

# ***Entick v Carrington* and *Boyd v United States*: Keeping the Fourth and Fifth Amendments on Track**

*Richard A. Epstein*†

*Much of the current confusion about the scope of the Fourth Amendment stems from two major decisions with opposing fact patterns. In Entick v Carrington, damages were rightly awarded when the King’s officers ransacked the plaintiff’s premises while searching for allegedly seditious materials. In Boyd v United States, on the other hand, the United States was denied access to a single record—identified in advance—that could have exposed a tax fraud. The yawning gap between these two cases highlights the dangers of treating these two Fourth Amendment landmarks as parts of a continuous whole. A close review of these and similar cases suggests an alternative, two-part approach to “unreasonable searches and seizures,” one that weakens the supposed link between trespasses and searches. Many trespasses involve no search, just as many searches involve no trespass. A special notion of privacy is therefore not needed to unify the field. Instead, a comprehensive account of searches should force closer attention to the unreasonableness notion built into the text of the Fourth Amendment. In my view, its correct explication allows “reasonable suspicion”—as articulated in Terry v Ohio—to cover any search that identifies a conversation or detects suspicious activities from off premises. If that initial search yields sufficient information, then there is probable cause to listen in on the conversation or enter and search the premises.*

## INTRODUCTION

One of the most striking features of the contemporary law of criminal procedure—insofar as it is embedded in the study of the Fourth Amendment—is the high frequency with which difficult and close cases come before the US Supreme Court. In one sense, this catalogue of disputes is a good sign. Generally speaking, if the courts are closely divided on cases that present difficult questions of interpretation or application, it means that the basic legal assumptions that frame the dispute are likely correct, given their wide range of support. But if these disagreements persist over fundamental questions, the opposite

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† James Parker Hall Distinguished Service Professor Emeritus of Law and Senior Lecturer, The University of Chicago Law School. I would like to thank Rachel Bukberg, Krista Perry, Chelsea Plyler, and Mallory Suede for their valuable research assistance.

inference should be drawn: there is conceptual disarray on matters of central importance to the interpretation of constitutional doctrine, which is best exposed by going back to constitutional fundamentals. This necessitates a return to the two cases that matter most for the early evolution of constitutional law as it relates to searches and seizures and self-incrimination. I refer first to the great 1765 case *Entick v Carrington*,<sup>1</sup> which provided a flawed template for the Fourth Amendment. I also refer to the equally significant, but wholly misguided, 1886 Supreme Court decision *Boyd v United States*,<sup>2</sup> with its double-barreled application of the Fourth and Fifth Amendments to a routine government request for a single document.

Part I of this Essay looks at the internal logic of these two cases, as well as that of the Fourth Amendment, which *Entick* inspired and *Boyd* interpreted. Part II analyzes the structure of the Fourth Amendment. Part III then discusses the emergence of the privacy interest in *Boyd*. This Essay concludes by discussing these cases' long-term influence on the overall structure of this branch of constitutional law. I conclude that a sound analysis of the Fourth Amendment must not artificially truncate the class of constitutional searches but must instead be forthright in dealing with the reasonableness of a wide range of investigative searches.

#### I. THE ENGLISH BACKDROP TO THE FOURTH AND FIFTH AMENDMENTS

*Entick v Carrington* was an action in trespass brought by John Entick, a Grub Street pamphleteer suspected of writing seditious documents.<sup>3</sup> The defendants were four of the King's messengers who had acted pursuant to a warrant "to search for and seize the plaintiff and his books and papers"<sup>4</sup> that was issued by Lord Halifax, who had recently been appointed secretary of state.<sup>5</sup> The defendants broke into Entick's home "with force and arms" and then proceeded over the next four hours to break down doors and open locks in an effort to find evidence of seditious libel that could lead to a criminal prosecution.<sup>6</sup> Their

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<sup>1</sup> 19 Howell's St Trials 1029 (CP 1765).

<sup>2</sup> 116 US 616 (1886).

<sup>3</sup> *Entick*, 19 Howell's St Trials at 1031.

<sup>4</sup> *Id.*

<sup>5</sup> Alan Valentine, 1 *Lord North* 114 (Oklahoma 1967).

<sup>6</sup> *Entick*, 19 Howell's St Trials at 1030–31.

charge from Halifax was “to make strict and diligent search for John Entick, the author, or one concerned in writing of several weekly very seditious papers, entitled the Monitor, or British Freeholder.”<sup>7</sup> In the course of their search, the defendants took about one hundred charts and one hundred pamphlets.<sup>8</sup> The particular actions were found to have caused £2,000 in damages, a very considerable sum for that time.<sup>9</sup> The trespass action was brought against the messengers but not Lord Halifax, who may have been immune from suit on a theory of sovereign immunity.<sup>10</sup>

In dealing with this case, Lord Camden had to address two related issues. The first was the scope of the *prima facie* action in trespass, and the second was the scope of the defenses that these four men could raise. Camden framed the issues thus:

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 licence, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to shew by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books; and if such a justification can be maintained by the text of the statute law, or by the principles of common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment.<sup>11</sup>

This trespass was far from “minute,” and it required adequate justification. Camden concluded, quite simply and correctly, that actions of this sort are all too common and that the silence on the books suggests that no adequate justification can be

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<sup>7</sup> *Id.* at 1034.

<sup>8</sup> *Id.* at 1030.

<sup>9</sup> *Id.*

<sup>10</sup> See James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims against the Government*, 91 *Nw U L Rev* 899, 917 (1997) (“As English law developed, the King himself was said to bear no personal legal responsibility for tortious invasions of the rights of his subjects. Instead, English law required individuals to bring their tort claims against the King’s subordinate officers.”).

<sup>11</sup> *Entick*, 19 Howell’s *St Trials* at 1066.

found in the English tradition.<sup>12</sup> He then observed, with an obvious nod to John Locke,<sup>13</sup> that no justification could be found under English law for this evident abuse of official power, because “[t]he great end, for which men entered into society, was to secure their property.”<sup>14</sup> Then, creating the linkage between this fundamental objective and what in 1791 became the Fourth and Fifth Amendments, Camden stated, “It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle.”<sup>15</sup>

Indeed, Camden carried the theme still further when he noted the congruence between tradition and “an argument of utility, [namely] that such a search is a means of detecting offenders by discovering evidence.” He further stated, “I wish some cases had been shewn, where the law forceth evidence out of the owner’s custody by process. There is no process against papers in civil causes.”<sup>16</sup>

With liability established for this trespass to both real and personal property, damages supplied the obvious legal remedy. In principle, an injunction might be obtainable from a court of equity were there a threat of repetition,<sup>17</sup> but no such threat was

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<sup>12</sup> See *id.* at 1065–66 (“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.”).

<sup>13</sup> For other commentators noting this linkage, see, for example, John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U Chi L Rev 49, 59–60, 62 (1996); Tom Bush, Comment, *A Privacy-Based Analysis for Warrantless Aerial Surveillance Cases*, 75 Cal L Rev 1767, 1790 (1987).

<sup>14</sup> *Entick*, 19 Howell’s St Trials at 1066. See also John Locke, *The Second Treatise of Civil Government and a Letter Concerning Toleration* § 134 at 66 (Blackwell 1948) (J.W. Gough, ed) (“The great end of men’s entering into society being the enjoyment of their properties in peace and safety . . .”). This sentence appears in the chapter devoted to the topic “Of the Extent of the Legislative Power,” in which the limitations of that power matter as much as its grant. *Id.* at § 135 at 67 (“Though the legislative . . . be the supreme power in every commonwealth, yet . . . [i]t is not nor can possibly be absolutely arbitrary.”).

<sup>15</sup> *Entick*, 19 Howell’s St Trials at 1073.

<sup>16</sup> *Id.*

<sup>17</sup> See *Coady Corp v Toyota Motor Distributors, Inc.*, 361 F3d 50, 61 (1st Cir 2004) (“[O]rdinarily a district court is not obligated to issue an injunction absent a threat of repetition. . . . [I]njUNCTIONS are normally a matter of equity and the court is not required to waste resources where there is no ongoing harm and reasonable threat of recurrence.”) (citations omitted).

present.<sup>18</sup> None of the materials collected yielded evidence worthy of criminal prosecution,<sup>19</sup> so the question whether the materials should be excluded from trial did not arise. Camden's opinion was strengthened by his explicit denial of having even the slightest sympathy for any abstract appeal to freedom of speech. Quite to the contrary, Camden put libel behind murder and rape on a list of criminal offenses, which he then condemned as follows:

I desire not to be understood as an advocate for libels. All civilized governments have punished calumny with severity; and with reason; for these compositions debauch the manners of the people; they excite a spirit of disobedience, and enervate the authority of government; they provoke and excite the passions of the people against their rulers, and the rulers oftentimes against the people.<sup>20</sup>

But the government has no need to rummage through private papers to prove a case of libel. The publication of the allegedly libelous statement always provides sufficient—indeed dispositive—evidence of the libel's occurrence. The bottom line is that, notwithstanding the high stakes, Camden treated the case as an easy one; yet while it was easy in principle, it was functionally difficult to decide against the concerted authority of the Crown.

## II. THE NICETIES OF THE FOURTH AMENDMENT

This powerful rhetoric in *Entick* shows its manifest influence on both of the Fourth Amendment's clauses:

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.<sup>21</sup>

The parallel clause in the Fifth Amendment—which was likewise influenced by *Entick*—reads: “[N]or shall [any person] be

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<sup>18</sup> See *Entick*, 19 Howell's St Trials at 1034.

<sup>19</sup> See *id.* at 1031 (noting that *Entick* was discharged from custody after the collected evidence was examined).

<sup>20</sup> *Id.* at 1074.

<sup>21</sup> US Const Amend IV.

compelled in any criminal case to be a witness against himself.”<sup>22</sup>

The most obvious way to examine these clauses is to note that they are clearly an effort to mimic in the Bill of Rights the protection that Lord Camden offered in *Entick* against “a warrant to search and seize” the plaintiff’s papers.<sup>23</sup> Yet the modern need to interpret the Fourth Amendment largely stems from the drafting decision to track the scope of this warrant rather than the common-law theory of trespass against private property that Camden relied on in *Entick*.<sup>24</sup>

With the benefit of hindsight, one can detect three awkward shortfalls in the scope of the Fourth Amendment that flow from this key drafting choice. The first relates to whether the Fourth Amendment’s coverage accurately tracks the rationale of *Entick*. The second is whether the response to the abuses so evident in *Entick* is tied too closely to the observed abuses, such that the Fourth Amendment’s protection is not equal in scope to the set of abuses that it is intended to guard against. The third relates to other kinds of searches that are not covered by the original warrant.

This Essay turns first to the extent of the Fourth Amendment’s coverage. In this regard, the use of the grand phrase “[t]he right of the people” is an initial source of uneasiness.<sup>25</sup> “We the people,” as it were, are the citizens of the United States.<sup>26</sup> But it would be an odd application of *Entick* to hold that the action in trespass in that case could have been denied to an alien, to a partnership, or indeed to a Crown corporation. The great end of government is, as Locke remarked, the protection of property, and that protection should in principle be extended to *all* persons living in any society operating under the natural law to which this Lockean conception appeals. It is worth noting that

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<sup>22</sup> US Const Amend V.

<sup>23</sup> *Entick*, 19 Howell’s St Trials at 1029.

<sup>24</sup> See generally Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich L Rev 547 (1999) (criticizing various interpretations of the Fourth Amendment and emphasizing that a valid warrant’s indemnification does not preclude the victim of an unjustified intrusion from obtaining legal recourse for trespass). At the time of the Framing, the “complainant who swore out a valid search warrant was subject to trespass liability if the search proved fruitless,” and the common law “assigned trespass liability for inappropriate searches under warrants where it belonged—on the complainant who initiated the search rather than on the executing officer who only did his duty.” *Id.* at 589 (emphasis omitted).

<sup>25</sup> US Const Amend IV.

<sup>26</sup> US Const Preamble.

the word “citizen” appears nowhere in *Entick*, while the words “person” and “persons” appear sixty-one times.

The omission of references to “citizens” is not some terminological oversight. It is well established that the protection of the Due Process Clause, which sits adjacent to the protection against self-incrimination in the Fifth Amendment, applies to all persons, not just citizens,<sup>27</sup> and the same is true with respect to the writ of habeas corpus.<sup>28</sup> In Lockean terms, those individuals who reside in a given country do not thereby acquire the right to participate as citizens in its political processes, but so long as they are “submitting to the laws of [the] country [and] living quietly,” all residents are entitled to the “privileges and protection” of those laws.<sup>29</sup> The citizen-alien distinction matters for many legal purposes. Indeed, it is just this distinction around which the key provisions of § 1 of the Fourteenth Amendment are configured. The Privileges or Immunities Clause applies only to citizens, while the Due Process and Equal Protection Clauses apply to all persons, including citizens, aliens, and corporations.<sup>30</sup>

It is critical to note that, under natural law theory, there is no state—all rights and duties establish relationships only between ordinary persons, none of whom enjoys any special status over others. The collision between the generality of the natural law and the specificity of the positive law has given rise to a system of two-tiered rights. The more fundamental rights are given to all persons. Special, additional rights are reserved only for

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<sup>27</sup> See US Const Amend V. See also, for example, *Wong Wing v United States*, 163 US 228, 238 (1896) (holding that “all persons within the territory of the United States” are protected by the Fifth Amendment’s Due Process Clause).

<sup>28</sup> See US Const Art I, § 9, cl 2 (“The Privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”). Note that the Suspension Clause specifies neither who can suspend the writ nor to whom its protection runs. But the application of habeas to aliens within the United States, including at Guantanamo Bay, is now universally accepted. See, for example, *Boumediene v Bush*, 553 US 723, 732 (2008) (holding that aliens detained at Guantanamo Bay have the habeas corpus privilege).

<sup>29</sup> Locke, *The Second Treatise of Civil Government and a Letter Concerning Toleration* at § 122 at 61 (cited in note 14).

<sup>30</sup> See US Const Amend XIV, § 1, cl 2 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.”). See also *First National Bank of Boston v Bellotti*, 435 US 765, 822 (1978) (Rehnquist dissenting) (“This Court decided at an early date, with neither argument nor discussion, that a business corporation is a ‘person’ entitled to the protection of the Equal Protection Clause of the Fourteenth Amendment.”) (citation omitted); *Truax v Raich*, 239 US 33, 39–40 (1915) (holding that the Fourteenth Amendment’s reference to “any person within its jurisdiction” includes aliens).

citizens (hence the term “privileges”). Fundamental rights protect foreigners from arbitrary arrest and property seizure, but such rights do *not* extend to entering the country, acquiring property, or engaging in any particular occupation.<sup>31</sup> Indeed, by something of a stretch, the term “people” has been held to cover resident-alien within the United States.<sup>32</sup>

Second, it is critical to note the difference in the scope of coverage provided in *Entick* and in the Fourth Amendment. Consistent with his Lockean bent, Camden applied the standard common-law trespass rules. These rules cover all forms of property, both real and personal, without distinction. Land, “goods[,] and chattels” are all covered by the limitation on governmental power to the full extent of their loss.<sup>33</sup> In contrast, the Fourth Amendment does not use the capacious term “property.” Instead, it contents itself with a list of four items, two of which cover the actual objects of search in *Entick*: “persons, houses, papers, and effects.”<sup>34</sup> This could easily be construed to exclude constitutional protection for offices, shacks, barns, cars, horses, wagons, meadows, and outhouses on the ground that they fall outside the scope of the Fourth Amendment, even though the logic of *Entick* applies with full force to them. Indeed, the contrast between the scope of the Fourth and Fifth Amendments is

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<sup>31</sup> See US Const Amend XIV. See also *Slaughter-House Cases*, 83 US (16 Wall) 36, 61–63 (1872) (declining to hold that the Privileges or Immunities Clause protects the right to engage in a given occupation). For an account of the significance of the decision in the *Slaughter-House Cases* as well as the jurisprudential twists and turns taken after the Fourteenth Amendment’s passage, see generally Richard A. Epstein, *Of Citizens and Persons: Reconstructing the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 NYU J L & Liberty 334 (2005); Richard A. Epstein, *Further Thoughts on the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 NYU J L & Liberty 1096 (2005).

<sup>32</sup> For the basic position, see *United States v Verdugo-Urquidez*, 494 US 259, 265 (1990):

“[T]he people” protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.

This passage follows along the tracks of Locke’s argument quoted above. See note 29 and accompanying text.

<sup>33</sup> Shyamkrishna Balganesh, *Property along the Tort Spectrum: Trespass to Chattels and the Anglo-American Doctrinal Divergence*, 35 Common L World Rev 135, 141 (2006) (discussing the English common-law rule that “the trespass to chattels, like its real property counterpart, is actionable per se independent of any proof of actual damage”).

<sup>34</sup> US Const Amend IV.



striking because the latter uses the broader term “private property” in connection with the Takings Clause,<sup>35</sup> and the still-broader term “property” in connection with the Due Process Clause.<sup>36</sup> These two Amendments thus avoid textual differentiation among various types of property for natural law–theory purposes. It is an open question whether these word choices—which narrow the scope of the Fourth Amendment—were a product of conscious design or something less. Perhaps the drafters were content with addressing major abuse, leaving analogous situations to be dealt with at some later day. It is also worth noting that the word “privacy” never appears in *Entick*; the best explanation for this omission is that, at least at that time, the extensive protection given to private property obviated the need to supply additional protection to privacy as such.<sup>37</sup> To be sure, the word “private” appears nineteen times in the opinion, but chiefly in such phrases as “private papers” or “private drawer” and never as a synonym for “privacy.”

Clearly, the no-trespass–no-injury position was tenuous even at the time that *Entick* was decided, given Blackstone’s recognition of eavesdropping as a potential source of mischief.<sup>38</sup> But whatever the drafters’ intentions, their choice of words has certainly set up a complex dynamic between (some form of) property and (some form of) privacy.

The third question relates to the nature of the government intrusion. In *Entick*, the government had no reason to snoop around the edge of the premises because the general warrant authorized a maximum search from the outset.<sup>39</sup> The warrant permitted a search of the premises for papers and other evidence that could be used to make out a case of seditious libel against *Entick*.<sup>40</sup> The case did not involve government agents secretly lurking in some back hallway, taking copious notes of private

<sup>35</sup> US Const Amend V.

<sup>36</sup> US Const Amend V.

<sup>37</sup> See Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 Wake Forest L Rev 307, 311 (1998) (noting that Camden’s opinion in *Entick* displayed “the common law’s strong support for private property,” because “every invasion of private property, be it ever so minute, was considered a trespass”) (quotation marks omitted).

<sup>38</sup> See William Blackstone, 4 *Commentaries on the Laws of England* 169 (Chicago 1979) (“Eaves-droppers . . . are a common nuisance and presentable at the court-leet [sic].”).

<sup>39</sup> See *Entick*, 19 Howell’s St Trials at 1031 (noting that the warrant authorized and required a “strict and diligent search”).

<sup>40</sup> *Id* at 1034.

conversations between Entick and the fellow journalists whom he had invited into his home. It is surely the case that this set of actions by the defendants would count as a trespass. So long as the entrance of these agents could be enjoined, the problem of eavesdropping takes care of itself. But it is worth asking what Camden would have done had the evidence revealed that the King's messengers had entered, or even snooped around, the premises in search of hints that Entick was engaged in private conversations that revealed his seditious intentions before they entered the premises under the general warrant. My guess is that his attitude would have been more hostile to the government, not less. Although the law at the time was largely unsettled, there is surely a credible case as a matter of tort law that, at least with illegal entry, Entick could recover some damages for emotional distress or perhaps (even in 1765) any consequential damages (say, the loss of a trade secret) flowing from such searches, or secure an injunction against repetition in order to protect against the threat of being overheard.<sup>41</sup> It is only a small stretch to say that the initial entry is subject to condemnation even if a subsequent warrant could have "particularly described" the papers targeted by the new search.<sup>42</sup>

Yet the term "search and seizure" is easily subject to a narrower interpretation, such as that given by a crusty Justice Hugo Black in *Katz v United States*,<sup>43</sup> in which he accused the majority of a lack of fidelity to the constitutional text: "By clever word juggling the Court finds it plausible to argue that language aimed specifically at searches and seizures of things that can be

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<sup>41</sup> For an illustration of prevailing English law, see, for example, Michael Lobban, *Mapping the Common Law: Some Lessons from History*, 2014 NZ L Rev 21, 32–34 (2014) (discussing concepts prevalent in eighteenth-century English tort law, such as how damages could be apportioned in trespass cases); Michael L. Rustad and Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 Brooklyn L Rev 1, 9–12 (2002) (describing early English tort law's focus on redress for trespass—including compensation based on injury classification—and the evolution of consequential damages to compensate for indirect injuries).

<sup>42</sup> See *Murray v United States*, 487 US 533, 535–36 (1988) ((mis)applying the independent-source doctrine to a situation in which the government claimed independent evidence only after conducting a search of the premises, a fact that the government concealed from the magistrate who issued the warrant). The independent-source doctrine dates back to *Silverthorne Lumber Co v United States*, 251 US 385 (1920), in which Justice Oliver Wendell Holmes refused to allow the government to first study the defendant's papers and then copy them in their entirety, before using that information to subpoena the originals. *Id.* at 391–92. The distinction between *Silverthorne* and *Murray* seems tenuous at best.

<sup>43</sup> 389 US 347 (1967).

searched and seized may, to protect privacy, be applied to eavesdropped evidence of conversations that can neither be searched nor seized.”<sup>44</sup> This claim warrants two textual comments. First, the words “of things” do not appear in the first clause of the Fourth Amendment. Second, the use of the term “specifically” indicates a distinctive constitutional orientation, whereby the literal meaning of a given term is preserved to the extent that it excludes analogous cases that are arguably outside its scope. But, at this point, the tension between the broader natural law theories of Camden and the now-cramped provisions of the Fourth Amendment tell a somewhat different story. It is clear, for example, that in many other areas, interpretation of official language—whether in contracts, statutes, or constitutions—is not subject to a rigid form of textualism, but is routinely extended to cover cases that are so analogous to the conduct that is the subject of the direct prohibition that it has to be caught by the test.<sup>45</sup> Roman law reached just this interpretive result in dealing with the fundamental provision of the *Lex Aquilia* when the commentators (who functioned as judges for the purpose of making the law) created an *actio in factum* (similar to the common-law action on the case) to cover the gaps in the law left by the basic command against killing (*occidere*) by allowing an action for furnishing a cause of death (*causam mortis praestare*) to deal with the dangers of poisoning.<sup>46</sup> Constitutionally, it takes a brave soul to insist that the Takings Clause does not apply in those cases in which the government just destroys the house with explosives but does not take title to the pieces. And it would be equally odd to say that speech does not include dancing, which is covered under the now-common use of the term “expression” as a substitute for speech.

The question then arises: What method is used to achieve these results? In most cases, the best method is to first put the government aside and then, in line with the Roman approach,

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<sup>44</sup> Id at 373 (Black dissenting).

<sup>45</sup> For a lengthy discussion of this point, see Richard A. Epstein, *The Classical Liberal Constitution: The Uncertain Quest for Limited Government* 46–54 (Harvard 2014) (discussing the anticircumvention principle).

<sup>46</sup> See Richard A. Epstein, *A Common Lawyer Looks at Constitutional Interpretation*, 72 BU L Rev 699, 706–10 (1992) (noting the parallel interpretive strategies applied in the Roman law and Fourth Amendment contexts). See also Richard A. Epstein, *Privacy, Publication, and the First Amendment: The Dangers of First Amendment Exceptionalism*, 52 Stan L Rev 1003, 1011 & n 26 (2000) (contrasting a broad approach to First Amendment protections with a common-law-focused approach).

ask whether, as a matter of ordinary language, one person would be regarded as having taken property by blowing it up, or searching property by entering it. This basic method will generally resolve a latent ambiguity by covering the analogous case, as noted above. That same principle can be applied to the government, such that the basic structure of the Fourth Amendment has to apply to trespasses committed on private property in order to acquire information: the analogous cases should be subject to the basic method.

More concretely, it becomes necessary to establish the right relationship between trespasses and searches. Not all trespasses are searches. People often trespass in order to take a shortcut over another person's land. They trespass, but they do not search. Similarly, a person can search without any entrance, let alone any unlawful entry, as by shining a searchlight—the choice of tool was intentional—through a window while standing on a public street. Nor is the class of searches limited to the senses of touch and sight. It is possible to search by sound, taste, or smell, so long as the intent is to learn something that is not already known. A member of a search party is doing his job when he cocks his ear in order to pick up the sound of an escaping fugitive, uses dogs to track the fugitive's scent, or touches a wall looking for a concealed lever. The only requirement for a search is an effort—by either the unaided senses or any instrument or device, whether commonplace or exotic—to learn something that one did not know. There is no need to scour an area in order to search it. Indeed, both police and con men often seek to conceal the fact that they have even conducted a search in the first place. A quick look at a thesaurus shows that there is only modest overlap between the terms “trespass” and “search.”<sup>47</sup> Surely it is always the case that, as in *Entick*, any unlawful entrance made in order to search and seize is both a trespass and a search or seizure. But this truth is contingent, not definitional.

This analysis thus exposes the huge flaws in the now-disregarded cases *Olmstead v United States*<sup>48</sup> and *Goldman v United States*,<sup>49</sup> neither of which meets the ordinary norms of

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<sup>47</sup> Compare *Oxford Thesaurus of English* 904 (Oxford 3d ed 2009) (listing “intrude on,” “encroach on,” and “invade” as synonyms for “trespass”), with id at 770 (listing “look through,” “hunt through,” “explore,” “scour,” “rifle through,” “go through,” “sift through,” “comb,” and so forth as synonyms for “search”).

<sup>48</sup> 277 US 438 (1928).

<sup>49</sup> 316 US 129 (1942).

constitutional interpretation. In *Olmstead*, the US government engaged in a wiretap enterprise of amazing magnitude.<sup>50</sup> In that case, Chief Justice William Howard Taft first conceded that “[t]he Fourth Amendment may have proper application to a sealed letter in the mail because of the constitutional provision for the Postoffice Department and the relations between the Government and those who pay to secure protection of their sealed letters.”<sup>51</sup> Indeed, it could hardly be otherwise—the Fourth Amendment protects all papers, not just those that are, as in *Entick*, found in houses.<sup>52</sup> The only reason why it matters that a letter is in a sealed envelope is because, once the government opens the envelope, it knows that it has removed all evidentiary restraints on the use of the letter. But if the owner of the letter entrusts it to a friend who leaves it exposed on her desk, the government still engages in a search by reading it at all. The post office is just a diversion from the central point. Accordingly, Taft seems plainly wrong when, in speaking of the post office case, he writes:

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.

. . .

[Although] the Fifth Amendment and the Fourth Amendment [are] to be liberally construed to effect the purpose of the framers of the Constitution in the interest of liberty, . . . that can not justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight.<sup>53</sup>

If it is a search to overhear a conversation while in a house, it is equally a search to do so outside its confines. It is also unnecessary to share the unease expressed by Justice Oliver Wendell Holmes, who sided with the Court on the ground that:

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<sup>50</sup> See *Olmstead*, 277 US at 471 (Brandeis dissenting) (emphasizing the magnitude of the government’s wiretap, which involved monitoring 8 telephones over a period of nearly 5 months and resulted in 775 pages of transcribed conversations).

<sup>51</sup> *Id.* at 464.

<sup>52</sup> See *Silverthorne Lumber Co.*, 251 US at 390–91 (determining that a seizure of business papers is a Fourth Amendment violation).

<sup>53</sup> *Olmstead*, 277 US at 465.

While I do not deny [Justice Louis Brandeis's examination of the subject], I am not prepared to say that the penumbra of the Fourth and Fifth Amendments covers the defendant, although I fully agree that Courts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them.<sup>54</sup>

It follows, therefore, that the Brandeis dissent is correct. But, as should be evident, the outcome is best reached on these textual grounds, without any appeal to the living Constitution or the notion of privacy, such as when Brandeis wrote:

But "time works changes, brings into existence new conditions and purposes." Subtler and more far-reaching means of invading privacy have become available to the Government. 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.<sup>55</sup>

This is yet another instance in which the static conception of the common law gives a more accurate rendition of the situation than the ad hoc appeal to changed circumstances.<sup>56</sup> If the King's messengers had listened in on whispered conversations while sitting in Entick's closet, it would still have been a search. There is no sensible distinction between reading lips and hearing speech, in constitutional law or anywhere else.

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<sup>54</sup> Id at 469 (Holmes dissenting) (citation omitted).

<sup>55</sup> Id at 473 (Brandeis dissenting). It is therefore perfectly predictable that Brandeis would quote Chief Justice John Marshall's famous passage in *McCulloch v. Maryland*, 17 US (4 Wheat) 316 (1816): "[W]e must never forget that it is a *constitution* we are expounding." Id at 407. See also *Olmstead*, 277 US at 472 (Brandeis dissenting). Indeed, it was just that sentiment that led Marshall to decide incorrectly on the issue whether the federal government has the power to establish a bank. See *McCulloch*, 17 US at 407–09. Cases like *Pensacola Telegraph Co v. Western Union Telegraph Co*, 96 US 1, 10 (1877) (holding, regarding telegraphic communications, that "[i]t cannot for a moment be doubted that this powerful agency of commerce and intercommunication comes within the controlling power of Congress"), which Brandeis cites, were treated not as bold exercises in a living Constitution, but as the no-brainers that they were. "Since the case of *Gibbons v. Ogden* (9 Wheat 1), it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress." Id at 9.

<sup>56</sup> See generally Richard A. Epstein, *The Static Conception of the Common Law*, 9 J Legal Stud 253 (1980). There are no special constitutional law rules for the interpretation of the text. For a detailed defense of this basic method, see Epstein, *The Classical Liberal Constitution* at 48–49 (cited in note 45) (dealing with the anticircumvention norm).

Once the error in *Olmstead* is exposed, *Goldman* becomes an a fortiori case. *Goldman* involved the electronic surveillance of private conversations that the defendant conducted in his own office; the government used a contraption known as a detectaphone to hear through the building's walls rather than tap external telephone wires.<sup>57</sup> That should distinguish *Goldman* from *Olmstead*, but the Supreme Court regarded the point as immaterial: "Both courts below have found that the trespass did not aid materially in the use of the detectaphone."<sup>58</sup> So the physical trespass counted as a form of harmless error in *Goldman*, but the want of a physical invasion proved decisive in *Olmstead*—an untenable distinction of degree. But the potential imbalance should have been redressed in the opposite direction. The entrance into the wall counted as a trespass, for which the information collected was consequential damages. The damages do not disappear if the listening is done remotely, without the trespass, nor if the investigator reads the defendant's lips through a window. All searches—but not necessarily reasonable searches—cause consequential damages, a point to which I shall return after a closer look at *Boyd*.

### III. *BOYD V UNITED STATES* AND THE PRIVACY INTEREST

The contrast between *Entick* and *Boyd* is stark. *Entick* arose out of a case with the highest political importance. *Boyd* arose out of a minor dispute over the collection of customs duties on the importation of plate glass—a routine administrative action.<sup>59</sup> Unlike laws against seditious libel, tax collection is, by any account, a legitimate government function that is not thrown into doubt by the Fourth or Fifth Amendments. Nor does the search of imported packages require a warrant, given that, with neither suspicion nor probable cause, searches of sealed packages have always been universally allowed in order to supplement the laws against smuggling.<sup>60</sup> If these are not reasonable searches, as it were, the system shuts down.

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<sup>57</sup> *Goldman*, 316 US at 131–32.

<sup>58</sup> *Id.* at 135.

<sup>59</sup> See *Boyd*, 116 US at 617–18.

<sup>60</sup> See, for example, *United States v Flores-Montano*, 541 US 149, 155 (2004) (holding routine, suspicionless border searches to be legal per se); *United States v Montoya de Hernandez*, 473 US 531, 538 (1985) (“[T]he Fourth Amendment’s balance of reasonableness is qualitatively different at the international border than in the interior.”).

Justice Joseph Bradley stated the factual issue in *Boyd* at a highly abstract level: the calculation of the proper tax on the thirty-five cases of plate glass seized by the tax collector depended on the “quantity and value of the glass contained in twenty-nine cases previously imported.”<sup>61</sup> The government then issued a subpoena that required production of the invoice for the importation of those twenty-nine cases of plate glass.<sup>62</sup> The two short lower-court opinions in *Boyd* upheld the government’s request and explained why that invoice was needed as evidence in the unusual circumstances of this case.<sup>63</sup> In that earlier transaction, the defendants and the United States entered into an agreement whereby the defendants supplied large quantities of plate glass from preexisting stocks for the construction of a courthouse and post office in Philadelphia.<sup>64</sup> The defendants had paid taxes on those shipments, but the taxes were forgiven in the new government’s construction deal, which waived all import duties on materials used in government projects.<sup>65</sup> Instead of issuing a simple refund, the government gave Boyd a credit on future shipments equal to the tax paid on the earlier shipments.<sup>66</sup> In its case, the Government insisted that Boyd had helped himself to extra credits to which he was not entitled.<sup>67</sup> The lower court already possessed the letter that Boyd had sent to the US Treasury stating his claim for the credit.<sup>68</sup> It needed the earlier invoice to close the loop on the fraud.

The government subpoena was entirely proper: the letter was relevant to the fraud issue. No other documents were requested under the statutory provision, which had been drafted with an eye to the Constitution and stated that the United States “may make a written motion, particularly describing such . . . invoice”—just what it did in this case.<sup>69</sup> Letting the defendant produce the document spared him the indignity of a more extensive government search. Lord Camden would have been proud. Boyd could not sue the United States in trespass for

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<sup>61</sup> *Boyd*, 116 US at 618.

<sup>62</sup> *Id.*

<sup>63</sup> See generally *United States v Boyd*, 24 F 692 (SDNY 1885); *United States v Boyd*, 24 F 690 (SDNY 1885).

<sup>64</sup> *Boyd*, 24 F at 692–93.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> See *id.* at 693.

<sup>68</sup> *Boyd*, 24 F at 694.

<sup>69</sup> *Boyd*, 116 US at 618–20, citing 18 Stat 186, 187 (1874), codified at 19 USC § 535.



nominal damages, let alone £2,000 or its dollar equivalent. Why the fuss over an issue that was not even raised below? Without pausing to identify the context, Bradley quickly moved into high gear:

It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence[ ]—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden’s judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man’s own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.<sup>70</sup>

Note that there is no question whether the Fourth Amendment applies to these papers. It surely does, and for good reason. It is therefore odd to see the gravamen of *Entick* turn into a “circumstance[ ] of aggravation” when it was the entire basis of the damage claim.<sup>71</sup> So why is it that the government cannot get what it so obviously needs? Bradley constructs a web that renders the Fourth and Fifth Amendments absolute bars when neither should apply at all. He does so by using a grand notion of privacy that plays no role whatsoever in the case.<sup>72</sup>

Start with the Fifth Amendment. The *Boyd* Court concluded that the use of the letter in court was compulsory testimony, which is barred under the Fifth Amendment.<sup>73</sup> That Amendment has no probable cause language, such that the only way to defeat its application is through waiver, which Boyd would never give. Neither use nor transactional immunity could have helped the government, because it sought to convict Boyd but no one

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<sup>70</sup> *Boyd*, 116 US at 630.

<sup>71</sup> *Id.*

<sup>72</sup> See *id.* (“The principles laid down in this opinion affect the very essence of constitutional liberty and security. . . . [T]hey apply to all invasions on the part of the government and its employés of the sanctity of a man’s home and the privacies of life.”).

<sup>73</sup> See *id.* at 634–35.

else.<sup>74</sup> Taken seriously, this position means that all papers, whether held by individuals or corporations, are beyond the power of the state to collect or examine for any reason. The first chink in that stout armor came in *Hale v Henkel*,<sup>75</sup> an antitrust case in which the Court held that the privilege against self-incrimination does not apply to a corporation.<sup>76</sup> This conclusion seems odd if the sacred rights of shareholders or employees are necessarily implicated. Indeed, the *Hale* Court was wrong to take this position. The more accurate view, which later emerged in *Fisher v United States*,<sup>77</sup> rightly repudiates *Boyd* by drawing a distinction between the act of document production and the document produced.<sup>78</sup> The Fifth Amendment applies to the former, but not the latter (at least for any document prepared in the ordinary course of business). It was therefore a mistake for the *Boyd* Court to treat the defendant as having “confessed” to the allegations, when evidence of the fact of production is not part of the case.<sup>79</sup>

Indeed, Bradley backtracked by insisting how the case (at least as a Fourth Amendment matter) would have been different if “the supervision authorized to be exercised by officers of the revenue over the manufacture or custody of excisable articles, and the entries thereof in books required by law to be kept for their inspection, [were] necessarily excepted out of the category of unreasonable searches and seizures.”<sup>80</sup> But that unsupported claim goes too far in the opposite direction because it fails to explain why the government can defeat a sacred constitutional

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<sup>74</sup> A limited-use immunity statute was struck down in *Counselman v Hitchcock*, 142 US 547, 586 (1892).

<sup>75</sup> 201 US 43 (1906).

<sup>76</sup> *Id.* at 69–70.

<sup>77</sup> 425 US 391 (1976).

<sup>78</sup> See *id.* at 410–11 (“The act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced.”). See also *United States v Doe*, 465 US 605, 608–09, 613 (1984) (noting that, although “the contents of business records ordinarily are not privileged because they are created voluntarily and without compulsion,” the act of producing the documents in this case, unlike in *Fisher*, would have involved testimonial self-incrimination, and the documents were therefore privileged); *United States v Hubbell*, 530 US 27, 35–36 (2000) (referencing *Fisher* for “the settled proposition that a person may be required to produce specific documents even though they contain incriminating assertions of fact or belief because the creation of those documents was not ‘compelled’ within the meaning of the privilege”).

<sup>79</sup> See *Boyd*, 116 US at 634–35, 639.

<sup>80</sup> *Id.* at 623–24. For a perceptive discussion of these issues in *Boyd*, see Stanton D. Krauss, Note, *The Life and Times of Boyd v. United States (1886–1976)*, 76 Mich L Rev 184, 189–95 (1977).

right just by “requiring” corporations and their agents to keep these papers in a form accessible to the government. A simple declaration that these papers are “required” should not automatically subject them to production or seizure, for if so the protection of both the Fourth and Fifth Amendments disappears.

The problem is obviated only by using some version of the doctrine of unconstitutional conditions, which imposes limits on how the government exercises its monopoly power.<sup>81</sup> Thus, the government could stop requiring all importers to waive their Fourth and Fifth Amendment rights in order to import these goods.<sup>82</sup> Most private parties cannot afford to sacrifice their livelihoods today to preserve a constitutional right that they may never need to exercise. After all, nearly everyone would waive their Fourth Amendment protections against vehicular searches and seizures in order to use the public roads, at which point all vehicular searches would become automatically constitutional. To avoid that horrific result, the usual test therefore mandates that the record-keeping requirement be related to some legitimate government interest, and collecting taxes is generally deemed one.<sup>83</sup> At this point, *Boyd’s* exception collapses because it does not explain why the government had to anticipate the peculiar circumstances that made this earlier invoice relevant.

But why is that bad, if the request for production is legitimate? After all, producing the paper is far less intrusive than a search of the defendant’s premises. Yet the *Boyd* Court never explained why this demand for production was illegitimate. Instead, it observed that this request for paper was different from the traditional request for contraband, some instrument of criminality, or property in which the government or some other party has an interest.<sup>84</sup> But so what, given that relevance and specificity are both satisfied? It is odd to erect a barrier around relevant evidence in the form of specified papers. Indeed, *Boyd*

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<sup>81</sup> See generally Richard A. Epstein, *Bargaining with the State* (Princeton 1993).

<sup>82</sup> See Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 Harv L Rev 4, 6–7, 22 (1988) (“In its canonical form, this doctrine holds that even if a state has absolute discretion to grant or deny a privilege or benefit, it cannot grant the privilege subject to conditions that improperly ‘coerce,’ ‘pressure,’ or ‘induce’ the waiver of constitutional rights.”).

<sup>83</sup> See, for example, *Shapiro v United States*, 335 US 1, 32–33 (1948) (upholding the required-records doctrine against Fifth Amendment challenges). The exception arises when the tax records relate unambiguously to illegal wagering activities. See *Marchetti v United States*, 390 US 39, 60–61 (1968).

<sup>84</sup> See *Boyd*, 116 US at 623–24.

would have been a nonevent if the government had just kept a copy of the invoice for the prior shipment of plate glass when it levied the initial tax. As a matter of constitutional principle, the timing of this request should be accorded no weight at all. On this issue *Boyd's* Fifth Amendment holding is rightly dead.<sup>85</sup> The Fourth Amendment holding in *Boyd* is every bit as untenable. Its basic proposition, crystallized in *Gouled v United States*,<sup>86</sup> is that “mere evidence” of the commission of the crime cannot be obtained under the Fourth Amendment, even when all the other requirements for evidence are fully satisfied.<sup>87</sup>

In a strange sense, therefore, the combined effect of *Boyd* and *Gouled* led the Court to the other extreme in *Olmstead*. Notwithstanding the strong conceptual arguments against the *Olmstead* decision, there is a sense in which the *Boyd* decision offers a backhanded justification for Justice Taft’s decision in *Olmstead*.<sup>88</sup> Under the legal regime created in *Boyd*, the decision to call the wiretap a search would not just require that the government get a warrant—which would not have been all that difficult given the extensive nature of the illegal operations under surveillance—but it would also bar admission of the evidence in the first place. Faced with the choice of letting everything in or keeping everything out, the former looks much more palatable, for there might still be other nonconstitutional devices to limit the scope of the search. But in truth, there is no reason to lurch from one extreme to the other. The simpler approach is to overturn the mere-evidence rule in *Gouled* and thus limit the scope of *Boyd*.

Indeed, just that result was not long in coming, for the mere-evidence rule was overturned in *Warden, Maryland Penitentiary v Hayden*<sup>89</sup> in a strong opinion by Justice William Brennan, which concluded that all the protections that were needed in this case were supplied by the warrant, particularity, and probable cause requirements.<sup>90</sup> In so doing, Brennan noted that

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<sup>85</sup> See Krauss, 76 Mich L Rev at 212 (cited in note 80).

<sup>86</sup> 255 US 298 (1921).

<sup>87</sup> See *id.* at 309, citing *Boyd*, 116 US at 623–24 (noting that, after *Boyd*, search warrants “may not be used as a means of gaining access to a man’s house or office and papers solely for the purpose of making search to secure evidence to be used against him”).

<sup>88</sup> My thanks to Professor Orin Kerr for pointing this out in the discussion of my Essay at the symposium.

<sup>89</sup> 387 US 294 (1967).

<sup>90</sup> See *id.* at 309–10.

the privacy claim for mere evidence was no greater than it was for contraband or dangerous instrumentalities.<sup>91</sup> So now the Fourth Amendment holding in *Boyd* is also dead. And with it should die the notion that privacy affords a special insight into the overall constitutional area. The simple point here is that all searches and all seizures (performed to collect proof) are invasions of privacy because they are concerned with the information that property or speech provides about the commission of some criminal offense.<sup>92</sup> Properly define searches and seizures, and the privacy issue takes care of itself.

#### CONCLUSION: OF REASONABLE SEARCHES AND SEIZURES

This examination of key stages in the progression of Fourth Amendment law shows that there is no shortcut to the right constitutional conclusions. This area of law is so difficult because no amount of verbal jousting can eliminate the basic tension between personal rights and the state's need to collect criminal evidence. In dealing with these Fourth Amendment arguments, it is always tempting to claim that the issue would go away if we only changed the substantive law so as to remove import duties or investigations of drug offenses from the list of governmental activities. But even if the state confined its activities to certain core offenses—for example, force, fraud, and monopoly—all the tension that is found in other substantive areas would still remain. The liberty of the public at large is surely protected by catching and incarcerating murderers, rapists, and thieves, and the Fourth and Fifth Amendments cannot establish parchment barriers against prosecuting these offenses.

So the question then arises: What mode of interpretation deals with these issues best? On this question, I take a leaf from what I regard as the proper interpretation of the Takings Clause. More concretely, I see no way in which a narrow definition of takings—roughly speaking, the taking of exclusive government possession—can deal with the full range of government takings of partial interests in land, such as mineral or air rights, or other forms of property, whether by taxation, regulation, or modification of liability rules.<sup>93</sup> The broad definition of “taking”

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<sup>91</sup> See *id.* at 301–02.

<sup>92</sup> See Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 Va L Rev 869, 925 (1985) (“All searches and seizures involve a serious invasion of privacy.”).

<sup>93</sup> See Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* 57–73 (Harvard 1985).

does not, however, commit us to the proposition that each and every taking requires cash compensation. It is always possible to show that particular governmental actions are justified under the police power—which is obviously relevant here—to deal with matters of safety and health.<sup>94</sup> And in comprehensive regulatory and tax schemes, it is critical to give the government credit against any compensation obligation for the *implicit, in-kind* compensation that is part and parcel of a reciprocal set of restrictions on land use, say, that works to the long-term advantage of all persons.

This approach is critical in dealing with searches and seizures. On this point, I think that Chief Justice Earl Warren struck just the right note in *Terry v Ohio*<sup>95</sup> when he wrote, in connection with stop-and-frisk, that “it is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person’s clothing all over his or her body in an attempt to find weapons is not a ‘search.’”<sup>96</sup> A search it surely is, such that the analysis next turns to whether that search is reasonable under the first clause of the Fourth Amendment. It is deemed reasonable if there is “reasonable suspicion”—which is not probable cause—that the detainee is engaged in criminal activity or is in possession of dangerous weapons or illegal contraband.<sup>97</sup>

The wrong approach to these issues is to deny searches when they in fact occur, which is what Justice Antonin Scalia did in *Arizona v Hicks*.<sup>98</sup> In that case, he held that “the mere recording of the serial numbers” on some stereo equipment found on the defendant’s premises “constituted neither a ‘search’ nor a ‘seizure’ within the meaning of the Fourth Amendment.”<sup>99</sup> Yet he also held that turning over another piece of equipment to record its serial number did constitute a search.<sup>100</sup> But the first part of

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<sup>94</sup> See *id.* at 107–12.

<sup>95</sup> 392 US 1 (1968).

<sup>96</sup> *Id.* at 16.

<sup>97</sup> *Id.* at 27. Searches for such contraband and weapons are still allowed in vehicular searches after *Arizona v Gant*, 556 US 332, 346 (2009), limiting *New York v Belton*, 453 US 454 (1981), even after the occupant of the car has been removed from the vehicle. *Gant* thus refers to the two categories that were listed in *Boyd*, but of course it does not preclude introducing mere evidence found pursuant to a search with a warrant.

<sup>98</sup> 480 US 321 (1987).

<sup>99</sup> *Id.* at 324.

<sup>100</sup> *Id.* at 324–25 (“[T]aking action, unrelated to the objectives of the authorized intrusion . . . did produce a new invasion of respondent’s privacy unjustified by the exigent circumstance that validated the entry.”).

this argument has to be wrong, given that the serial number was new information in both cases. Since the police were on the premises with probable cause for another criminal offense related to the firing of guns,<sup>101</sup> the proper question was whether there was reasonable suspicion to believe that expensive new stereo equipment was stolen—an easy question. At this point, it is no longer necessary to invoke Scalia’s stirring peroration that, given the refusal to allow the serial numbers into evidence, “[i]t may well be that, in such circumstances, no effective means short of a search exist. But there is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all.”<sup>102</sup>

The use of the reasonable-suspicion standard in cases like *Terry* and *Hicks* is the key to understanding the overall structure of the Fourth Amendment, for, outside of *Terry*, there are many searches that should be regarded as permissible upon reasonable suspicion. The rough-and-ready line that I would draw is that this standard is appropriate for particularized searches of individual persons, places, or things so long as the search in question tracks only who is talking with whom or monitors the movement of persons. On that list, I would include pen register searches,<sup>103</sup> which track who is speaking with whom without listening to the messages, as well as beeper searches, which track the movement of objects, either alone or in conjunction with visual searches.<sup>104</sup> Once further information is gathered that fits into a general case for probable cause, the police should then obtain a warrant for a more thorough search of the content of the messages or entry into either the vehicle or the place where it is parked to make out the remainder of the case. In one sense, this limits the power of the government to make suspicionless searches of particular persons, which would impose only a modest restraint on police activity, given the costs of running any search. But it would also allow for a smooth progression in which stronger evidence of criminality allows for more-intrusive

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<sup>101</sup> *Id.* at 323.

<sup>102</sup> *Hicks*, 480 US at 329.

<sup>103</sup> See *Smith v Maryland*, 442 US 735, 745–46 (1979) (upholding the constitutionality of warrantless pen register installations). A pen register is a device that records numbers dialed on a telephone. *Id.* at 736 n 1.

<sup>104</sup> See *United States v Karo*, 468 US 705, 721 (1984) (holding that it was not a violation of the Fourth Amendment for agents to visually surveil a storage locker and use a beeper to track a can placed inside it without first obtaining a warrant). A beeper is a radio transmitter that can be used to track moving objects. *Id.* at 707 n 1.

police investigation. After all, that balance is what the Fourth Amendment is all about.