to “assur[e] preservation of . . . privacy.”

It is easy to sympathize with Justice Alito’s apparent frustration with this rewriting of the *Katz* opinion. Alito responded in his concurring opinion that *Katz* “finally did away with the old approach, holding that a trespass was not required for a Fourth Amendment violation,”¹⁷⁶ and later opinions confirmed that “an actual trespass is neither necessary nor sufficient to establish a constitutional violation.”¹⁷⁷

173. *Id.* at 405–06. Justice Scalia noted the links between Whig theories of property and liberty in the creation of the Constitution. He quoted from both *Boyd* and *Entick*, and repeated the classic description of *Entick* as “a case we have described as a ‘monument of English freedom’ ‘undoubtedly familiar’ to ‘every American statesman’ at the time the Constitution was adopted, and considered to be ‘the true and ultimate expression of constitutional law’ with regard to search and seizure.” *Id.* at 405–406 (quoting *Brower v. Cty. of Inyo*, 489 U.S. 593, 596 (1989)).

174. *Jones*, 565 U.S. at 411.

175. *Id.* at 406–07 (citations omitted).

176. *Id.* at 422 (Alito, J., concurring).

177. *Id.* at 423 (quoting *United States v. Karo*, 468 U. S. 705, 713 (1984)).

Justice Alito was correct. *Jones* is not an important decision because it simply reaffirmed rules that had been in place for half a century. It is important because it upended rules applied since 1967. Alito concluded correctly that “the majority is hard pressed to find support in *post-Katz* cases for its trespass-based theory.”¹⁷⁸

But it is easy to find such support in *pre-Katz* case law. In fact, *Jones* simply restored the *pre-Katz* rules linking trespass theory and technological surveillance as they existed after the Court’s 1961 decision in *Silverman v. United States*.¹⁷⁹ That opinion established that when government agents physically trespassed into a home to install electronic surveillance equipment in order to overhear private conversations,¹⁸⁰ they conducted a Fourth Amendment search.¹⁸¹

Jones applied the same rules to the use of a different technology. Installing a GPS device and using it to track a vehicle’s locations for twenty-eight days was held to be a search requiring authorization by a judicial warrant.¹⁸² The reasoning and rules announced in *Jones* mirrored those applied more than half a century earlier in *Silverman*. Although an intangible conversation could be the target of a search, *Olmstead’s* narrow theory of property still demanded a physical trespass upon private property.

In this way, Justice Scalia’s opinion in *Jones* did not create a new property-based theory for regulating technological surveillance. But an opinion he authored more than a decade earlier did.

B. *Kyllo and the Functional Equivalent of a Trespass*

Justice Scalia’s majority opinion in *Kyllo v. United States*¹⁸³ introduced a concept that melded property theory and nontrespassory technological surveillance—the *functional equivalent of a trespass*.¹⁸⁴

Federal agents suspected that *Kyllo* was growing marijuana in his Oregon home, but lacked the probable cause needed to secure a search warrant. In an effort to

178. *Id.* at 424 (emphasis added).

179. *Silverman v. United States*, 365 U.S. 505, 509 (1961).

180. Using the Fourth Amendment to protect the spoken word is consistent with both Whig theories of rights and the seminal expositions of the legal right to privacy. Madison wrote, for example, that “a man has property in his opinions and the free communication of them,” and also “has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them.” Madison, *supra* note 57, at 101 (emphasis added). Neither example is limited to written expressions of opinion or belief, and the description of religious “profession and practice” logically describes speech and action. Warren and Brandeis argued that the right to privacy “may exist independently of any corporeal being, as in words spoken . . .” Warren & Brandeis, *supra* note 122, at 198. In his *Olmstead* dissent, Brandeis warned that “[d]iscovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.” *Olmstead v. United States*, 277 U.S. 438, 473 (1928) (Brandeis, J., dissenting).

181. *Silverman*, 365 U.S. at 509. In *Silverman*, federal agents drove a spike mic through the exterior wall of a home until it contacted duct work inside the building. *Id.* at 506; see also *Jones*, 565 U.S. at 421 (Alito, J., concurring).

182. *Jones v. United States*, 565 U.S. 400, 404 (2012).

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

184. This is my label and it is not used in Justice Scalia’s opinion.

develop probable cause, they used a thermal imager¹⁸⁵ to measure the heat emanating from Kyllo's house.¹⁸⁶ The agents were able to conduct this surveillance without a physical trespass onto Kyllo's property because they could take thermal images of Kyllo's house while sitting in their automobile, which was parked on a public street. The Supreme Court held that this use of technology was a Fourth Amendment search because it supplied the agents with information about the interior of the home that was otherwise unobtainable without a physical trespass.¹⁸⁷ Technology permits government agents to intrude upon liberty and privacy rights with the *functional equivalent* of a trespass. The Court explained:

“We think that *obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical ‘intrusion into a constitutionally protected area,’ constitutes a search*—at least where (as here) the technology in question is not in general public use.”¹⁸⁸

Scalia's test linked Fourth Amendment property theory with the reality of modern technology. It used the physical trespass as an objective measure of an intrusion triggering constitutional scrutiny, while extending this protection to analogous nontrespassory technological intrusions.

The idea is elegantly simple and easy to apply. The Fourth Amendment regulates both physical trespasses and the technological equivalents. If the government uses technology to obtain information from within “a constitutionally protected area” that would have otherwise been inaccessible without a physical trespass, it has

185. For an explanation of how thermal imagers work, see *Kyllo*, 533 U.S. at 29–30:

Thermal imagers detect infrared radiation, which virtually all objects emit but which is not visible to the naked eye. The imager converts radiation into images based on relative warmth—black is cool, white is hot, shades of gray connote relative differences; in that respect, it operates somewhat like a video camera showing heat images. The scan of Kyllo's home took only a few minutes and was performed from the passenger seat of Agent Elliott's vehicle across the street from the front of the house and also from the street in back of the house. The scan showed that the roof over the garage and a side wall of petitioner's home were relatively hot compared to the rest of the home and substantially warmer than neighboring homes in the triplex. Agent Elliott concluded that petitioner was using halide lights to grow marijuana in his house, which indeed he was.

186. *Id.* at 29–30. The agents subsequently applied for a search warrant. *Id.* at 30. A Federal Magistrate Judge concluded that the results of this thermal imaging, coupled with Kyllo's unusually large utility bills, and an informant's tips provided probable cause and issued a search warrant. *Id.* The searchers discovered an indoor agricultural operation using halide lamps, which had produced the heat detected by the thermal imager, and more than 100 marijuana plants. Kyllo entered a conditional guilty plea, and appealed. *Id.* Employing the reasonable expectation of privacy test, the Ninth Circuit concluded that the agents' use of the thermal imager was not a search. *Id.* at 30–31. Applying the expectations test, four dissenting Justices agreed that Kyllo had no reasonable expectation of privacy in the heat emanating from inside his house creating measurable heat signatures on the home's exterior walls. *Id.* at 43–44.

187. *Id.* at 34–35.

188. *Id.* at 34 (emphasis added) (citations omitted).

conducted a search that must satisfy the requirements of the Warrant Clause.¹⁸⁹

Scalia's ultimate constitutional justification for this functional trespass theory was the same one he cited to justify applying the literal trespass doctrine in *Jones*: It "assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted."¹⁹⁰ This is more than a reflexive originalist claim about appropriate constitutional interpretation. Used to describe incorporeal intrusions upon physical property as trespasses, this invocation of the property rights harkens back to the value driven theories espoused by John Locke, Lord Camden, and James Madison. They each articulated theories of property far more expansive than the constricted materialism imposed by the *Olmstead* opinion and other formulations of the narrow theory of property. Specifically, Scalia's functional trespass theory is conceptually consistent with Brandeis's argument that the Fourth Amendment right to privacy protects against nontrespassory wiretapping of telephone conversations.

What connects the ideas expressed by Locke, Camden, Madison, Brandeis, and Scalia, and those expressed in judicial opinions like *Entick* and *Boyd*, is not the legal categories—privacy or property—to which their ideas frequently are assigned. They are connected instead by shared fundamental values that survive across centuries and continents.

These value based connections are apparent in another of the Supreme Court's recent decisions interpreting the relationship between the Fourth Amendment and technology. This opinion examines a now ubiquitous technological repository of ideas created and stored not by using old technologies like paper and ink, but rather by using twenty-first century digital technologies.

C. *Riley, Digital Information, and Expressive Property*

In *Riley v. California*, the Supreme Court addressed the constitutionality of warrantless searches of cell phones incident to arrest in two consolidated cases.¹⁹¹

189. Justice Scalia noted that this was one benefit of employing property-based rules to resolve Fourth Amendment disputes. See *Florida v. Jardines*, 569 U.S. 1, 6–8 (2013). "One virtue of the Fourth Amendment's property-rights baseline is that it keeps easy cases easy. That the officers learned what they learned only by physically intruding on Jardines' property to gather evidence is enough to establish that a search occurred." *Id.* at 1417. In fact, his functional trespass doctrine offers the same benefits.

190. *Kyllo*, 533 U.S. at 34. Scalia used the same justification for applying the trespass doctrine to GPS surveillance eleven years later. See *United States v. Jones*, 565 U.S. 400, 404–05 (2012).

191. *Riley v. California*, 134 S. Ct. 2473, 2480–82 (2014). Riley was stopped for driving with expired registration tags. *Id.* at 2480. The police impounded the vehicle and conducted an inventory search which uncovered two concealed firearms. *Id.* Riley was arrested and, incident to that arrest, the officer seized Riley's cell phone (described by the Court as a "smart" phone), which he found in a pants pocket. *Id.* Hoping to find evidence linking Riley to gang related crimes, officers searched the phone's contents. *Id.* at 2480–81. In the second case, a police officer saw Wurie make an apparent drug sale from a car. *Id.* at 2481. Officers later arrested Wurie and drove him to the police station where they seized two cell phones from his person. *Id.* They searched his "flip" phone, and information discovered led them to his home. *Id.* After obtaining a warrant, officers searched Wurie's home where they found "crack cocaine, marijuana, drug paraphernalia, a firearm and ammunition, and cash." *Id.*

Chief Justice Roberts' opinion for the Court did not frame the issues in terms of property, but it did discuss cell phones as physical devices containing expressive information in terms consistent with those used in judicial opinions like *Entick*, *Gee*, *Pritchard*, and *Boyd*, and by other advocates of a broad theory of property.¹⁹²

In *Riley*, the Court held that the search incident to arrest exception to the warrant rule did not authorize warrantless searches of data on cell phones seized during lawful arrests. Instead, law enforcers generally must obtain a warrant authorizing these searches.¹⁹³

The Court rejected a “mechanical application” of the “blanket rule” permitting searches for physical objects incident to any lawful arrest.¹⁹⁴ It concluded that although this categorical rule strikes the appropriate balance in the context of searches for physical objects, “neither of its rationales has much force with respect to digital content on cell phones.”¹⁹⁵

Much of the *Riley* opinion was devoted to describing how cell phones are different from physical objects. One difference is the sheer quantity of data stored on these devices. A phone with 16 gigabytes of storage capacity “translates to millions of pages of text, thousands of pictures, or hundreds of videos.”¹⁹⁶ In a passage reminiscent of Lord Camden's concerns about government searchers rummaging through all of a person's private papers, the Chief Justice wrote:

One of the most notable distinguishing features of modern cell phones is their immense storage capacity. Before cell phones, a search of a person was limited by physical realities and tended as a general matter to constitute only a narrow intrusion on privacy. Most people cannot lug around every piece of mail they have received for the past several months, every picture they have taken, or every book or article they have read.¹⁹⁷

The quantity of information that can be stored on a cell phone “has several interrelated consequences for privacy.”¹⁹⁸ The variety of types of information “reveal much more in combination than any isolated record,” making it possible to

The parties stipulated that the police conducted searches of the cell phones in both cases, so the Court did not decide “whether the collection or inspection of aggregated digital information amounts to a search under other circumstances.” *Id.* at 2490 n.1.

192. *Id.* at 2482–85.

193. *Id.* at 2485.

194. *Id.* at 2482–85.

195. *Id.* at 2484; *see also id.* at 2488–89:

Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse. A conclusion that inspecting the contents of an arrestee's pockets works no substantial additional intrusion on privacy beyond the arrest itself may make sense as applied to physical items, but any extension of that reasoning to digital data has to rest on its own bottom.

196. *Id.* at 2489.

197. *Id.* at 2489 (citations omitted).

198. *Id.* at 2489.

reconstruct “an individual’s private life” from photographs, stored messages, lists of contacts, records of phone calls, music and video libraries, the applications installed in the phone, and data stored in the “cloud”¹⁹⁹ that may be accessible from the device.²⁰⁰

Riley treated cell phone contents as expressive property deserving Fourth Amendment protections. Chief Justice Roberts explained that

[m]odern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans “the privacies of life.” The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought.²⁰¹

The act of viewing the contents of a twenty-first century cell phone is not a physical trespass, but it is a search. This echoes Lord Camden’s assertion in *Entick* that private papers were protected by unauthorized viewing “though the eye cannot by the laws of England be guilty of a trespass”²⁰² Justice Brandeis made a similar point 163 years later, arguing “that the [Fourth] Amendment is violated by the officer’s reading the paper without a physical seizure, without his even touching it”²⁰³

The unifying principle uniting these statements describing rights—whether defined by property or privacy theories—is that a person’s ideas are protected against uninvited intrusions. These protections are strongest when private ideas are memorialized in an expressive form, whether written on paper or recorded on a digital device.

This is a principle expressed in the Fourth Amendment text, in *Boyd*’s affirmation of this principle as a property right, in Brandeis’s objections to warrantless wiretapping of conversations as a violation of the right to privacy, and in *Riley*’s limitations on searches of the digital contents of cell phones.

CONCLUSION

Among the countless criticisms leveled against *Katz*, one of the most provoca-

199. *Id.* at 2491.

200. *Id.* at 2489. The Court also concluded that information stored on a cell phone differs *qualitatively* from paper records.

An Internet search and browsing history, for example, can be found on an Internet-enabled phone and could reveal an individual’s private interests or concerns—perhaps a search for certain symptoms of disease, coupled with frequent visits to WebMD. Data on a cell phone can also reveal where a person has been. Historic location information is a standard feature on many smart phones and can reconstruct someone’s specific movements down to the minute, not only around town but also within a particular building.

Id. at 2490.

201. *Id.* at 2494–95 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)).

202. *Entick v. Carrington* (1765) 95 Eng. Rep. 807; 19 How. St. Tr. 1029, 1066.

203. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

tive was written by Justice Harlan, whose concurring opinion in *Katz* formulated the the two part expectation of privacy standard.²⁰⁴ Only three years after *Katz* was decided, Justice Harlan dissented from a decision relying upon that test and questioned its utility as a tool for defining limits on government electronic surveillance.

In *United States v. White*, federal agents listened to several conversations between White and a government informant, who was wearing a “radio transmitter.”²⁰⁵ The case forced the justices to reconsider earlier decisions involving the use of undercover informants and electronic listening devices. The plurality opinion synthesized the *Katz* expectations analysis and an assumption of the risk doctrine announced in cases involving secret informers.²⁰⁶ The plurality opinion’s merger of the two doctrines is apparent in the following passage:

Our problem is not what the privacy expectations of particular defendants in particular situations may be or the extent to which they may in fact have relied on the discretion of their companions. Very probably, individual defendants neither know nor suspect that their colleagues have gone or will go to the police or are carrying recorders or transmitters. Otherwise, conversation would cease Our problem, in terms of the principles announced in *Katz*, is what expectations of privacy are constitutionally “justifiable”—what expectations the Fourth Amendment will protect in the absence of a warrant.²⁰⁷

The plurality resolved the problem in favor of the government, holding that warrants were not required to authorize either the use of undercover informers to gather evidence from consensual conversations with the suspect, even in a suspect’s home, or the additional intrusion of using electronic technology to listen to and record these conversations.²⁰⁸

Justice Harlan dissented. One of his arguments emphasized the centrality of constitutional values in Fourth Amendment doctrine. Harlan questioned whether “uncontrolled consensual surveillance in an electronic age is a tolerable technique of law enforcement, *given the values and goals* of our political system”?²⁰⁹ His answer: neither the risk analysis nor expectation of privacy methods protected the

204. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

205. *United States v. White*, 401 U.S. 745, 746–47 (1971).

206. *Id.* at 748–51. The most important of these opinions, *Hoffa v. United States*, 385 U.S. 293 (1966),

held that, however strongly a defendant may trust an apparent colleague, his expectations in this respect are not protected by the Fourth Amendment when it turns out that the colleague is a government agent regularly communicating with the authorities. In these circumstances, “no interest legitimately protected by the Fourth Amendment is involved,” for that amendment affords no protection to “a wrongdoer’s misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.”

Id. at 749.

207. *Id.* at 751–52.

208. *Id.* at 749, 752–53.

209. *Id.* at 785 (Harlan, J., dissenting) (emphasis added).

people's constitutional rights to be free from such intolerable intrusions:

While these formulations represent an advance over the unsophisticated trespass analysis of the common law, they too have their limitations and can, ultimately, lead to the *substitution of words for analysis*. *The analysis must, in my view, transcend the search for subjective expectations or legal attribution of assumptions of risk. Our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present.*

Since it is the task of the law to form and project, as well as mirror and reflect, we should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society. *The critical question, therefore, is whether, under our system of government, as reflected in the Constitution, we should impose on our citizens the risks of the electronic listener or observer without at least the protection of a warrant requirement.*²¹⁰

Justice Harlan was correct. Defining constitutional restraints on technological surveillance should not be consigned to arid hypotheses about individual and collective "expectations." Our foundational rights must be defined by searching instead for the liberty based values embedded in our Constitution, our history, and our institutions. Constitutional rights must not be adapted to accommodate unprecedented intrusions simply because new technologies make them possible. Use of these technologies must instead be adapted to conform to our fundamental rights.²¹¹

This argument echoes those found in the broad theories of property contained in the Fourth Amendment text and embraced by the Supreme Court in *Boyd* and its progeny; in Brandeis's arguments for Fourth Amendment privacy rules constraining technological searches and seizures; and in the recent Supreme Court decisions imposing Fourth Amendment values and rules upon the use of thermal imagers and searches of cell phones. This history reveals that theories of property and privacy can both be deployed to eviscerate or to preserve individual freedoms. Rule makers and interpreters can manipulate either theory to achieve the outcomes they prefer. It is not the theories we employ, but rather the values we choose to preserve, that define our liberties.

210. *Id.* at 786 (Harlan, J., dissenting) (emphases added) (citations omitted). Harlan apparently rejected the property based Fourth Amendment doctrines adopted in *Olmstead* and overruled in *Katz*.

211. Justice Harlan did not have time to expand upon this critique. He resigned from the Court only five months after dissenting in *White*, and died only three months later. See generally *Justices: John M. Harlan II*, OYEZ PROJECT, https://www.oyez.org/justices/john_m_harlan2?_escaped_fragment (last visited Nov. 6, 2017). But *White*'s dissent suggests that less than 40 months after *Katz* was decided, the author of what became the expectations test was having second thoughts, especially when electronic surveillance was employed.