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COLLECTIVE RIGHTS AND THE FOURTH AMENDMENT AFTER *CARPENTER*

DAVID GRAY*

In a landmark opinion, the Supreme Court held in *Carpenter v. United States*¹ that government acquisition of cell-site location records from a cellular service provider is a “search” for purposes of the Fourth Amendment requiring a warrant.² The majority opinion written by Chief Justice John Roberts in support of that holding is not a model of lucidity. In fact, it seems almost deliberately obscure at several critical junctures. *Carpenter* is far from unique in this regard. The Court has a long history of mumbling when it confronts new challenges or controversial social questions. Perhaps that is as it should be. Vagueness at the vanguard preserves latitude for the Court to construe its own precedents broadly or narrowly in response to subsequent events and the facts of particular cases, refining and developing doctrine as it goes along. It is therefore hard to criticize the Justices for preserving the possibility of future humility at these moments of maximum hubris.

And who are we to complain anyway? This is just the sort of thing that keeps law professors well-fed. The feast has certainly begun on *Carpenter* with critics asking impertinent questions such as “What, precisely, is the government action that constitutes a ‘search’ when law enforcement requests business records from a service provider?”³ and “How, exactly, do customers have Fourth Amendment ‘standing’ to challenge those requests?”⁴ This Essay will answer both questions. The key, as we shall see, is that the Court finally seems to be taking seriously the text of the Fourth Amendment, which guarantees the right of “*the people* to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,”⁵ not, as the Court often has assumed, a right of *persons* or *individuals*.⁶ This shift in

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1. 138 S. Ct. 2206 (2018).

2. *Id.* at 2223.

3. Professor Danielle Citron and I squarely addressed this question in David Gray & Danielle Citron, *The Right to Quantitative Privacy*, 98 MINN. L. REV. 62, 133–37 (2013).

4. *Carpenter*, 138 S. Ct. at 2227 (Kennedy, J., dissenting); *id.* at 2241–42 (Thomas, J., dissenting).

5. U.S. CONST. amend. IV.

6. I make the case for a collective rights reading of the Fourth Amendment at length in my recent book. DAVID GRAY, *THE FOURTH AMENDMENT IN AN AGE OF SURVEILLANCE* 134–89 (2017).

focus is subtle, but critical, both as a matter of fidelity to the text and as a way to light the path forward as the Court confronts law enforcement's use of new and emerging surveillance technologies.

I. FIRST HINTS: *UNITED STATES V. JONES*

The story starts in 2011 during oral argument in *United States v. Jones*.⁷ In that case, law enforcement officers in Washington, D.C., had installed GPS-tracking devices on vehicles possessed and operated by Antoine Jones and Lawrence Maynard. Officers suspected that Jones and Maynard were involved in a drug distribution conspiracy of significant dimensions. Agents hoped to use the GPS devices to track their suspects' movements in order to find locations associated with the conspiracy and to look for evidence, additional suspects, and potential witnesses. The strategy was quite successful. By tracking Jones and Maynard for almost a month, investigators found stash houses and distribution centers. Agents were also able to document Jones's and Maynard's making regular stops at these and other locations associated with the conspiracy, providing valuable direct and corroborating evidence of their participation.

Before trial, Maynard and Jones sought to suppress the GPS tracking evidence and all the investigative fruits derived from that evidence.⁸ By their lights, the officers' installation of those devices and their subsequent use of the devices to conduct long-term surveillance constituted a "search" for purposes of the Fourth Amendment, and therefore required a warrant. Interestingly, the investigating officers seemed to have agreed at some point—or at least worried at the outset that their conduct might implicate the Fourth Amendment. That is evidenced by the fact that they sought and secured warrants to install and use the GPS trackers. Unfortunately, they failed to abide by the terms of those warrants—allowing them to expire and, in the case of Jones, installing the device in Maryland, outside the jurisdiction of the court that granted the warrant.⁹

The trial court in large part denied the motions to suppress.¹⁰ The court agreed that the officers violated the terms of their warrants. But, the court ruled, those mistakes did not rise to the level of constitutional violations because the installation and use of GPS trackers was not a "search" for purposes of the Fourth Amendment and, therefore, no warrant was required in the first place. The warrants were gratuities—nice gestures, but not constitutionally

7. 565 U.S. 400 (2012).

8. *Id.* at 403.

9. *Id.* at 402–03.

10. *United States v. Jones*, 451 F. Supp. 2d 71, 89 (D.D.C. 2006), *aff'd in part, rev'd in part sub nom. United States v. Maynard*, 615 F.3d 544, 563 (D.C. Cir. 2010), *aff'd in part sub nom. United States v. Jones*, 565 U.S. 400 (2012). The trial court granted the motion only as to the short periods of time when Jones's car was parked in a garage adjoining his residence. *Id.*

required. Violating the terms of those warrants was, therefore, of no legal consequence. In reaching this conclusion, the court relied principally on the “public observation doctrine.”¹¹ The public observation doctrine holds that officers may conduct surveillance from any lawful vantage without encroaching upon Fourth Amendment rights. The theory promulgated by the Supreme Court in support of the public observation doctrine is that when officers conduct observations from sidewalks, public roads, or public airspace, they are doing no more than a member of the public might do and, therefore, are not violating anyone’s reasonable expectations of privacy.¹² It follows that these kinds of observations from public space are not “searches” for purposes of the Fourth Amendment. The trial court’s reliance on the public observation doctrine in *Jones* seemed to be particularly appropriate in light of the Supreme Court’s holding in *United States v. Knotts*.¹³

In *Knotts*, officers used a radio beeper device to track a container of chemicals in an effort to find locations associated with a conspiracy to manufacture and distribute methamphetamine. During their surveillance, officers used that device to track a coconspirator while he drove on public roads until he stopped, eventually, at a cabin owned by Knotts. Writing for the Court in *Knotts*, Chief Justice William Rehnquist held that “A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.”¹⁴ “The fact,” the Court continued, “that the officers in this case relied not only on visual surveillance, but also on the use of the beeper to signal the presence of [petitioner’s] automobile to the police receiver, does not alter the situation. Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and

11. For an explanation of the public observation doctrine, see GRAY, *supra* note 6, at 78–84. Among the important cases in which the Court has elaborated the public observation doctrine are *Florida v. Riley*, *California v. Ciraolo*, *Dow Chemical Co. v. United States*, and *United States v. Knotts*. *Florida v. Riley*, 488 U.S. 445, 449–50 (1989) (holding that the police did not need a warrant to inspect a backyard from a helicopter because the airways are public); *California v. Ciraolo*, 476 U.S. 207, 215 (1986); *Dow Chem. Co. v. United States*, 476 U.S. 227, 239 (1986) (“We hold that the taking of aerial photographs of an industrial plant complex from navigable airspace is not a search prohibited by the Fourth Amendment.”); *United States v. Knotts*, 460 U.S. 276, 281 (1983) (“A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.”).

12. The idea that “search” is defined as a violation of a reasonable expectations of privacy that society is prepared to recognize as reasonable traces to a concurring opinion written by Justice John Marshall Harlan II in *Katz v. United States*. 389 U.S. 347, 361 (1967) (Harlan, J., concurring). The Court subsequently adopted Justice Harlan’s definition of search as its own. See GRAY, *supra* note 6, at 76–78. Of course, nobody without a law degree would define “search” in these terms. Most folks would define “search” as inquiring, looking for, trying to find, seeking, etc. Much of the current crisis in Fourth Amendment law can be traced to the Court’s decision to derogate from the common public meaning of “search.” See GRAY, *supra* note 6, at 76–100, 158–60.

13. 460 U.S. 276 (1983).

14. *Id.* at 281.

technology afforded them in this case.”¹⁵ Given the close technological kinship between the radio beeper used in *Knotts* and the GPS trackers used to monitor Maynard and Jones, the *Jones* trial court quite reasonably found that there was no “search,” that the officers were therefore not required to secure a warrant in order to install and use the GPS tracking devices, and that the officers’ failures to abide by the terms of their warrants did not violate the Fourth Amendment. Ebulient, prosecutors relied on the GPS evidence at trial and secured convictions against both Maynard and Jones.¹⁶

Maynard and Jones appealed to the United States Court of Appeals for the District of Columbia Circuit, where they prevailed.¹⁷ Writing for that court, Judge Douglas Ginsburg acknowledged the public observation doctrine, but held that it has limits, and could not sanction continuous, long-term surveillance “world without end.”¹⁸ Judge Ginsburg grounded that holding, in part, on what came to be known as the “mosaic theory.”¹⁹ The idea is simple and powerful. The kinds of short term and otherwise limited surveillance at issue in the cases that gave rise to the public observation doctrine reveal very little and correspond with the kinds of limited interactions we commonly have with other members of the public. It is not uncommon, for example, to walk behind the same pedestrian for a few minutes or to follow the same car on the highway for an hour, but these happenstance interactions reveal very little about our fellow travelers.

By contrast:

Prolonged surveillance reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble. These types of information can each reveal more about a person than does any individual trip viewed in isolation. Repeated visits to a church, a gym, a bar, or a bookie tell a story not told by any single visit, as does one’s not visiting any of these places over the course of a month. The sequence of a person’s movements can reveal still more; a single trip to a gynecologist’s office tells little about a woman, but that trip followed a few weeks later by a visit to a baby supply store tells a different story. A person who knows all of another’s travels can deduce whether he is a weekly church goer, a

15. *Id.* at 282.

16. *United States v. Jones*, 565 U.S. 400, 403–04 (2012).

17. *United States v. Maynard*, 615 F.3d 544, 563 (D.C. Cir. 2010), *aff’d in part sub nom. United States v. Jones*, 565 U.S. 400 (2012).

18. *Id.* at 557.

19. *Id.* at 562. For discussions of the mosaic theory, see David Gray & Danielle Keats Citron, *A Shattered Looking Glass: The Pitfalls and Potential of the Mosaic Theory of Fourth Amendment Privacy*, 14 N.C. J.L. & TECH. 381, 381–82 (2013); Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311, 313 (2012).

heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups—and not just one such fact about a person, but all such facts.

....

A reasonable person does not expect anyone to monitor and retain a record of every time he drives his car, including his origin, route, destination, and each place he stops and how long he stays there; rather, he expects each of those movements to remain “disconnected and anonymous.”²⁰

Given its nature, duration, and extent, Judge Ginsburg held that the GPS tracking conducted against Maynard and Jones violated their reasonable expectations of privacy, constituted a Fourth Amendment “search,” and required a valid warrant. The Government appealed to the Supreme Court. Along the way, Maynard negotiated a resolution in his case, leaving Jones alone before the Justices.²¹ Representing the Government, Deputy Solicitor General Michael Dreeben staked his argument on the public observation doctrine, prompting the following exchange with Chief Justice John Roberts:

CHIEF JUSTICE ROBERTS: You think there would also not be a search if you put a GPS device on all of our cars, monitored our movements for a month? You think you’re entitled to do that under your theory?

MR. DREEBEN: The Justices of this Court?

CHIEF JUSTICE ROBERTS: Yes. (Laughter.)

MR. DREEBEN: Under our theory and under this Court’s cases, the Justices of this Court when driving on public roadways have no greater expectation of . . .

CHIEF JUSTICE ROBERTS: So, your answer is yes, you could tomorrow decide that you put a GPS device on every one of our cars, follow us for a month; no problem under the Constitution?²²

At that point the argument was effectively over. The result was clear. The Government had lost, impaled on the petard of absurdity. All that remained was the rationale. Before turning to the Court’s reasoning, however, it is worth a moment’s pause to consider this exchange.

20. *Maynard*, 615 F.3d at 562–63 (footnote omitted) (quoting *Nader v. Gen. Motors Corp.*, 255 N.E.2d 765, 772 (1970) (Breitel, J., concurring)).

21. The procedural story here is interesting for those of us who find that sort of thing interesting. Among the points of particular interest is a dissenting opinion from the Circuit Court’s denial of the Government’s petition for rehearing *en banc* written by then-Judge Brett Kavanaugh. In that prescient opinion, Judge Kavanaugh argued that GPS tracking is not a search, but that *installing* a GPS tracker on a private “effect” is a search insofar as it entails a physical intrusion into a constitutionally protected area for investigative purposes. *United States v. Jones*, 625 F.3d 766, 769–71 (2010) (Kavanaugh, J., dissenting). In advancing this position, Judge Kavanaugh predicted the majority opinion of the Court.

22. Transcript of Oral Argument, *United States v. Jones*, 565 U.S. 400 (2012) (No. 10-1259).

The Chief Justice caught some flak for this line of questioning. One point of concern was that his question indicated a bias in favor of law enforcement in Fourth Amendment cases unless the nature of the threat is such as to cause disquiet and insecurity among the Justices and their peers—in this case, wealthy, privileged, white men.²³ When it comes to pretextual stops of young, black men and challenges against racially skewed stop and frisk policies, the Court is uninterested.²⁴ But when it comes to police officers using heat detection devices to determine when “the lady of the house takes her daily sauna and bath”²⁵ or ignoring the sensibilities of social callers,²⁶ the Court leaps into action. I would like to suggest a somewhat more charitable reading.

As Chief Justice Roberts would recognize a couple of terms later, the Fourth Amendment is tied to founding-era concerns about general warrants and the threats they posed of broad and indiscriminate search.²⁷ The very existence of general warrants threatened the security not just of those targeted for searches and seizures, but, indeed, the people as a whole.²⁸ As I hear the Chief Justice in this exchange, he is giving voice to those collective interests by using himself and his colleagues as extreme examples.²⁹ “If you can track us, then you can track anyone,” he might have said, “and if you can track anyone, anytime, all the time, for any reason or for no reason at all, then surely that violates the right of the people to be secure against threats of unreasonable search!” Although that sense of concern for the collective dimensions of Fourth Amendment rights did not decide the case in *Jones*,³⁰ the Chief Justice tugged at an important thread—one that would become critical to understanding the role of the Fourth Amendment in addressing new and emerging surveillance technologies.

The Chief Justice did not assign himself the majority opinion in *Jones*. That duty went instead to Justice Antonin Scalia who, writing for himself,

23. See, e.g., Tamara Rice Lave, *Protecting Elites: An Alternative Take on How United States v. Jones Fits into the Court's Technology Jurisprudence*, 14 N.C. J.L. & TECH. 461, 461, 484–86 (2013).

24. See *Whren v. United States*, 517 U.S. 806, 813 (1996) (declining to consider the subjective intentions of police officers, including potential racial bias, when evaluating the constitutionality of stops).

25. *Kyllo v. United States*, 533 U.S. 27, 38 (2001) (holding that the use of heat detection devices to monitor the interior of constitutionally protected areas is a “search”).

26. *Georgia v. Randolph*, 547 U.S. 103, 106 (2006) (holding that police should respect the rules of genteel social decorum by not entering a home when one resident has consented to a search but the other has refused to consent).

27. See *Riley v. California*, 573 U.S. 373, 403 (2014).

28. GRAY, *supra* note 6, at 69–71, 154.

29. *Id.* at 114–15.

30. The Court ultimately held that the physical intrusion entailed in installing the GPS device on Jones’s car was a “search.” *United States v. Jones*, 565 U.S. 400, 404–05 (2012) (“The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a ‘search’ within the meaning of the Fourth Amendment when it was adopted.”).

Chief Justice Roberts, and Justices Anthony Kennedy, Clarence Thomas, and Sonia Sotomayor, held that the physical intrusion upon Jones's "effect"—his vehicle—for purposes of gathering information was a "search" subject to Fourth Amendment regulation.³¹ That holding was moderately exciting because it revitalized a thread of Fourth Amendment law all but abandoned since the Court's 1967 decision in *Katz v. United States*,³² which famously defined "searches" as violations of subjectively manifested expectations of privacy that society is willing to recognize as "reasonable."³³ But the truly thrilling action came in concurring opinions written by Justices Sonia Sotomayor and Samuel Alito.

Justice Sotomayor joined Justice Scalia's majority opinion, but wrote separately to highlight her concerns with the exploitation of tracking technologies embedded in a range of consumer goods, including cars and smartphones.³⁴ As Justice Sotomayor noted, surveillance conducted through these devices might provide a "comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations."³⁵ Moreover, the "government can store such records and efficiently mine them for information years into the future."³⁶ "And because GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: 'limited police resources and community hostility.'"³⁷ Given these features, Justice Sotomayor worried that granting government agents unfettered access to the location information produced by these devices would "chill[] associational and expressive freedoms" and "alter the relationship between citizen and government in a way that is inimical to democratic society."³⁸ In recognition of the fact that third parties routinely have access to some or all of this location data, Justice Sotomayor concluded that "it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties,"³⁹ thereby foreshadowing changes in not only the public observation doctrine, but the third party doctrine as well.⁴⁰

31. *Id.*

32. 389 U.S. 347 (1967).

33. The two-pronged reasonable expectation of privacy test is found not in the majority decision but in Justice John Marshall Harlan II's concurring opinion. *See id.* at 361 (Harlan, J., concurring).

34. *Jones*, 565 U.S. at 414 (Sotomayor, J., concurring).

35. *Id.* at 415.

36. *Id.*

37. *Id.* at 415–16 (quoting *Illinois v. Lidster*, 540 U.S. 419, 426 (2004)).

38. *Id.* at 416 (quoting *United States v. Cuevas-Perez*, 640 F.3d 272, 285 (7th Cir. 2011) (Flaum, J., concurring)).

39. *Id.* at 417.

40. The third party doctrine holds that if a citizen shares information with a third party, then they have no Fourth Amendment complaint if that third party subsequently shares that information

There is a lot to think about in Justice Sotomayor's *Jones* concurrence, but for present purposes I would like to emphasize two critical features. First, she picks up the thread of Chief Justice Roberts's question at oral argument, making clear that *Jones* was not the primary party of interest in the case.⁴¹ Rather, the main stakeholders were all of us. That concern for the collective interests of "the people" is evident in the picture she paints of pervasive surveillance, the creation of what Professor Stephen Henderson has called "Fourth Amendment time machines,"⁴² and the effects of those threats on associational freedoms and our democratic order. Second, she explicitly connects Fourth Amendment interests with fundamental political freedoms and the proper relationship between the government and the governed in a democratic society. By failing to protect against threats of broad, indiscriminate, and intrusive surveillance, she contends, the Court would leave unprotected the core First Amendment rights of "the people" while allowing totalitarianism to enter through the backdoor. Fundamental to functioning democracy is the role of the people as disciplinary observers of their government. In democracies, the people watch the government. By contrast, a defining feature of totalitarian states is that the state is a disciplinary observer of the people. In totalitarian regimes, the government watches the people. Granting broad, unfettered discretion for executive agents to use surveillance technologies would, Justice Sotomayor suggests, grant them authoritarian powers characteristic of a totalitarian state.

Justice Samuel Alito also wrote an important concurring opinion in *Jones*.⁴³ Writing for himself and Justices Ruth Bader Ginsburg, Stephen Breyer, and Elena Kagan, Justice Alito expressed surprise and concern with the majority's return to physical intrusion as a Fourth Amendment trigger. As he read *Katz* and its progeny, the Court had long abandoned the link between search and trespass in favor of assessing reasonable expectations of privacy. Why wake the dead? In addition, he worried about the inability of a physical intrusion test to deal with the challenges posed by new and emerging surveillance technologies, many of which do not require anything like a trespass. He therefore favored an interpretation of reasonable expectations of privacy that would take into account the duration of the surveillance or, perhaps, the quantum of information gathered. Specifically, he would have

with the government. See *Smith v. Maryland*, 442 U.S. 735, 741–42 (1979) (holding that people willingly supply the numbers they dial to the phone company and thus have no expectation of privacy over those numbers); *Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21, 54 (1974) (holding that a bank did not violate the Fourth Amendment when it gave a depositor's records to the government); *United States v. White*, 401 U.S. 745, 752 (1971) (holding that when a wrongdoer's accomplice records or transmits a conversation for authorities, no Fourth Amendment right has been violated); *Hoffa v. United States*, 385 U.S. 293, 302 (1966).

41. See *supra* notes 28–30 and accompanying text.

42. Stephen Henderson, *Fourth Amendment Time Machines (and What They Might Say About Police Body Cameras)*, 18 U. PA. J. CONST. L. 933, 937 (2016).

43. *Jones*, 565 U.S. at 418 (Alito, J., concurring).

held that “longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.”⁴⁴

II. WHAT TO MAKE OF *JONES*?

There was a bit of a feeding frenzy among law professors and other commentators in the wake of *Jones*. Some were deeply critical.⁴⁵ Some were elated.⁴⁶ But everyone was left to wonder where the Court would go next, and why. *Jones* made clear that at least five Justices were ready to rethink some of the Court’s Fourth Amendment doctrine, but there were few clues as to what those changes might be or the constitutional theory that would support them. As law professors are wont to do, we took this as an invitation of sorts. The Justices were seeking our advice. We responded. Some tried to operationalize Justice Alito’s durational approach.⁴⁷ Some focused instead on the nature of the information gathered⁴⁸ or its source.⁴⁹ Others suggested that what mattered was how much information or data was gathered and the “mosaics” revealed.⁵⁰ Dissatisfied with all of these options, Professor Danielle Citron and I argued that courts should focus on the new technologies themselves, recognizing that the Fourth Amendment regulates the deployment and use of means and methods capable of facilitating programs of broad and indiscriminate surveillance.⁵¹ Then, we all waited to see what would come next.

44. *Id.* at 430.

45. *See, e.g.*, Kerr, *supra* note 19.

46. *See, e.g.*, Erin Murphy, *Back to the Future: The Curious Case of United States v. Jones*, 10 OHIO J. CRIM. L. 325 (2012).

47. *See* Christopher Slobogin, *Making the Most of United States v. Jones in a Surveillance Society: A Statutory Implementation of Mosaic Theory*, 8 DUKE J. CONST. L. & PUB. POL’Y 1, 16–28 (2012) (creating a series of brightline durational thresholds dictating when law enforcement officers would need court approval to conduct surveillance).

48. *See, e.g.*, ABA STANDARDS FOR CRIMINAL JUSTICE: LAW ENFORCEMENT ACCESS TO THIRD PARTY RECORDS 25-4.1(a) commentary (3d ed. 2013) (explaining, for example, that medical records are “highly private,” which means that law enforcement would need a judicial warrant to access them but call records are only minimally or moderately private, so would require only official approval by a command official or a subpoena); Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1937–41 (2013).

49. *See, e.g.*, Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1185–94 (2016); Kiel Brennan-Marquez, *Fourth Amendment Fiduciaries*, 84 FORDHAM L. REV. 611, 616–37 (2015).

50. For a discussion of the mosaic approach and its promoters, see Gray & Citron, *supra* note 19, at 408.

51. Gray & Citron, *supra* note 3, at 82.

III. EMERGING CONCERNS ABOUT COLLECTIVE RIGHTS: *RILEY V. CALIFORNIA*

As the academic debate about *Jones* raged, the Court decided *Riley v. California*.⁵² The question presented in that case was whether the search incident to arrest rule applied to cellular phones. The search incident to arrest rule allows officers effecting a lawful arrest to conduct a warrantless search of an arrestee and areas and effects within his immediate reach and control at the time of arrest.⁵³ Officers routinely rely on this rule to justify searches of pockets, wallets, backpacks, and purses. But should that same rule allow officers to search a cellular phone incident to arrest and without a warrant? A unanimous Court held that it does not. But why? The answer is intriguing.

Writing for everyone except Justice Alito—who concurred—Chief Justice Roberts framed the question this way: “These cases require us to decide how the search incident to arrest doctrine applies to modern cell phones, which are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy.”⁵⁴ In the next few sentences he then explained that these new technologies—cellular smartphones—have emerged from the “inconceivable” to become something “a significant majority of American adults now own.”⁵⁵ The clear signal was that the Court was concerned not just with Mr. Riley and similarly situated arrestees, but with all of us whose interests were at stake due to the sheer pervasiveness of the technology. But it was not just the “pervasiveness” of the technology that concerned the Court. It was equally concerned about the nature of the technology and our relationship to it.

Unlike wallets, bags, and notebooks—mere “physical objects” that can contain modestly finite amounts of information—smart phones “place vast quantities of personal information literally in the hands of individuals.”⁵⁶ To compare the search of wallets and bags to cellular phones, the Court continued, is a bit “like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together.”⁵⁷ In both quantitative and qualitative dimensions, smart phones are just different. They have “immense

52. 573 U.S. 373 (2014).

53. *Chimel v. California*, 395 U.S. 752, 768 (1969) (holding that subsequent to a lawful arrest in arrestee’s home, police may search arrestee and areas accessible to him in the room where he was arrested, but may not search the rest of the house without a warrant or other justification); *United States v. Rabinowitz*, 339 U.S. 56, 65–66 (1950) (finding the search of arrestee and areas within his reach at the time of his arrest in his office, including desk and filing cabinets, was reasonable and did not require a warrant).

54. *Riley*, 573 U.S. at 385.

55. *Id.*

56. *Id.* at 386.

57. *Id.* at 393.

storage capacity,” capable of storing “millions of pages of text, thousands of pictures, [and] hundreds of videos,” not to mention emails, contacts, and historical location data.⁵⁸ They are also conduits to even more data stored in third-party servers.⁵⁹ Beyond the amount and diversity of data stored in or directly accessible through cellular smartphones, the nature of that data raises serious privacy concerns. That is because the kinds of data gathered, stored, and accessed through smartphones is uniquely intimate—think Jeff Bezos⁶⁰—and also capable of painting a detailed account of a user’s life going back months and even years.⁶¹ Citing Justice Sotomayor’s concurring opinion in *Jones*, the *Riley* majority worried that information stored on smartphones can reveal movements, associations, health information, and more—concerns that affect each of us and all of us.⁶²

In the Chief Justice’s *Riley* opinion, we can see emerging the key features of the Court’s evolving Fourth Amendment jurisprudence: First, the Court puts the collective interest of the people front and center. What drives the opinion is the ubiquity of cellular phones, the central role they have come to play in daily life, and the intimate nature of our relationships with these devices. To fail to afford phones the very highest levels of Fourth Amendment protection would, the Court implies, leave each of us and all of us insecure against threats of unreasonable searches in the same way that general warrants and writs of assistance threatened the security of the founding generation.⁶³

And keep in mind the government’s position in *Riley*. Law enforcement was not arguing that smartphones do not enjoy Fourth Amendment protection. To the contrary, it conceded that point. All the government wanted was to have smartphones treated the same way as briefcases, purses, and other portable “effects” commonly seized during lawful arrests. But the Court—unanimously—rejected that not unreasonable position, granting cellular phones the same Fourth Amendment status as homes.

Second, the Court adopted a technology-centered approach when analyzing the Fourth Amendment question presented in *Riley*. Although the technology at issue was the object of the search rather than the means and method of conducting the search, the Court’s focus on technology and the

58. *Id.* at 393–94.

59. *Id.* at 397.

60. Jim Rutenberg & Karen Weise, *Jeff Bezos Accuses National Enquirer of “Extortion and Blackmail,”* N.Y. TIMES (Feb. 7, 2019), <https://www.nytimes.com/2019/02/07/technology/jeff-bezos-sanchez-enquirer.html>. A national paper obtained intimate pictures Mr. Bezos took of himself, which he sent to his mistress. Those pictures were stored on his phone and hers as well as in cloud back-up servers to which their phones were linked. *Id.*

61. *Riley*, 573 U.S. at 393–94.

62. *Id.* at 396.

63. *Id.* at 403.

dimensions and extent of the threat posed to Fourth Amendment interests in relation to the technology foreshadowed what was to come in *Carpenter*.⁶⁴

IV. *CARPENTER*, SEARCH, AND STANDING: COLLECTIVE RIGHTS IN THE FOURTH AMENDMENT

Broadly, the issue in *Carpenter* was whether government agents need a warrant to access the cell site location information (“CSLI”) gathered and stored by cellular service providers.⁶⁵ CSLI is generated as cellular phones maintain regular contact with provider networks.⁶⁶ Cellular companies routinely store this data. This means that those private companies have substantial and detailed records of users’ movements going back months or years. But what was the constitutional question? As in many cases that come before the Court, framing matters.

Echoing his question at oral argument in *Jones* and his majority opinion in *Riley*, Chief Justice Roberts starts his majority opinion in *Carpenter* by highlighting the collective interests at stake. “There are 396 million cell phone service accounts in the United States,” we are told in the opening sentences, “for a Nation of 326 million people.”⁶⁷ Not only does almost everyone have a cellular phone, but we also carry them with us everywhere all the time.⁶⁸ Why does this matter? Well, because the Fourth Amendment, Chief Justice Roberts reminds us, was framed in response to concerns about general warrants, writs of assistance, and the unfettered discretion they gave executive agents to search and seize.⁶⁹ Cast against this historical backdrop, the Chief Justice explains, the Fourth Amendment is best understood as a proscription against “arbitrary power” and “too permeating police surveillance.”⁷⁰ As the Chief Justice notes, the Court has highlighted these collective interests in its recent cases dealing with new and emerging surveillance technologies. As an example, he cites the Court’s opinion in *Kyllo v. United States*.⁷¹

64. Not to mention endorsing precisely the approach Professor Danielle Citron and I prescribed in a series of articles published in the months after *Jones*. See David Gray & Danielle Keats Citron, *Addressing the Harm of Total Surveillance: A Reply to Professor Neil Richards*, 126 HARV. L. REV. F. 262, 269–74 (2013); Gray & Citron, *supra* note 19, at 385–89; David Gray et al., *Fighting Cybercrime After United States v. Jones*, 103 J. CRIM. L. & CRIMINOLOGY 745, 765–70 (2013); David C. Gray, *The ABA Standards for Criminal Justice: Law Enforcement Access to Third Party Records: Critical Perspectives from a Technology-Centered Approach to Quantitative Privacy*, 66 OKLA. L. REV. 919, 921–27 (2014).

65. *Carpenter v. United States*, 138 S. Ct. 2206, 2211, 2217, 2220–21, 2223 (2018).

66. *Id.* at 2211.

67. *Id.*

68. *Id.* at 2218.

69. *Id.* at 2213; see also GRAY, *supra* note 6, at 160–65.

70. *Carpenter*, 138 S. Ct. at 2214 (first quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886); and then quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948)); see also GRAY, *supra* note 6, at 264–75.

71. 533 U.S. 27 (2001).

Kyllo dealt with the use of thermal imaging devices to gather evidence about the interior of homes, and particularly hot-spots associated with the use of high-powered lamps used to grow marijuana indoors.⁷² On Chief Justice Roberts's telling, *Kyllo*, brought the use of thermal imaging devices under Fourth Amendment regulation "[b]ecause any other conclusion would leave homeowners 'at the mercy of advancing technology.'"⁷³ The *Carpenter* Court identified the same dangers in granting law enforcement unfettered access to CSLI. "[B]ecause location information is continually logged for all of the 400 million devices in the United States—not just those belonging to persons who might happen to come under investigation," the Chief Justice writes, "this newfound tracking capacity runs against everyone."⁷⁴ Moreover, as the Court points out, because CSLI is gathered continuously and stored for years, "police need not even know in advance whether they want to follow a particular individual, or when."⁷⁵ "Whoever the suspect turns out to be," the Court continues, "he has effectively been tailed every moment of every day for five years, and the police may—in the Government's view—call upon the results of that surveillance without regard to the constraints of the Fourth Amendment."⁷⁶ As a consequence, "[o]nly the few without cell phones could escape this tireless and absolute surveillance."⁷⁷

Although the Court is obviously feeling its way in *Carpenter*, it is clearly focused on collective effects—in this case how CSLI can facilitate invasive, pervasive, broad, and indiscriminate searches. In adopting this approach, the Court makes explicit what was implicit in the Chief Justice's question at oral argument in *Jones*: that the Justices are concerned about the collective impact of granting government agents unfettered access and broad discretion to deploy and use modern surveillance technologies.⁷⁸ Granting such a license would allow "too permeating police surveillance," leaving each of us and all of us insecure against threats of indiscriminate surveillance in ways similar to the threats posed by general warrants and writs of assistance.⁷⁹

So, going back to the beginning of this Essay, how does all of this help the Court answer those two questions: "What, precisely, is the government

72. *Id.* at 29.

73. *Carpenter*, 138 S. Ct. at 2214 (quoting *Kyllo*, 533 U.S. at 35); see also GRAY, *supra* note 6, at 125.

74. *Carpenter*, 138 S. Ct. at 2218; see also GRAY, *supra* note 6, at 252–54.

75. *Carpenter*, 138 S. Ct. at 2218.

76. *Id.*; see also GRAY, *supra* note 6, at 270–71.

77. *Carpenter*, 138 S. Ct. at 2218.

78. See GRAY, *supra* note 6, at 253.

79. Citron & Gray, *supra* note 3, at 70 n.46 (quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948)); see also *id.* at 85, 92, 95–99, 101, 144 ("In our view, the threshold Fourth Amendment question raised by quantitative privacy concerns is whether an investigative technique or technology has the capacity to facilitate broad programs of indiscriminate surveillance that raise the specter of a surveillance state if deployment and use of that technology is left to the unfettered discretion of government.").

action that constitutes a ‘search’ when law enforcement requests business records from a service provider?”⁸⁰ and “How, exactly, do customers have Fourth Amendment ‘standing’ to challenge those requests?”⁸¹ The answer to the first question—what was the “search”—is easy. Government agents in *Carpenter* were inquiring, seeking, and trying to find where Carpenter was by examining and looking through the documents and data provided by his cellular service provider.⁸² This is conduct that any competent English speaker would identify as a “search.”⁸³ That includes our eighteenth century forebears.⁸⁴ The fact that the agents were looking for Carpenter on public streets does not make their conduct any less a “search.” The fact that one can search in many places, inside and outside, in private homes and on public streets, is in keeping with common law usage going back to, at least, 1658.⁸⁵ Moreover, as the Court recognized more recently, officers might “search the wood for a thief.”⁸⁶ So, *of course* the agents in *Carpenter* were conducting a search. The important question for purposes of the Fourth Amendment is whether granting government agents unfettered discretion to conduct searches using CSLI threatens “[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures.”⁸⁷ As the Fourth Amendment commands, this is a right that “shall not

80. Gray & Citron, *supra* note 3, at 133–37.

81. *Carpenter*, 138 S. Ct. at 2227 (Kennedy, J., dissenting); *id.* at 2241–42 (Thomas, J., dissenting).

82. GRAY, *supra* note 6, at 251–52.

83. *Id.*

84. See *Kyllo v. United States*, 533 U.S. 27, 32 n.1 (2001) (“When the Fourth Amendment was adopted, as now, to ‘search’ meant ‘[t]o look over or through for the purpose of finding something; to explore; to examine by inspection . . .’” (alteration in original) (quoting N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 66 (6th ed. 1989) (1828)); SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE (London, 1792) (defining search as, *inter alia*, “To examine . . . to look through. . . . To inquire; to seek.”); see also GRAY, *supra* note 6, at 158–60.

85. See, e.g., WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 602–1791 320 (2009) (discussing English magistrates’ order commanding officers “‘to make diligent search’ for able-bodied vagrants”); *id.* at 322 (discussing English magistrates’ report describing “Rogues, Vagabonds, sturdy Beggars, and disorderly Persons apprehended by virtue of search Warrants[,] in Night Houses and other disorderly Houses or such as infest the Streets in the Night-time” (alteration in original)); WILLIAM SHEPPARD, THE OFFICES OF CONSTABLES, CHURCH-WARDENS, OVERSEERS OF THE POOR, SUPRAVISORS OF THE HIGH-WAYES, TREASURERS OF THE COUNTY-STOCK; AND SOME OTHER LESSER COUNTRY OFFICERS, PLAINLY AND LIVELY SET FORTH Chp. 8, § 2 (London 1658) (“[T]his Officer receiving a Hue and Cry after a Fellow, must, with all speed, make diligent pursuit, with Horse and Foot, after the offenders from Town to Town the way it is sent, and make diligent search in his own Town.”); THE CONDUCTOR GENERALIS: OR, THE OFFICE, DUTY AND AUTHORITY OF JUSTICES OF THE PEACE 197–98 (Phila. 1801) (noting the authority of a constable or sheriff to “search in his town for suspected persons” and advising that “it is a good course to have the warrant of a justice of the peace when time will permit, in order to prevent causeless hue and cry”).

86. *Kyllo*, 533 U.S. at 32 n.1 (quoting N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 66 (6th ed. 1989) (1828)).

87. U.S. CONST. amend. IV; see GRAY, *supra* note 6, at 251–52.

be violated,”⁸⁸ an imperative that can only be fulfilled by imposing prior restraints.⁸⁹ With these concerns front and center, the Court held that affording law enforcement broad discretion to search using CSLI would leave each of us and all of us—“the people”—vulnerable to intrusive, pervasive, and indiscriminate surveillance—just the sort of insecurity posed by the general warrants that inspired ratification of the Fourth Amendment in 1791.⁹⁰

The answer to the second question—how can Carpenter have Fourth Amendment “standing” to challenge the search of business records kept by his cellular service provider—is also easy: it is the wrong question to ask. Or, at the very least, it is a question based on one or more false premises. Take, as examples, the dissenting opinions of Justice Anthony Kennedy and Justice Clarence Thomas in *Carpenter*. According to Justice Kennedy: “Fourth Amendment rights . . . are personal. The Amendment protects ‘[t]he right of the people to be secure in *their* . . . persons, houses, papers, and effects’—not the persons, houses, papers, and effects of others.”⁹¹

Reprising this same theme,⁹² Justice Thomas contends,

The Fourth Amendment specifies that the people have a right to be secure from unreasonable searches of “their” persons, houses, papers, and effects. Although phrased in the plural, “[t]he obvious meaning of [‘their’] is that *each* person has the right to be secure against unreasonable searches and seizures in *his own* person, house, papers, and effects.” . . . Stated differently, the word “their” means, at the very least, that individuals do not have Fourth Amendment rights in *someone else’s* property.⁹³

In other words, the text does not mean what it says, it means the opposite of what it says.⁹⁴

It is this silly bit of anti-textualism that is the source of the problem. As folks like Justice Kennedy and Justice Thomas see matters, the Fourth Amendment is a constitutional specification of one of the sticks in the bundle

88. U.S. CONST. amend. IV.

89. GRAY, *supra* note 6, at 166–69.

90. *Carpenter v. United States*, 138 S. Ct. 2206, 2223 (2017).

91. *Id.* at 2227 (Kennedy, J., dissenting).

92. Because the more something is said, the truer it becomes.

93. *Carpenter*, 138 S. Ct. at 2241–42 (Thomas, J., dissenting) (alterations in original) (citations omitted) (first quoting *Minnesota v. Carter*, 525 U.S. 83, 92 (1998), and then citing *District of Columbia v. Heller*, 554 U.S. 570, 579 (2008)).

94. Here, Justice Thomas quotes Justice Scalia’s majority opinion in *Heller* for the proposition that “the Constitution uses the plural phrase ‘the people’ to ‘refer to individual rights, not “collective” rights.’” *Id.* at 2242. Obviously. That is why we each have an individual right to the House member of our choice, U.S. CONST. art. I, § 2, cl. 1, and an individual right to assemble, U.S. CONST. amend. I. For a more detailed and serious—but still fun—critique of Justice Scalia’s off-handed claim in *Heller* regarding the meaning of “the people” in the Fourth Amendment see David Gray, *Dangerous Dicta*, 72 WASH. & LEE L. REV. 1181, 1184–85 (2015).

of property rights: the right to exclude.⁹⁵ Another, alienation, comes along (twice!) in the Fifth Amendment.⁹⁶ There is a certain Lockean quality to this. After all, John Locke famously claimed that we have a natural right in ourselves, in the surpluses and improvements that result from our labor, and that a condition of justice in the social contract is the legal recognition of that right.⁹⁷ But the Bill of Rights is about much more than property rights. It is also concerned with political rights: the right to assemble and petition the government,⁹⁸ the preservation of unenumerated rights to the people,⁹⁹ and the reservation of undelegated rights to the people.¹⁰⁰ And this too is very Lockean. Locke imagined not one contract but two leading to the formation of just states.¹⁰¹ First, individuals exit the state of nature by entering into a social contract forming a nation or a people.¹⁰² Second, that people enters a political contract with its government.¹⁰³ And who, by the very terms of the United States Constitution, enters into a political contract to form a more perfect union, etc.? “We, the individual persons residing in the United States?” Of course not. It is, instead, “We, the People of the United States” who entered into the contract of political government described thereafter.¹⁰⁴

So, the Fourth Amendment means what it says. It guarantees a right “of the people.” Not a right “of persons.” If James Madison and his colleagues in the First Congress meant for the Fourth Amendment to guarantee rights “of persons,” then they would have written it that way. They certainly had a ready model in Article Fourteen of the Massachusetts Declaration of Rights,

95. Because the Third Amendment was not enough to make the point. *See* U.S. CONST. amend. III (“No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner . . .”). “My home is my castle! You cannot live here unless I so consent. In fact, you can’t even come in! Okay, you can, but only if it’s not unreasonable. And my person, my papers, and my effects are also my castle. Okay, my person is my temple, but you get the point. And, at any rate, temples are protected too! Just look at the First Amendment.”

96. U.S. CONST. amend. V. “No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.”

97. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT*, Chap. IX, § 124 (C.B. Macpherson ed., 1980) (1690) (“The great and *chief end*, therefore, of men’s uniting into commonwealths, and putting themselves under government, is *the preservation of their property*. To which in the state of nature there are many things wanting.” (emphasis added)).

98. U.S. CONST. amend. I.

99. U.S. CONST. amend. IX.

100. U.S. CONST. amend. X.

101. LOCKE, *supra* note 97, at Chap. VIII, § 106 (“[T]he beginning of politic society depends upon the consent of the individuals, to join into, and make one society; who, when they are thus incorporated, might set up what form of government they thought fit.”).

102. GRAY, *supra* note 6, at 144–46.

103. *Id.*

104. U.S. CONST. pmb1.

which provides that “[e]very subject has a right to be secure from all unreasonable searches, and seizures.”¹⁰⁵ And they demonstrably knew how to assign rights to individuals when they wanted to, as they did in the Fifth¹⁰⁶ and Sixth Amendments.¹⁰⁷ But they chose to assign Fourth Amendment rights to “the people,” which can only be read as a reference to “the people,” perhaps aspirationally, cited in the Preamble.¹⁰⁸ Read in this light, the Fourth Amendment is not a defense of individual property rights. It is, instead, a restraint on government power—a restraint designed to preserve the independence and integrity of the people as a whole.¹⁰⁹ It is a bulwark against tyranny.¹¹⁰

The collective nature of the Fourth Amendment is even more evident when we consider the precise nature of the right it enshrines. The Fourth Amendment does not prohibit searches and seizures. It does not even prohibit unreasonable searches and seizures. Instead, it guarantees a right “to be secure” against unreasonable searches and seizures. It commands that “the people” shall live in a state free from fear of being the targets of unreasonable searches and seizures—and particularly searches and seizures wielded as tools to punish disfavored political and religious groups.¹¹¹ Viewed from this perspective, the Fourth Amendment is not particularly concerned with individual searches and seizures as such, or rights violations suffered by individual victims of those searches.¹¹² After all, those individuals can vindicate their own rights through civil actions.¹¹³ The Fourth Amendment is instead concerned with the general threat to the people arising from claims of government power inherent in those individual events—the maxims of tyranny expressed in those actions.¹¹⁴ As Lord Camden put the point in *Huckle v. Money*¹¹⁵ (one of the “General Warrants” cases identified by Justice Thomas

105. MASS. CONST. art. XIV. This provision of the Massachusetts Constitution was first adopted in 1780, seven years before the constitutional convention and eleven years before the Fourth Amendment was ratified.

106. U.S. CONST. amend. V (“No *person* shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any *person* be subject for the same offence to be twice put in jeopardy of life or limb . . .” (emphasis added)).

107. U.S. CONST. amend. VI (“In all criminal prosecutions, *the accused* shall enjoy the right to a speedy and public trial, by an impartial jury . . .” (emphasis added)).

108. GRAY, *supra* note 6, at 148.

109. *Id.* at 146–56.

110. *Id.* at 156, 168–69; see also Renée McDonald Hutchins, *Tied Up in Knotts? GPS Technology and the Fourth Amendment*, 55 UCLA L. REV. 409, 444 (2007) (“The Fourth Amendment . . . erects a wall between a free society and overzealous police action—a line of defense implemented by the framers to protect individuals from the tyranny of the police state.”).

111. CUDDIHY, *supra* note 85, at 122–23; GRAY, *supra* note 6, at 157–58; Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1208–10 (2016).

112. See generally David Gray, *The Fourth Amendment Categorical Imperative*, 116 MICH. L. REV. ONLINE 14, 24–31 (2017).

113. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 758–59 (1994).

114. Gray, *supra* note 112, at 14.

115. 95 Eng. Rep. 768 (1763).

in *Carpenter* as reflecting what “the founding generation considered ‘the true and ultimate expression of constitutional law’”¹¹⁶:

[T]he small injury done to the plaintiff, or the inconsiderableness of his station and rank in life did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject appeared to them at the trial; they saw a magistrate over all the King’s subjects, exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom¹¹⁷

The security of the people is threatened whenever anyone, no matter “his station,” is the target of an unreasonable search or seizure. The Fourth Amendment explicitly recognizes the collective interests at stake in these particular events and commands the enforcement of measures sufficient to guarantee our collective security.¹¹⁸

With these minor clarifications in mind, let us revisit the majority opinion in *Carpenter* that Justices Kennedy and Thomas attack. Early on, the Court identifies two “basic guideposts” drawn from “historical understandings” of the Fourth Amendment.¹¹⁹ “First, that the Amendment seeks to secure ‘the privacies of life’ against ‘arbitrary power.’”¹²⁰ Second, “a central aim of the Framers was ‘to place obstacles in the way of a too permeating police surveillance.’”¹²¹ As is outlined above, the Court then goes on to explain how collective interests in securing privacy and guarding against threats of pervasive surveillance have guided the Court’s treatment of contemporary

116. *Carpenter v. United States*, 138 S. Ct. 2206, 2239 (2017) (Thomas, J., dissenting) (quoting *Boyd v. United States*, 116 U.S. 616, 626 (1886)).

117. *Huckle*, 95 Eng. Rep. at 769; see also *Entick v. Carrington*, 95 Eng. Rep. 807, 817 (1765) (“[W]e can safely say there is no law in this country to justify the defendants in what they have done; if there was, it would destroy all the comforts of society”); *Wilkes v. Wood*, 98 Eng. Rep. 489, 498 (1763) (noting that granting “discretionary power . . . to messengers to search wherever their suspicions may chance to fall . . . certainly may affect the person and property of every man in this kingdom”); James Otis, Speech on Writs of Assistance 1761, in *AMERICAN HISTORY LEAFLETS* No. 33 15–16 (Albert Bushnell Hart & Edward Channing eds. 1906) (attacking general warrants as “destructive of English liberty” because they grant “a power, that places the liberty of every man in the hands of every petty officer”).

118. GRAY, *supra* note 6, at 166–69.

119. *Carpenter*, 138 S. Ct. at 2214.

120. *Id.* (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)). Worth noting is that the *Boyd* Court relies, paraphrases, and quotes heavily from Lord Camden’s opinion in *Entick v. Carrington*, another of the General Warrants cases. See *Boyd*, 116 U.S. at 627–29 (quoting *Entick v. Carrington* (1765) 19 How. St. Tri. 1030 (KB) 1063–67). When introducing the section of his opinion whence the *Boyd* Court draws inspiration, Lord Camden clearly identifies that what is at stake in sanctioning a claim of unfettered executive authority to search and seize, is that:

the secret cabinets and bureaus of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the secretary of state shall think fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel.

Entick v. Carrington, (1765) 19 How. St. Tri. 1030 (KB) 1063. What makes this particularly important is its claim to the general interests of “every subject.”

121. *Carpenter*, 138 S. Ct. at 2214 (quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948)).

surveillance technologies. For example, in *Kyllo* its required government agents to secure warrants before using thermal imagers to detect infrared radiation emanating from homes “[b]ecause any other conclusion would leave homeowners ‘at the mercy of advancing technology.’”¹²² Similarly, in *Riley* the Court required that officers obtain a warrant before searching the data on cellular phones because the devices are ubiquitous, having become virtual fifth appendages for most Americans, and in light of “the vast store of sensitive information” they contain.¹²³ To hold otherwise, the Court noted in *Riley*, would be to ignore the pervasive threat posed to the ninety percent of American adults who own cellular phones if those phones were open to police scrutiny “on a routine basis,”¹²⁴ a result, the Court suggested, that would be akin to granting general warrants and writs of assistance, the opposition to which was “one of the driving forces behind the Revolution itself.”¹²⁵

As the *Carpenter* Court recognized, allowing government agents unfettered access to CSLI implicates general, collective interests that are protected by the Fourth Amendment. Cellular phones are ubiquitous, to the point that there are more cellular service accounts with United States carriers than there are people.¹²⁶ Moreover, most people “compulsively carry cell phones with them all the time . . . beyond public thoroughfares and into private residences, doctor’s offices, political headquarters, and other potentially revealing locales.”¹²⁷ This means that granting unfettered government access to CSLI can facilitate programs of “near perfect surveillance, as if [the government] had attached an ankle monitor to the phone’s user.”¹²⁸ Of course we are all already wearing those ankle monitors all the time. As a consequence,

[P]olice need not even know in advance whether they want to follow a particular individual, or when.

Whoever the suspect turns out to be, he has effectively been tailed every moment of every day for five years, and the police may—in the Government’s view—call upon the results of that surveillance without regard to the constraints of the Fourth Amendment. Only the few without cell phones could escape this tireless and absolute surveillance.¹²⁹

What this shows is that the majority in *Carpenter* was keenly aware that the real party in interest in the case was “the people” as a whole. What was at stake was “the tracking of not only Carpenter’s location but also everyone

122. *Id.* (quoting *Kyllo v. United States*, 533 U.S. 27, 35 (2001)).

123. *Id.* (quoting *Riley v. California*, 573 U.S. 373, 386 (2014)).

124. *Riley*, 573 U.S. at 395.

125. *Id.* at 403.

126. *Carpenter*, 138 S. Ct. at 2211 (noting “[t]here are 396 million cell phone service accounts in the United States—for a Nation of 326 million people”).

127. *Id.* at 2218.

128. *Id.*

129. *Id.*

else's, not for a short period but for years and years."¹³⁰ Failing to impose Fourth Amendment restraints on government access to CSLI would therefore leave the people insecure against threats of broad and indiscriminate surveillance—exactly the kind of “permeating police surveillance” the Fourth Amendment was designed to prevent.¹³¹

Now, at last, we can understand how badly Justices Kennedy and Thomas missed the mark when they accused the Court of indulging collective rights to grant *Carpenter* “standing” to assert a property interest in his service provider’s papers. The Court did indeed rely on the fundamentally collective nature of Fourth Amendment rights when deciding to regulate government access to CSLI, but it did not do so in order to expand the doctrine of Fourth Amendment “standing.” Instead, it took note of the collective interests at stake in searches of CSLI to determine whether these kinds of searches fall within the regulatory compass of the Fourth Amendment. The quite reasonable question the Court asked was whether granting government agents unfettered access to this particular means of conducting searches would compromise the security of the people against unreasonable searches by facilitating programs of broad and indiscriminate search.¹³² In answer to that question, the Court held that “[i]n light of the deeply revealing nature of CSLI, its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection,” it must “decline to grant the state unrestricted access to a wireless carrier’s database of physical location information.”¹³³ It instead imposed a warrant requirement, which is the Fourth Amendment’s preferred prospective remedy, and one that is particularly well-suited to the regulation of tracking technologies, in part because they are most likely to be used in the context of discrete investigations.¹³⁴

V. COLLECTIVE RIGHTS AND THE TECHNOLOGY-CENTERED APPROACH GOING FORWARD

The academic debate about *Carpenter* is well under way with scholars and critics trying to understand what the Court did, why, and where it is likely to go from here. This Essay has attempted to answer the “what” and “why” question. In essence, the Court held that “the threshold Fourth Amendment question . . . is whether an investigative technique or technology has the capacity to facilitate broad programs of indiscriminate surveillance that raise the specter of a surveillance state if deployment and use of that technology is

130. *Id.* at 2219.

131. *Id.* at 2214 (quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948)).

132. *Id.* at 2223; see also Gray & Citron, *supra* note 3, at 71–72 (proposing this approach to Fourth Amendment cases involving emerging surveillance technologies).

133. *Carpenter*, 138 S. Ct. at 2223.

134. GRAY, *supra* note 6, at 251–57; Gray & Citron, *supra* note 3, at 105–12.

left to the unfettered discretion of government.”¹³⁵ It grounded this rule in the Fourth Amendment right “of the people to be secure . . . against unreasonable searches and seizures,”¹³⁶ rightly emphasizing the collective dimensions of that right. So where do we go from here?

I expect that we will see a steady stream of challenges targeting new and emerging search methods and surveillance technologies. As these cases come to the Court, the Justices are likely to ask questions about the intrusiveness of the searches these technologies facilitate, the scalability of the technology, and the costs associated with its deployment and use.¹³⁷ Applying these and other factors, the Court will find that there is no threat associated with allowing law enforcement officers full discretion to use traditional means and methods such as human surveillance and radio beepers. The Court is also likely to find that some technologies must be subject to Fourth Amendment regulation. Here, I think it is quite likely that the Court will impose constitutional restraints on RFID tracking, cell site simulators, tower dumps, drones, Big Data, and efforts to access data stored on third party servers (the “Cloud”).¹³⁸ What will be more interesting is the form of those restraints.

To date, the Court has endorsed only one prospective remedy in Fourth Amendment cases: the warrant requirement. But there is nothing in the text or history of the Fourth Amendment to support the proposition that probable cause warrants are the only way to guarantee the security of the people against unreasonable searches and seizures.¹³⁹ The Government had an opportunity on this front in *Carpenter*. Rather than staking its position on the claim that CSLI tracking is not a “search,” the Government might have conceded that it is a search, but could have then maintained that Section 2703 of the Stored Communications Act (“SCA”)¹⁴⁰ is sufficient to guarantee that the government is not tracking most people, most of the time, through their cellular phones. Although Section 2703(d) orders do not require probable cause, and certainly do not have a particularity requirement, the Government could have argued that the 2703 framework reflects a considered legislative view and strikes a reasonable balance among the interests at stake, guarding against “unreasonable” searches. The Court may well have been skeptical, but this would certainly have been an interesting argument. But the door is far from closed. At least since *Jones*, the Court has been very interested in legislative and executive solutions to the privacy and security challenges

135. Gray & Citron, *supra* note 3, at 101.

136. U.S. CONST. amend. IV.

137. Gray & Citron, *supra* note 3, at 102.

138. *See generally* GRAY, *supra* note 6, at 249–75.

139. *See id.* at 203–04.

140. 18 U.S.C. § 2703 (2012). Section 2703 requires court orders, but not warrants, for investigators to access electronic communications records, which, by consensus and general practice, encompasses CSLI. 2703(d) orders are issued when the government can show “that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation.” *Id.*

posed by new and emerging technologies.¹⁴¹ That interest remains. I suspect that the Court would be favorably disposed to more bespoke arrangements than a warrant requirement.¹⁴² So what will happen next? The ball, it seems to me, is in the court of the political branches.

141. *United States v. Jones*, 565 U.S. 400, 429 (2012) (Alito, J., concurring).

142. For some examples of these kinds of arrangements, see GRAY, *supra* note 6, at 249–94.