UNIVERS STATES V. JONES: DOES KATZ STILL HAVE NINE LIVES?

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At the apex of the pyramid comes Big Brother. Big Brother is infallible and all-powerful. Every success, every achievement, every victory, every scientific discovery, all knowledge, all wisdom, all happiness, all virtue, are held to issue directly from his leadership and inspiration. Nobody has ever seen Big Brother. He is a face on the hoardings, a voice on the telescreen. We may be reasonably sure that he will never die, and there is already considerable uncertainty as to when he was born.3

Many thought that, with the United States Supreme Court’s anticipated decision in United States v. Jones,4 we would no longer harbor any uncertainty as to when Big Brother was born. Because motorists generally travel on public streets, some predicted the Court in Jones would hold that the totality of those public movements enjoy no Fourth Amendment protection. A parade of horribles, debated at water coolers everywhere, included the fear that law enforcement, based on a hunch, could attach a Global Positioning System (“GPS”) device to any vehicle and discover the pattern and intricate details of a motorist’s daily life over an extended period of time. This could allow law enforcement to track a driver’s travels to a psychiatrist’s office; to a mistress’s home; to a political rally; or to an AIDS clinic. With the decision in Jones, however, it appears that we should have been less concerned with the birth of Big Brother and more concerned with the death of Katz v. United States.5

This article explores the Court’s recent retreat from the two-part Katz test, and an unexpected shift in the considerations the Court declared it will primarily rely upon when evaluating whether a Fourth Amendment search has occurred. Part I recounts the Court’s early evolutionary Fourth Amendment cases, leading to the establishment in Katz of the “reasonable expectation of privacy” test by which a Fourth Amendment violation has since been measured. Part II explores significant cases involving electronic surveillance—GPS in particular, but also electronic eavesdropping through wiretapping and other then-evolving technologies. Part III analyzes the Court’s decision in United States v. Jones, the newly-minted test proposed by Justice Scalia in the majority opinion, and its potential impact on the test first formulated in Katz.

I. THE EARLY EVOLUTION OF THE FOURTH AMENDMENT STANDARD

One of the earliest cases in this area required the Court to determine

whether persons had an expectation of privacy in sealed letters and papers sent through use of the United States mail. The Court later addressed whether the Fourth Amendment extended to the interception of oral communications, and depended largely on the existence of a trespass upon a constitutionally protected area to find that a search had occurred. It was not until the decision in Katz v. United States that the Court abandoned the requirement of a physical trespass and focused instead on the protection of persons—not property. This Part will discuss briefly the historical context of the Fourth Amendment and its early evolution as technological advances ushered in an era of electronic surveillance.

A. Olmstead and Goldman

1. Olmstead v. United States

In 1928, the Court addressed for the first time whether the Fourth Amendment applied to the content of telephone conversations intercepted by law enforcement through the use of a wiretap. Olmstead involved three defendants who were among several co-conspirators charged with, and convicted of, violations of the National Prohibition Act. The evidence ultimately leading to their arrest was primarily gathered by intercepting the defendants’ telephone messages. The Court began its analysis by reviewing prior cases which involved entries into a home or office to search for and seize papers or other tangible objects. For example, in Ex parte Jackson the items sought and seized by law enforcement consisted of sealed letters and packages in the mail. In Weeks v. United States, law enforcement entered and searched Weeks’s home without a warrant, seizing various papers and articles as evidence to support of a charge of using the

6. Ex parte Jackson, 96 U.S. 727, 733 (1877) (noting the difference between sealed papers and packages and open ones such as newspapers and pamphlets). The Court stated that certain items such as newspapers, magazines, pamphlets, and other printed matter were “open to inspection.” Id. at 732. However, papers which were “closed to inspection” such as letters and sealed packages were entitled to Fourth Amendment protection save for “their outward form and weight.” Id. at 733.

7. See generally Olmstead v. United States, 277 U.S. 438 (1928) (holding the wiretapping conducted by the government was not a search or seizure falling within the scope of the Fourth Amendment).

8. Id. at 456.

9. 96 U.S. 727 (1877).

10. Id. at 733.

mails in furtherance of an illegal lottery enterprise. In distinguishing Jackson while concurrently recognizing the protection afforded by the Fourth Amendment to warrantless searches and seizures of sealed letters placed in the United States mail, the Court observed:

It is plainly within the words of the [Fourth] [A]mendment to say that the unlawful riffling by a government agent of a sealed letter is a search and seizure of the sender’s papers or effects. The letter is a paper, an effect, and in the custody of a government that forbids carriage, except under its protection. The United States takes no such care of telegraph or telephone messages as of mailed sealed letters.

The Court distinguished Weeks and the Fourth Amendment’s protection against warrantless entries into one’s home or office:

The amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants. By the invention of the telephone 50 years ago, and its application for the purpose of extending communications, one can talk with another at a far distant place. The language of the amendment cannot 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.

In affirming the decision of the Circuit Court of Appeals for the District of Columbia, the Court concluded:

Neither the cases we have cited nor any of the many federal decisions brought to our attention hold the Fourth Amendment to have been violated as against a defendant unless there has been an official search and seizure of his person or such a seizure of his papers or his tangible material effects or an actual physical invasion of his house “or curtilage” for the purpose of making a seizure. We think therefore, that the wire tapping here disclosed did not amount to a search or seizure within the meaning of the Fourth Amendment.

The Court appeared to focus on a requirement of physical intrusion—a trespass upon one’s tangible property or into one’s home. Without some government act triggering such an intrusion, the Fourth Amendment could

12. Id. at 386. In Weeks, the Court also “decided with great emphasis and established as the law for the federal courts that the protection of the Fourth Amendment would be much impaired, unless it was held that not only was the official violator of the rights under the amendment subject to action at the suit of the injured defendant, but also that the evidence thereby obtained could not be received.” Olmstead, 277 U.S. at 463 (citing Weeks, 232 U.S. at 386.)
15. Id. at 466.
not offer its protection.

2. Goldman v. United States

In 1942, the Court reaffirmed its holding in Olmstead, applying it to the placement of a listening device against a wall adjoining the defendant’s office so that federal agents investigating bankruptcy fraud could overhear conversations between two conspiring defendants, Goldman and Shulman. Federal agents learned of the conspiratorial plan defendants hatched and, with the assistance of the building manager, gained access to an office that shared a wall with Shulman’s office. The agents initially installed a listening device into a small opening in the wall between the two adjoining offices, and a wire extended through the opening and into Shulman’s office. This listening device, however, failed to operate. The federal agents employed their backup plan, which required use of a different device known as a “detectaphone.” The Court described this device as “having a receiver so delicate as, when placed against the partition wall, to pick up sound waves originating in Shulman’s office, and means for amplifying and hearing them.” With this detectaphone placed against—but not into or through—the wall, the agents overheard and, through the use of a stenographer present with them, transcribed the conversations which occurred between Goldman and Shulman as they talked in Shulman’s office. The agents also overheard and transcribed Shulman’s conversations from his office telephone.

The defendants contended that the words uttered by Shulman into a telephone receiver were the product of an unlawful search and seizure in violation of the Fourth Amendment. They also contended that it violated the Federal Communications Act of 1934. Addressing the Fourth Amendment, the defendants argued that the installation of the first listening device was a trespass, because the device went through the partition wall and a wire extended into Shulman’s office. Although that device was inoperable and did not permit the agents to overhear the conversations, the defendants contended that it was in the nature of a “continuing trespass” and aided the agents in the eventual use of the detectaphone. The Court re-

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17. Id. at 131.
18. Id. at 132. Six years after the Court’s decision in Olmstead, Congress enacted the Federal Communications Act of 1934, 47 U.S.C. § 605 (1934). That Act prohibited the unauthorized interception of any communication and further prohibited the publication of any such intercepted communication. See id.
jected the "continuing trespass" argument and noted that the lower court had made a factual finding that the installation of the original device did not materially assist in the use of the detectaphone. The Court did not disturb this finding and concluded that no causally-connected trespass of Shulman's office had occurred. With little fanfare and even less discussion, the Court also held that no violation of the Fourth Amendment occurred, observing that "no reasonable or logical distinction can be drawn between what federal agents did in the present case and state officers did in the Olmstead case." We can safely infer by this that the Court concluded there had been neither a search nor a seizure, consistent with the principle announced in Olmstead. However, the Court was not explicit in its recognition of the extent to which Goldman mirrored Olmstead. Moreover, the Court left for another day the significance, if any, which would flow from a trespass committed by law enforcement precedent to, or as part of, a search. Four justices dissented in Olmstead; three in Goldman. Justice Brandeis, dissenting in Olmstead, noted that the majority's strict interpretation of the words of the Fourth Amendment render its general principles "impotent and lifeless formulas." As for the majority's reliance on the language and meaning of the Fourth Amendment as it existed in 1791, he observed:

When the Fourth and Fifth Amendments were adopted, "the form that evil had theretofore taken" had been necessarily simple. Force and violence were then the only means known to man by which a government could directly affect self-incrimination. It could compel the individual to testify—a compulsion effected, if need be, by torture. It could secure possession of his papers and other articles incident to his private life—a seizure effected, if need be, by breaking and entry. Protection against such invasion of "the sanctities of a man's home and the privacies of his life" was provided in the Fourth and Fifth Amendments by specific language. 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.

Justice Brandeis not only noted the then-modern-day differences, but won-

19. Id. at 134–35.
20. Id. at 135.
22. Goldman v. United States, 316 U.S. 129 (1942). The dissenting Justices were Justices Stone, Frankfurter and Murphy. Justice Jackson took no part in the decision in Goldman.
23. Olmstead, 277 U.S. at 473 (Brandeis, J., dissenting).
24. Id.
dered aloud, almost presciently, about the application of the Fourth Amendment to future technology:

Moreover, "in the application of a Constitution, our contemplation cannot be only of what has been, but of what may be." The progress of science in furnishing the government with means of espionage is not likely to stop with wire tapping. Ways may some day be developed by which the government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions.... To Lord Camden a far slighter intrusion seemed "subversive of all the comforts of society." Can it be said that the Constitution affords no protection against such invasions of individual liberty?

Given what has been and also what may be of our scientific advances, a definitive answer to Justice Brandeis's question remains elusive.

B. ON LEE v. UNITED STATES

In 1951, the Court decided On Lee v. United States, in which the defendant was under federal investigation for conspiracy and selling opium. During the investigation, a former employee of On Lee (and, as it turned out, an informant for the Bureau of Narcotics), entered Lee's shop "wired for sound" and spoke with him as a Bureau agent monitored and recorded the conversation. A later conversation was also recorded between On Lee and the informant while they talked on the street. On Lee was indicted, tried and convicted of the charges. The recorded conversations were admitted at trial over his objection. His convictions were affirmed on direct appeal, and the Supreme Court held in a 5-4 decision that the actions of the agent and the informant "did not amount to an unlawful search and seizure such as is proscribed by the Fourth Amendment."

25. Lord Camden authored the opinion in Entick v. Carrington, 95 Eng. Rep. 807 (C.P. 1765), a case regularly cited by the United States Supreme Court as authoritative in representing the understanding of liberties and rights protected by the Fourth Amendment at the time of its adoption. See infra at notes 179-80 and accompanying text. Justice Scalia relies on Lord Camden and Entick in framing his analysis for the majority opinion in Jones. Id.

26. Olmstead, 277 U.S. at 474 (Brandeis, J. dissenting) (citations and footnotes omitted).

27. 343 U.S. 747 (1952)

28. Id. at 749.


30. Id. at 751. On Lee also contended that the interception and recording of the conversations violated the Federal Communications Act of 1934, 47 U.S.C. § 605, which provided in pertinent part: "[N]o person not being authorized by the sender shall intercept any communication
The defendant in *On Lee* attempted to raise the question left open in *Goldman*: what is the significance, upon Fourth Amendment analysis, of a trespass committed by law enforcement in the course of a search or seizure? On Lee argued that, even if the informant entered the business premises at his implied invitation, the informant’s ‘‘unlawful conduct’’ vitiated the consent and rendered his entry a trespass *ab initio.‘‘ The majority, however, found that any common law doctrine of trespass *ab initio* was limited in its application to civil actions and would not be extended to criminal cases. The Court also rejected On Lee’s contention that the informant’s entry was a trespass because it was procured through fraud. Acknowledging that it was not at all clear whether such an entry ‘‘would be a trespass under orthodox tort law,’’ the Court, relying on *McGuire v. United States*, rejected ‘‘such fine-spun doctrines for exclusion of evidence’’ from criminal prosecutions. In his final salvo on this point, On Lee posited that the agent, though located outside the premises, was a trespasser because he was able to overhear the conversation within the premises through the use of an electronic monitoring device. The Court described this argument as one which ‘‘verges on the frivolous’’: ‘‘[o]nly in the case of physical entry, either by force, . . . by unwilling submission to authority, . . . or without any express or implied consent . . . would the problem left undecided in the Goldman case be before the Court.’’ Thus, *Goldman* and the trespass theory were left to cross paths on another day.

C. *Silverman v. United States*

In *Silverman v United States*, the Court reviewed whether ‘‘officers’ testimony as to what they had heard through an electronic instrument’’ was


31. *Id.* at 752.
32. *Id.* (citing McGuire v. United States, 273 U.S. 95, 98–99 (1927) (‘‘This fiction, obviously invoked in support of a policy of penalizing the unauthorized acts of those who had entered under authority of law, has only been applied as a rule of liability in civil actions against them. Its extension is not favored . . . .’’).
33. *Id.* at 752.
34. 273 U.S. 95 (1927).
35. *Id.* at 762 (Douglas, J., dissenting). The defendant in *On Lee*, like the defendant in *Goldman*, asked the Court to overturn its decision in Olmstead. *See id.* It is not surprising that the majority, on both occasions, declined the invitation. What may be surprising, however, is that the four dissenting justices in *On Lee* included Justice Douglas, who was part of the 5-3 majority nine years earlier in *Goldman*. In his dissenting opinion in *On Lee*, Justice Douglas plainly acknowledged: ‘‘I now feel I was wrong in the *Goldman* case.’’ *Id.*
admissible in evidence at a subsequent criminal prosecution. The officers' testimony revealed "incriminating conversations engaged in by the petitioners at their alleged gambling establishment" which were overheard using a "spike-mike." The spike-mike had been inserted "under a baseboard in a second-floor room of the vacant house and into a crevice extending several inches into the party wall." Unlike Goldman and Olmstead, the record in Silverman "clearly indicate[d] that the spike made contact with a heating duct serving the house occupied by the petitioners." Further, it was acknowledged that the overheard conversations "played a substantial part in the petitioners' convictions." The Court concluded that "the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by the petitioners," and relied upon this physical intrusion to find an invasion of the Fourth Amendment rights. Such a physical intrusion was absent in Olmstead. The Silverman Court observed that the determination of a Fourth Amendment violation "does not turn upon the technicality of a trespass . . . it is based upon the reality of an actual intrusion into a constitutionally protected area."

In Olmstead, the Court explored the legal limits of the Fourth Amendment. Although acknowledging its prior holdings that the Fourth Amendment is to be "liberally construed," the Court concluded that this

38. Id. at 506.
39. Id.
40. Id. (describing a spike mike as "a microphone with a spike about a foot long attached to, it together with an amplifier, a power pack, and earphones").
41. Id. at 506.
42. Id. at 506–07 (emphasis added).
44. Id. at 510.
45. Id. at 510–11 ("eavesdropping accomplished by means of such a physical intrusion is beyond the pale of even those decisions in which a closely divided Court has held that eavesdropping accomplished by other electronic means did not amount to an invasion of Fourth Amendment rights.") The Court also found that the eavesdropping accomplished in Goldman (in which a detectaphone was placed on an office wall) and in On Lee (where an undercover agent concealed a microphone on his person and recorded conversations with the defendant in defendant's business) "had not been accomplished by means of an unauthorized physical encroachment within a constitutionally protected area." Id. at 510.
46. See id. at 510. Cf. Olmstead, 277 U.S. at 464 ("The [Fourth] Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants.").
47. Silverman, 365 U.S. at 512.
48. Olmstead, 277 U.S. at 465 (citing Boyd v. United States, 116 U.S. 616, 635 (1886); Gouled v. United States, 255 U.S. 298, 305–06 (1921)).
protection could not be "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."\textsuperscript{49} The Court determined that broadening the Fourth Amendment to a situation without an actual intrusion would effectively remove a police officer's ability to use his senses while conducting investigations. So long as a police officer did not intercept information by invading a constitutionally protected area, then neither a search nor a seizure occurred. However, if the information was intercepted by way of an actual intrusion or penetration into a protected area, then it could be deemed an unlawful search in violation of the Fourth Amendment.\textsuperscript{50}

The distinction between the results reached in \textit{Olmstead} and \textit{Silverman} turned on the presence or absence of an actual physical intrusion into a protected area.\textsuperscript{51} The requisite extent of such a physical intrusion was very minimal, as demonstrated by the facts in \textit{Silverman}.\textsuperscript{52} The \textit{Olmstead} Court noted that its interpretation of the limits on the Fourth Amendment was not absolute, however, and that it might be expanded as technology evolves and lends itself to more intrusive forms of surveillance.

D. \textit{Katz} Out of the Bag

Just six years after \textit{Silverman}, \textit{Katz v. United States}\textsuperscript{53} significantly altered the Fourth Amendment landscape by establishing a new paradigm for determining whether a search is constitutionally unreasonable. The Court introduced this new framework by observing "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."\textsuperscript{54} With this statement, and the holding

\textsuperscript{49} \textit{Olmstead}, 277 U.S. at 465 (emphasis added).

\textsuperscript{50} \textit{See id.} at 466 (describing how one who installs a telephone in his home may project his voice to others through wires not on his property, and therefore messages intercepted in such a transmission are not protected under the Fourth Amendment).

\textsuperscript{51} \textit{Id.} at 466. The Court explained for requirement of a physical trespass for the application of Fourth Amendment protections:

Neither the cases we have cited nor any of the many federal decisions brought to our attention hold the Fourth Amendment to have been violated as against a defendant, unless there has been an \textit{official} search and seizure of his person or such a seizure of his papers or his tangible material effects or an \textit{actual physical invasion} of his house "or curtilage" for the purpose of making a seizure.


\textit{Id.} (emphasis added).

\textsuperscript{52} \textit{Silverman}, 365 U.S. at 506-07 (finding this physical intrusion requirement was satisfied where spike mike "made contact with a heating duct serving the house occupied by the petitioners.").

\textsuperscript{53} 389 U.S. 347 (1967).

\textsuperscript{54} \textit{Id.} at 351.
which flowed from this proposition, the Katz Court simultaneously expanded and narrowed the scope of the protection afforded by the Fourth Amendment. In Katz, the Federal Bureau of Investigation had reason to believe Charles Katz was using a telephone to transmit wagering information across state lines, in violation of federal law. Without obtaining a warrant, the FBI agents attached an electronic listening and recording device to the outside of a public telephone booth Katz visited each morning to place a phone call. The police listened to and recorded six telephone conversations, which were later introduced into evidence at Katz’s trial. Katz was convicted and a court of appeals affirmed his conviction, holding “[t]here was no physical entrance into the area occupied by [Katz].” Katz sought review by the Supreme Court, and in doing so, framed the issues as follows:

A. Whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening recording device to the top of such a booth is obtained in violation of the right to privacy of the user of the booth.

B. Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the fourth Amendment to the United States Constitution.

The Court granted certiorari review, but “decline[d] to adopt this formulation of the issues,” explaining:

In the first place the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase “constitutionally protected area.”

Secondly, the Fourth Amendment cannot be translated into a general constitutional “right to privacy.” That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all.

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Because of the misleading way the issues have been formulated, the

55. Id. at 350. “[T]he correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase ‘constitutionally protected area.’” Id.
56. Id. (dismissing a broad right to privacy). “[T]he Fourth Amendment cannot be translated into a general constitutional ‘right to privacy.’ That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all.” Id. (emphasis added).
57. Id. at 354, n.14.
58. Id. at 349.
60. Id.
parties have attached great significance to the characterization of the telephone booth from which the petitioner placed his calls. [Katz] has strenuously argued that the booth was a "constitutionally protected area." The Government has maintained with equal vigor that it was not.

The Government argued that because the phone booth was made of glass, Katz made himself visible even after he entered the booth and thus relinquished any reasonable expectation of privacy to his actions within the booth. The Court rejected this argument, finding that what Katz sought to exclude was not the intruding eye—it was the uninvited ear. He did not shed his right to do so simply because he made calls from a place where he might be seen . . . One who occupies [a telephone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world.

The Court declined the invitation to focus on whether the phone booth was a constitutionally protected area; in doing so, it introduced a fundamental change in Fourth Amendment jurisprudence:

[T]his effort to decide whether or not a given "area" viewed in the abstract, is "constitutionally protected" deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

However, it was not the majority opinion which formulated the test to be applied when determining whether a search violates constitutional standards. The test was first proposed by Justice Harlan in his concurring opinion in Katz, in which he stated: "My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first

61. Id. at 351; see also Silverman v. United States, 365 U.S. 505, 512 (1961) (stating that the decision did not "turn upon the technicality of a trespass upon a party wall as a matter of local law . . . [but] [i]t was based upon the reality of an actual intrusion into constitutionally protected area"); discussion supra note 47, at 512 and accompanying text. In Katz, of course, the parties’ focus on whether law enforcement intruded upon a "constitutionally protected area" was not fanciful; it was based upon the Court’s invocation of this analysis in prior cases. See Katz, 389 U.S. at 350.


63. Id. (dismissing the Government’s argument that because the telephone booth was glass, and therefore the defendant visible, the information acquired was not meant to be concealed). "[W]hat [the defendant] sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear." Id.

64. Id. at 351–52.
that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’” In explaining the test further, Justice Harlan points to the critical factor used in deciding Katz:

Thus a man’s home is, for most purposes, a place where he expects privacy, but objects, activities or statements that he exposes to “plain view” of outsiders are not “protected” because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable. The critical fact in this case is that “one who occupies it (a telephone booth) shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume” that his conversation is not being intercepted. The point is not that the booth is “accessible to the public” at other times, but that it is a temporarily private place whose momentary occupants’ expectations of freedom from intrusion are recognized as reasonable.

Katz’s efforts to conceal his conversations were used to demonstrate that he exhibited a subjective desire to preserve his privacy. And the Court determined that this subjective expectation of privacy was one which society recognized as reasonable. Thus, the Court concluded, a Fourth Amendment search had occurred and, because it was conducted without a warrant and did not fall within any of the warrant exceptions, was per se unreasonable.

Unlike previous Fourth Amendment cases which relied upon a trespass or other physical intrusion in finding a constitutional violation, the installation of the listening and recording device on top of—but without penetrating—the telephone booth was given little consideration by the Court. The Court made this point emphatically, overruling their decisions in Olmstead and Goldman which relied upon a physical penetration or some physical trespass. The Court “conclude[d] that the underpinnings of

65. Id. at 361.
66. Id.
67. Id.
69. Id. at 353 (stating that “the fact the electronic device employed . . . did not happen to penetrate the wall of the booth can have no constitutional significance”).
70. Id. (quoting Silverman, 365 U.S. at 511).

[Although a closely divided Court supposed in Olmstead that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested. Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements]
Olmstead and Goldman have been so eroded by our subsequent decisions that the ‘trespass’ doctrine there enunciated can no longer be regarded as controlling.” The Katz Court found a Fourth Amendment search even though it was conducted in a public area, and without an accompanying trespass. Because “the Fourth Amendment protects people, not places,” the Court centered its Fourth Amendment analysis on the subjective (individual) and objective (societal) expectations of privacy. Accordingly, after Katz, Fourth Amendment protection could be found to exist regardless of whether the search was accomplished by a physical intrusion and regardless of whether the area was considered “constitutionally protected.” It was generally thought, at least before Court’s decision in Jones, that Katz displaced the notion that the Fourth Amendment attaches only to protected places, and instead refocused the Fourth Amendment on people and expectations of privacy. While there remained some disagreement regarding the extent to which trespass and property concepts played a role in Katz’s reasonable-expectation-of-privacy test, there was little disagreement that Fourth Amendment analysis no longer required proof of a physical trespass or reliance upon common law property concepts.

overheard without ‘any technical trespass under local property law.’

Id. 71. Katz, 389 U.S. at 357–58.

72. Id.

73. Id. at 351–52 (“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection; and . . . what [a person] seeks to preserve as private, even in an area accessible to the public, may not be constitutionally protected.”) (emphasis added) (citations omitted); see, e.g., Bond v. United States, 529 U.S. 334, 334–36, 338–39 (2000). The standard of an expectation of privacy is a flexible one. In Bond, a border patrol agent manipulated the bags of passengers on a Greyhound bus. Id. at 335. One passenger, Steven Dewayne Bond, had a brick-like object in his bag which turned out to be a package of methamphetamine. Id. at 336. Although a traveler usually does not have a reasonable expectation of privacy in their luggage because other passengers have access to the luggage, it was the fact that the agent manipulated the bag that transformed the conduct into a search. Id. at 338–39. Bond, by placing his bag in the overhead compartment expected “that it would be exposed to certain kinds of touching and handling.” Id. at 338. However, Bond argued that “Agent Cantu’s physical manipulation of his luggage ‘far exceeded the casual contact petitioner could have expected from other passengers.’” Id. (citations omitted). The Court accepted Bond’s argument and held that the exploratory manner in which the bag was felt violated the Fourth Amendment. Id. at 339.

74. Katz, 389 U.S. at 351 n.6 (explaining how the parties erroneously concentrated their arguments on whether the telephone booth to which the wires were attached was a constitutionally protected area). The Court recognized the departure from prior decisions which coined the phrase “constitutionally protected area.” See id. at n. 6.
II: THE FOURTH AMENDMENT AND ELECTRONIC SURVEILLANCE

In cases which followed, and even preceded, *Katz*, the Court noted that the scope and nature of the protection afforded by the Fourth Amendment protection must be flexible enough to adjust to technological advances. The use of electronic tracking devices is an example of such a technological advance; in two "beeper" cases, the Court addressed this technology in the context of Fourth Amendment analysis: *Knotts v. United States* and *Karo v. United States*. The Court also discussed the implications of evolving technology in *Kyllo v. United States*, a case involving the use of a heat-sensing thermal imaging device to detect activity within a home.

A. THE INFANCY OF ELECTRONIC SURVEILLANCE: KNOTTS AND KARO

1. *Knotts v. United States*

In *Knotts*, the Court decided whether the use of a beeper to monitor the movements of a car violated the defendant's rights under the Fourth Amendment. The investigation began when police suspected Tristan Armstrong was obtaining chemicals to manufacture narcotics. Police followed Armstrong and soon discovered that he was purchasing chemicals from a chemical company and delivering those chemicals to another individual. With the consent of the chemical company, the officers inserted a beeper into a five-gallon container of chloroform so that, when the container was purchased by Armstrong, police could track its movements and, potentially, the location of the men involved. Armstrong purchased the chloroform and placed the container, which now contained the beeper, into the vehicle he was driving. Officers followed the vehicle, and were able to

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80. Id. at 277.
81. Id. at 278.
82. Id.
83. Id. The Court noted that chloroform is a "precursor" chemical that can be used in the manufacture of illegal drugs. Id.
maintain contact by using “both visual surveillance and a monitor which received the signals sent from the beeper.”

The surveillance began in Minnesota, and the officers followed the vehicle to a house, where the container was transferred to the vehicle of co-defendant, Darryl Petschen. Officers began following Petschen and his vehicle, and continued their surveillance as Petschen drove across the state line and into Wisconsin. However, when Petschen began using evasive maneuvers, the officers ended their visual surveillance. At the same time, the officers lost the beeper signal, but were able to pick up the signal location about an hour later with the assistance of a surveillance helicopter. The signal indicated that the vehicle was no longer moving, and the officers soon arrived at a cabin occupied by Knotts, who turned out to be the third member of the drug operation. The officers maintained visual surveillance on the cabin and, based upon the visual surveillance and the information acquired from the use of the beeper, they secured a search warrant. During the execution of the warrant, the officers discovered a fully operational drug lab, including equipment, formulas, and chemicals for manufacturing amphetamine and methamphetamine. The five-gallon container of chloroform was also recovered underneath a barrel outside the cabin. Knotts moved to suppress the seized evidence because the warrant was obtained through information gathered by the warrantless use of the beeper to monitor the movements of the vehicle once the chloroform container was placed in the vehicle. The motion was denied and Knotts was convicted. The Court of Appeals reversed, holding that the monitoring of the beeper violated Knotts’s reasonable expectation of privacy and the information and evidence obtained as a result was fruit of that illegality. In examining whether the conduct of the police constituted a search, the Court noted the “diminished expectation of privacy in an automobile.” Because an auto-

84. Id.
86. Id.
87. Id.
88. Id. at 278–79, 284–85. There was no evidence in the record to suggest that the police continued to use or monitor the beeper signal once the vehicle arrived at the cabin, or that the beeper was used to monitor the movements of the container within the cabin. Id. The Court considered this an important distinguishing factor in its subsequent decision in Karo. See discussion infra at II.A.2.
89. Id. at 279.
90. Id.
92. Id. at 281 ("One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one’s residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where
mobile is not used as one’s residence and because its contents are in plain view, an automobile does not enjoy the same level of Fourth Amendment protection accorded one’s home.93 The Court appeared to dilute the concept of public privacy it had created in Katz, holding in Knotts:

A person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another. When Petschen travelled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was travelling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination when he exited from public roads onto private property.94

The Court noted that traditional visual surveillance, or non-device tracking, by the police would have revealed the same information that was obtained through the use and monitoring of the beeper. In fact, the Court noted that the officers relied upon a combination of both visual and electronic surveillance, and found this significant:

Visual surveillance from public places along Petschen’s route or adjoining Knotts’ premises would have sufficed to reveal all of these facts. The fact that the officers in this case relied not only on visual surveillance, but on the use of the beeper to signal the presence of Petschen’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 technology afforded them in this case.95

The Court also rejected the general notion that police should not be permitted to use electronic surveillance to assist them in their duties: “Insofar as Knotts’s complaint appears to be simply that scientific devices such as the beeper enabled the police to be more effective in detecting crime, it simply has no constitutional foundation. We have never equated police efficiency with unconstitutionality, and we decline to do so now.”96 The Court determined that the conduct of the police did not “invade any legitimate expectation of privacy” of Knotts and therefore, no Fourth Amendment search had occurred.97 In his brief, Knotts raised the specter of Big Brother, arguing that the Court’s finding of no Fourth Amendment viola-

93. Id.
94. Id. at 281–82.
95. Id. at 282.
96. Id. at 284.
tion would permit "twenty-four hour surveillance of any citizen of this country . . . without judicial knowledge or supervision." However, the Court declined to reach the issue, explaining that "if such dragnet type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable." The Court also considered the "limited use which the government made of the signals from this particular beeper," departing from the Court's analysis under Katz which disregarded the limited use of the recording device. The Court made an important distinction between the beeper, which only gave the location of the can, as opposed to any "information as to the movement of the drum within the cabin or in any way that would not have been visible to the naked eye from outside the cabin." The Court reemphasized how the beeper did not lead to the police officers acquiring any new information, only that which would have been available to them with careful visual surveillance. A significant issue, that was neither raised by the parties nor addressed by the Court, was whether the actual placement of the beeper in the container itself amounted to a Fourth Amendment search or seizure.

2. United States v. Karo

In United States v. Karo, the defendants were suspected of ordering ether "to extract cocaine from clothing." Pursuing information provided by an informant, law enforcement officers obtained a court order allowing them to install a tracking device in one of the cans of ether they expected to be delivered to Karo. Agents from the Drug Enforcement Agency then used a beeper, in addition to their own visual surveillance, to monitor the defendants' travels. The agents used the beeper three times to locate the can of ether. After discovering that the can was moved to a locker in a commercial storage facility, the agents obtained a court order to install an entry tone alarm on the door of locker, and, with the consent of the facility

98. Id. at 283 (citations omitted).
99. Id. at 284
100. Id.
101. Id. at 285.
102. Id.
104. Id. at 708.
105. Id.
106. Id.
107. Id.
manager, subsequently installed a video camera. The agents reinitiated use of the beeper to track the location of the ether cans after they were removed from storage. In analyzing whether the initial installation of the device violated Karo’s Fourth Amendment rights, the Court stated:

It is clear that the actual placement of the beeper into the can violated no one’s Fourth Amendment rights. The can into which the beeper was placed belonged at the time to the DEA, and by no stretch of the imagination could it be said that respondents then had any legitimate expectation of privacy in it.

In rejecting the trespass question, the Court recognized the significance of the possessory nature of the object upon which the tracking device was attached. No one in Karo could legitimately argue that they possessed a reasonable expectation of privacy in the can of ether at the time the agents placed the beeper in it. However, the Court ultimately found that a search had occurred because the agents, by using the beeper, were able to learn that the can of ether was inside a home. The Court distinguished Knotts:

The monitoring of an electronic device such as a beeper... reveal[ed] a critical fact about the interior of the premises that the Government is extremely interested in knowing and that it could not have otherwise obtained without a warrant. The case is thus not like Knotts, for there the beeper told the authorities nothing about the interior of Knotts' cabin. The information obtained in Knotts was "voluntarily conveyed to anyone who wanted to look ...".

Because the location of the can in the home was not discernible without the use of the beeper, the protection afforded by the Fourth Amendment to the sanctity of the home compelled the Court to find that a search occurred. Unlike the can of ether, the defendants certainly maintained a reasonable expectation of privacy in their home.

3. Kyllo v. United States

In 2001, the Court examined a different type of technology which was used in the search of a home: a thermal imaging device. In Kyllo v. Unit-
ed States, 114 Danny Kyllo was suspected of growing marijuana plants in his home; two agents subsequently used a thermal imaging device to scan the triplex where Kyllo lived, detecting an abnormal amount of heat emanating from his home and confirming their suspicion. 115 The agents scanned the triplex from their vehicle, parked across the street from the home; the agents never physically entered Kyllo’s property. The thermal scan showed that the roof over the garage and one side wall of the home were relatively “hot” compared to the rest of the home, and substantially warmer than the two neighboring homes in the triplex. The agents concluded that Kyllo was using special heating lamps in an area of his home to cultivate marijuana. 116 Using the information obtained from the scan as well as information provided by informants, the agents secured a warrant to search Kyllo’s home. 117 A search of the home revealed more than 100 marijuana plants and led to Kyllo’s indictment for manufacturing marijuana. Kyllo’s motion to suppress the evidence seized from his home was denied, and he was convicted. 118 On appeal, the Ninth Circuit Court of Appeals reversed and remanded the case to the trial court for an evidentiary hearing regarding the intrusiveness of thermal imaging. 119 On remand the district court found that the thermal imager was

a non-intrusive device which emits no rays or beams and shows a crude visual image of the heat being radiated from the outside of the house. . . . The device cannot and did not show any people or activity within the walls of the structure. . . . No intimate details of the home were observed . . . . The device used cannot penetrate walls or windows to reveal conversations or human activities. 120

In the second appeal, the Ninth Circuit initially reversed in an opinion that was later withdrawn. The subsequent decision affirmed the lower court’s holding that Kyllo did not exhibit an expectation of privacy because he made no attempt to conceal the heat escaping from his home, and even if he had, there was no objectively reasonable expectation of privacy because the imager “did not expose any intimate details of Kyllo’s life,” only “amorphous ‘hot spots’ on

relative amounts of heat: cool is imaged as black in color, hot is imaged as white, and shades of gray connote relative differences in between. Id. at 29–30.
115. Id. at 29–30.
116. Id. at 30.
117. Id.
118. Id.
119. Id.
the roof and exterior wall."\textsuperscript{121}

The Supreme Court granted certiorari. In an opinion authored by Justice Scalia, the Court framed the question presented: "[W]hether the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a 'search' within the meaning of the Fourth Amendment."\textsuperscript{122} The Court disclaimed the trespass doctrine previously abandoned by the Court in \textit{Katz}, but recognized that its previous decisions held visual surveillance did not amount to a Fourth Amendment search. Nevertheless, the Court applied the \textit{Katz} test to determine that a Fourth Amendment search occurred. The Court distinguished \textit{Kyllo} from its prior surveillance cases and found a parallel between the contents of \textit{Katz}'s telephone conversations and the thermal images detected within \textit{Kyllo}'s home: The surveillance conducted of each subject could produce intimate details, and both defendants possessed a subjective expectation of privacy that society recognized as reasonable.\textsuperscript{123} Society reasonably expects the government to honor the sanctity of the home, just as it reasonably expects the government not to surreptitiously listen to private conversations in a closed telephone booth. In an often cited example of intimate information the thermal imaging device could obtain, Justice Scalia noted that it "might disclose, for example, at what hour of the night the lady of the house takes her daily sauna and bath – a detail that many would consider 'intimate' . . . ."\textsuperscript{124}

The Court also discussed various other Fourth Amendment contexts in which the \textit{Katz} test was applied. Specifically, the Court recalled that the use of a pen register,\textsuperscript{125} aerial surveillance,\textsuperscript{126} and enhanced aerial photo-

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\textsuperscript{121} \textit{Kyllo}, 533 U.S. at 31 (citations omitted).
\textsuperscript{122} \textit{Id.} at 31–32. The Court begins its discussion by disclaiming the trespass doctrine previously abandoned by the Court in \textit{Katz}:

The permissibility of ordinary visual surveillance of a home used to be clear because, well into the 20th century, our Fourth Amendment jurisprudence was tied to common-law trespass. . . . We have since decoupled violation of a person's Fourth Amendment rights from trespassory violation of his property, but the lawfulness of warrantless visual surveillance of a home has still been preserved.

\textit{Id.} (citations omitted).
\textsuperscript{123} See \textit{id.} at 32–33 (citations omitted).
\textsuperscript{124} \textit{Id.} at 38.
\textsuperscript{125} See Smith v. Maryland, 442 U.S. 735, 743–44 (1979). Unlike \textit{Katz}, the pen register information gathered by law enforcement in \textit{Smith} was first voluntarily provided to a third party, and the information revealed nothing more than who the defendant called – not the content and intimate details of those conversations. \textit{Id.}
\textsuperscript{126} See generally Florida v. Riley, 488 U.S. 445, 455 (1989) (holding that a naked-eye observation from a helicopter 400 feet above ground of marijuana plants in a partially covered greenhouse was not a search according to the Fourth Amendment); California v. Ciraolo, 476
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were not searches because there was no legitimate expectation of privacy. The defendants in those cases did not take steps to shield their information from public view, as Katz had by closing the door to the telephone booth and as Kyllo had by entering a home, which provided him the most protection under the Fourth Amendment. The Court seemed poised to address the question of how advances in technology might reshape the Court's Fourth Amendment analysis: "The question we confront today is what limits there are upon this power of technology to shrink the realm of guaranteed privacy." Justice Scalia acknowledged "it would be foolish to contend that . . . privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology." Technology and privacy, as Justice Scalia observed, were the subjects of a tug-of-war: any advance in technology would necessarily erode the "realm of privacy" and the traditionally-guaranteed protection provided by the Fourth Amendment. With the development of new surveillance technology, society may reasonably and objectively expect less information to remain private.

At bottom, there is a minimum level of expected privacy that will be recognized as legitimate and infringed upon by sense-enhancing technology even absent a physical intrusion, at least with regard to a home. Prohibiting the use of any information obtained through sense-enhancing tech-

U.S. 207 (1986) (holding that although petitioner displayed a subjective expectation of privacy, it was not reasonable because anyone flying overhead, even as high as 1,000 feet, would be able to observe the growing marijuana without the use of any visual-enhancing surveillance).

127. See generally Dow Chemical Co. v. United States, 476 U.S. 277 (1986) (holding that the use of a camera to photograph a facility does not violate the Fourth Amendment only because it enhances what may be seen under normal visual surveillance). Dow Chemical Company argued that, because the case dealt with an industrial plant, the area surrounding the plant was within its curtilage and should be protected as such. Id. at 235. The Court rejected this argument and found that the area was more analogous to an open field which has no Fourth Amendment protection according to Oliver v. United States, 466 U.S. 170, 179 (1984). Id. at 235–36. "[T]he Court has drawn a line as to what expectations are reasonable in the open areas beyond the curtilage of a dwelling: 'open fields do not provide the setting for those intimate activities that the Fourth Amendment is intended to shelter from governmental interference or surveillance.'" Id. at 235 (quoting Oliver, 466 U.S. at 179).

128. Kyllo, 533 U.S. at 34. "The question we confront today is what limits there are upon this power of technology to shrink the realm of guaranteed privacy." Id.

129. See id. ("[t]he technology enabling human flight has exposed to public view (and hence, we have said, to official observation) uncovered portions of the house and its curtilage that once were private." (citing Ciraolo, 476 U.S. at 215)).

130. Id. ("We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area' constitutes a search -- at least where (as here) the technology in question is not in general public use." (quoting Silverman v. United States, 365 U.S. 505, 512 (1961) (citations omitted)).
nology from the home "assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." In Justice Stevens's dissent, joined by Justice O'Connor and Justice Kennedy, he argues that the thermal imaging device does not give information regarding the interior of the home and is therefore not a search. The Court's decision in Kyllo noted that the use of certain sense-enhancing technology has the ability to clearly intrude on privacy rights and violate the Constitution. However, the constant advancement of technology makes it impossible for the Court to expressly state which surveillance devices are constitutionally violative and which are not. Further, the Court concentrated on the fact that the information was obtained from the home, just as the Karo Court noted that the activation of the beeper revealed that a can of ether was in a home.

In fact, the Court rejects that the Fourth Amendment's protection should turn on the revealing of intimate details. The Government tried to argue that the thermal imaging "did not detect private activities occurring in private areas" citing Dow Chemical for support, but the Court first emphasized the special protection offered to a home as compared to the industrial complex that was surveilled in Dow Chemical. Second, the Court noted that the "quality and quantity of information obtained" through an investigation has never been the dispositive factor of whether a constitutional violation has occurred. Interestingly enough, and as discussed later, it is just these qualities that led the Court to find a search in the Jones case. Perhaps the Court intended its observations in Kyllo to apply only to information gathered from a home.

The Court left open whether the use of such a device would still be considered a search if it was used on an area outside the home. The only guidance the Court offers as to whether society maintains an objectively reasonable expectation to the subject of the investigation is whether the de-

131. Id.
132. Id. at 41–42.
133. Kyllo v. United States, 533 U.S. 27, 36 (2001); see supra notes 103–12 and accompanying text.
134. Id. at 37.
135. Id. (citations omitted).
136. Id.
137. See id. (dismissing the type of information gathered when analyzing a search that threatens the sanctity of the home). "Limiting the prohibition of thermal imaging to 'intimate details' would not only be wrong in principle; it would be impractical in application, failing to provide 'a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment.'" Id. at 38 (quoting Oliver v. United States, 466 U.S. 170, 181 (1984)).
vice the government uses to conduct the investigation is in general public use. Meaning, the extent to which citizens used thermal imaging devices in their daily lives would directly affect Kyllo’s argument that he had an objectively reasonable expectation of privacy from government efforts to detect the varying degrees of temperature within his home. It is not until the Jones case that the Court was presented with electronic surveillance (a Global Positioning System or “GPS” device), which was in general public use to gather information not from within a home, but from a vehicle traveling on the “public thoroughfares.”

III: THE FOURTH AMENDMENT AND UNITED STATES V. JONES

A. UNITED STATES V. MAYNARD: THE DECISION BELOW

In United States v. Maynard, Antoine Jones and Lawrence Maynard appealed their convictions following a joint trial in which they were found guilty of conspiracy to distribute cocaine and possession with intent to distribute cocaine. In his appeal, Jones argued that the trial court erred in denying his motion to suppress evidence acquired by law enforcement’s warrantless use of a GPS device to track his movements continuously for a month.

In a 3-0 decision, the Court of Appeals for the District of Columbia Circuit reversed the conviction of Jones, holding that the trial court erred in denying the motion to suppress the evidence acquired by the use of the GPS device. The court framed the issue in two parts: “We consider first whether that use of the device was a search and then, having concluded it was, consider whether it was reasonable and whether any error was harm-

138. Id. at 39 n.6 (“The dissent argues that we have injected potential uncertainty into the constitutional analysis by noting that whether or not the technology is in general public use may be a factor. . . . Given that we can quite confidently say that thermal imaging is not ‘routine,’ we decline in this case to reexamine that factor.”).
140. 615 F.3d 544 (D.C. Cir. 2010).
141. Id. at 548. The United States Court of Appeals for the District of Columbia Circuit affirmed Maynard’s conviction and sentence. Id. at 568. Maynard sought further review by the United States Supreme Court, which denied his petition for writ of certiorari. Maynard v. United States, 131 S. Ct. 671 (2010) (mem.). Jones’s conviction was reversed by the District of Columbia Circuit, and the Government was granted certiorari review by the Supreme Court. Maynard, 615 F.3d at 568, cert. granted, United States v. Jones, 131 S. Ct. 3064 (2011) (mem.).
142. Maynard, 615 F.3d at 549.
143. Id. at 568. The members of the panel were Judges Ginsburg, Tatel, and Griffith. See id. at 547.
Jones and the Government both agreed that the test announced in *Katz* was the appropriate test to apply. The Government, however, contended that Jones’s expectation of privacy could not be considered reasonable because the argument was already foreclosed in *Knotts*. The court found *Knotts* did not control, describing *Knotts* as a case involving “limited information discovered by use of the beeper—movements during a discrete journey—and more comprehensive or sustained monitoring of the sort at issue in this case.” In other words, the panel in *Maynard* found that this case presented the issue expressly left open in *Knotts*: “[I]f such dragnet-type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable.”

The *Maynard* court quickly dispatched the Government’s position that the “dragnet-type” practice envisioned by the Supreme Court in *Knotts* meant mass surveillance rather than prolonged surveillance of a single individual. The *Knotts* Court specifically stated it was reserving the question of whether “twenty-four hour surveillance of any citizen of this country” was a search, which certainly suggests the “dragnet” concern was focused on the length of the surveillance rather than on the number of people subject to the surveillance. That question, the court concluded, was squarely presented in *Maynard* because the police used the GPS device not to track Jones’s “movements from one place to another,” but rather to track Jones’s movements 24 hours a day for 28 days as he moved among scores of places, thereby discovering the totality and pattern of his movements from place to place.

By characterizing *Knotts* as a case involving limited information obtained in the course of a single trip, the *Maynard* court was free to consider the application of *Katz* to the Government’s actions in this case. The *Maynard* court first addressed the Government’s main contention that

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144. *Id.* at 555.
147. *Maynard*, 615 F.3d at 556.
148. *Id.* (quoting *Knotts*, 460 U.S. at 283–84).
149. *Knotts*, 460 U.S. at 283.
150. *Maynard*, 615 F.3d at 558 (citation omitted).
151. *Id.* at 556. Other courts have similarly described, and thereby limited, the *Knotts* decision. See, e.g., United States v. Butts, 729 F.2d 1514, 1518 n.4 (5th Cir. 1984); People v. Weaver, 12 N.Y.3d 433, 440–44 (N.Y. 2009).
Jones had no reasonable expectation of privacy because, as Katz itself observed: "What a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection."152 The Government argued that because the police could have followed the vehicle’s movements on the public roads by use of traditional surveillance for twenty-eight days, those movements were actually exposed to the public.153

The Maynard court, however, saw the issue differently: “In considering whether something is ‘exposed’ to the public as that term was used in Katz we ask not what another person can physically and may lawfully do but rather what a reasonable person expects another might actually do.”154 Framing the issue in this manner, the conclusion (and the court’s holding on this issue) becomes self-evident: “[W]e hold the whole of a person’s movements over the course of a month is not actually exposed to the public because the likelihood a stranger would observe all those movements is not just remote, it is essentially nil.”155

The Court of Appeals then addressed the possibility that, even if the whole of Jones’s movements were not actually exposed to the public, they were constructively exposed because each of his individual movements was itself exposed to the public view. The court held no such constructive exposure occurred here, finding that, “[w]hen it comes to privacy . . . precedent suggests that the whole may be more revealing than the parts. Applying the precedent to the circumstances of this case, we hold the information the police discovered using the GPS device was not constructively exposed.”156

The court embarked on a discussion of the so-called “mosaic theory”: the idea, in essence, that the whole of perpetual electronic surveillance is greater than the sum of its parts.157 The Maynard court found that the cumulative nature of the data gathered by law enforcement provided more than simply the travel history of the vehicle, and this led ultimately to a “mosaic” of the driver’s life.158 The mosaic theory has previously been re-

152. Maynard, 615 F.3d at 559 (quoting Katz v. United States, 389 U.S. 347, 351 (1967)).
153. Id.
154. Id.
155. Id. at 560.
156. Id. at 561.
157. Id. at 562. See Benjamin M. Ostrander, The “Mosaic Theory” and Fourth Amendment Law, 86 NOTRE DAME L. REV. 1733 (2011), and Erin Smith Dennis, A Mosaic Shield: Maynard, the Fourth Amendment, and Privacy Rights in the Digital Age, 33 CARDOZO L. REV. 737 (2011), for a more thoughtful discussion of the mosaic theory.
158. Maynard, 615 F.3d at 562. Justice Sotomayor was the only member of the Court who even discussed the mosaic theory as applied to the search in Jones. United States v. Jones, 132 S. Ct. 945, 954–57 (2012) (Sotomayor, J., concurring).
lied on by the Government in asserting objections to records requests that implicated national security interests.\textsuperscript{159} The \textit{Maynard} court concluded that "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.’\textsuperscript{160} Thus, the court held Jones had a subjective expectation that the entirety of his movements over the course of twenty-eight days would not be exposed to the public.\textsuperscript{161}

I will digress for just a moment to discuss this mosaic theory embraced by the \textit{Maynard} court. It is a digression because, as we will see infra, only one member of the United States Supreme Court was willing to give affirmative credence to this theory under the facts of the case.\textsuperscript{162} While the mosaic theory, as espoused by \textit{Maynard} may a viable theory as applied to this Fourth Amendment analysis, its viability is dependent on the \textit{Maynard} court’s initial characterization of “knowingly exposed to the public” as a practical rather than an absolute consideration.

No one can reasonably contend that a GPS collects more, or more substantial, information than that which could be collected by traditional police surveillance conducted over the same period of time. In truth, GPS reveals only:

- Where a car is located at any given point in time;
- How long a car remains at any one location; and,
- The route traveled from one location to another.

The \textit{Maynard} court concluded that such information, over time, provides a pattern that reveals a person’s habits, routines, and daily life. While this is also perhaps true, one must necessarily concede that traditional surveillance provides information above and beyond that provided by use of purely electronic surveillance. Among other information, traditional surveillance allows the surveillance officer to know:

- Who is driving the vehicle at any given time;
- How many people are in the vehicle at any given time;

\textsuperscript{160} \textit{Maynard}, 615 F.3d at 563 (quoting Nader v. Gen. Motors Corp., 25 N.Y.2d 560, 572 (N.Y. 1970) (Breitel, J., concurring)).
\textsuperscript{161} id. at 568.
\textsuperscript{162} \textit{Jones}, 132 S. Ct. at 955–57 (Sotomayor, J., concurring).
• The position of each passenger within the vehicle;
• Whether anything is placed in, or removed from, the vehicle;
• What the driver and passenger(s) do after arriving at a destination (e.g., who gets out of the vehicle, who remains in the vehicle);
• Where the driver and passenger(s) go upon arrival at the location (e.g., go into a building, serve as a lookout, remain next to the vehicle);
• Whether the driver and passenger(s) meet or speak with any other individuals upon arrival at the location; and,
• Whether the driver and passenger(s) go to multiple places within the given location (if, for example, the location is a shopping mall or an apartment building).

Thus, to the extent the mosaic theory has credence, it is not because of the type of data revealed by GPS, but because of its practical perpetuity when compared to so-called traditional or direct surveillance. GPS requires virtually no manpower or cost and so, as a practical matter, can be used to collect data for an unlimited period of time. Traditional surveillance, on the other hand, cannot be performed in perpetuity, due to limitations of cost and manpower. It is thus the length of the surveillance and, therefore, the amount of data collected over time, rather than the significance of the data itself, that distinguishes GPS from traditional surveillance.

The majority in Maynard acknowledged as much in its determination that whether one’s movements over the course of time are "actually exposed" to the public involves a practical consideration—whether one reasonably expects his movements over twenty-eight days to be exposed to the same member of the general public.163 Viewed this way, of course, one must necessarily concede that the quantity and quality of information from GPS surveillance will outstrip traditional surveillance, but only because of the pragmatic recognition that traditional surveillance could not be conducted over the same time period.

The court then moved to the heart of the matter, though the outcome at this point was hardly in doubt: Given that "the aggregation of Jones’s movements over the course of a month was not exposed to the public,"164 was Jones’s expectation of privacy reasonable? The court held it was:

Application of the test in Katz and its sequellae to the facts of this case can lead to only one conclusion: Society recognizes Jones’s expectation of privacy in his movements over the course of a month as reason-

163. Maynard, 615 F.3d at 563.
164. Id.
able, and the use of the GPS device to monitor those movements defeated that reasonable expectation. As we have discussed, prolonged GPS monitoring reveals an intimate picture of the subject’s life that he expects no one to have—short perhaps of his spouse. The intrusion such monitoring makes into the subject’s private affairs stands in stark contrast to the relatively brief intrusion at issue in Knotts . . . .

A careful reader will note one issue the Maynard court did not discuss in its Katz analysis: the installation of the GPS device. Although the court in its statement of the facts acknowledged the installation of the device, the installation itself appeared to play no role in the court’s Fourth Amendment determination. The main issue, as framed by the court: “Was Use of GPS a Search?” However, as we will see, the Supreme Court found the act of installation to be the more constitutionally significant factor in its determination that a Fourth Amendment search occurred.

The Maynard court declined to address the Government’s argument that, even absent a warrant, the use of the GPS device was nevertheless “reasonable” because it was based upon probable cause. Because this argument was not raised in the trial court, the Maynard court would not consider this argument. Finally, the court rejected the Government’s contention that the district court decided too much—that by holding this surveillance violated the Fourth Amendment, Maynard would prohibit even visual surveillance conducted over a prolonged period of time. The Maynard court expressly noted that its holding did not reach this issue: “This case does not require us to, and therefore we do not, decide whether a hypothetical instance of prolonged visual surveillance would be a search subject to the warrant requirement of the Fourth Amendment.” The Maynard court reversed Jones’s conviction. The Government moved for rehearing en banc, which was denied 5-4.

B. United States v. Jones: Background and Overview

The Government filed a petition for writ of certiorari seeking review of the Court of Appeals’ decision reversing Jones’s conviction. The Supreme Court granted review. In United States v. Jones, the Court was

165. Id.
166. Id. at 555 (emphasis added).
167. See supra discussion accompanying notes 130–37.
168. Maynard, 615 F.3d at 566 (internal quotation marks omitted).
presented with the opportunity to answer the question left open in *Knotts*: whether law enforcement’s use of an electronic monitoring device to remotely record a vehicle’s public movements, over a continuous period of twenty-eight days, violates the Fourth Amendment.

On petition for a writ of certiorari, the brief of the United States presented a single question: “Whether the warrantless use of a GPS tracking device on respondent’s vehicle to monitor its movements on public streets violated the Fourth Amendment.”170 The United States Supreme Court granted certiorari. In doing so, however, the Court stated: “In addition to the question presented by the petition, the parties are directed to brief and argue the following question: ‘Whether the government violated respondent’s fourth amendment rights by installing the GPS tracking device on his vehicle without a valid warrant and without his consent.’”171 Thus, the Court determined that the issue of installation (not raised by the Government, and an issue left open in *Knotts* since it had not been raised) was ripe for review.

Justice Scalia delivered the opinion of the Court, joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Sotomayor.172 Although the result reached in *Jones*—that is, the Court’s determination that the actions of law enforcement constituted a search—was reached by unanimous decision, the Court’s underlying reasoning was far from unanimous. Justice Sotomayor, for example, wrote a concurring opinion, while Justice Alito wrote an opinion concurring in judgment only, which was joined by Justices Ginsburg, Breyer, and Kagan.

C. THE MAJORITY OPINION OF JUSTICE SCALIA

The parties argued the two questions presented (installation and use) as separate and distinct issues; however, Justice Scalia’s opinion combines the two separate actions and frames them as a single question presented for review: “We decide whether the attachment of a Global-Position-System (GPS) tracking device to an individual’s vehicle, and subsequent use of that device to monitor the vehicle’s movements on public streets, constitutes a search or seizure within the meaning of the Fourth Amendment.”173 In a

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171. *Jones*, 131 S. Ct. at 3064.
narrowly-drawn opinion that avoided the issue left open in *Knotts*, the Court held that the Government’s installation of the GPS device upon the vehicle and its use of that device to monitor the movements of the vehicle constituted a “search” within the meaning of the Fourth Amendment.

Justice Scalia’s opinion wastes little time in reaching the crux of the matter. Relying upon the express language of the Fourth Amendment, Scalia first noted: “It is beyond dispute that a vehicle is an ‘effect’ as that term is used in the Amendment.” He then determined that the Government, through its installation and use of the GPS device on Jones’s car, “physically occupied private property for the purpose of obtaining information.”

Focusing on the installation of the GPS device, and drawing upon the original meaning of the Fourth Amendment at the time of its adoption, Justice Scalia concluded that such a physical intrusion by the Government upon the personal property of an individual would have been considered a search in 1791. In support of this proposition, Justice Scalia cites to the case of *Entick v. Carrington* and quotes Lord Camden’s discourse regarding the invasion of one’s property rights:

> [O]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbour’s close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour’s ground, he must justify it by law.

Justice Scalia spends some time describing the historical connection

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174. See United States v. *Knotts*, 460 U.S. 276, 283 (1983). The *Knotts* Court, responding to the argument that its decision would legitimize warrantless twenty-four hour surveillance of any citizen, expressly observed: “[I]f such dragnet type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable.” *Id.* By combining the installation and use into a single issue (and by focusing primarily upon the act of installation), the majority did not reach the issue of whether use of the device, over such an extended period of time, violates the Fourth Amendment. *See id.*

175. U.S. CONST. amend. IV (“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.”).


177. *Id.*

178. *Id.*; see Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 557 (1999) (“The Fourth Amendment was adopted by Congress in 1789 and ratified by the states in 1791 as one of the provisions of the Bill of Rights.”).


of common-law trespass and Fourth Amendment jurisprudence. However, this avowed connection is found wanting by several of the other Justices, and it merits additional scrutiny given the evolution of Fourth Amendment analysis over the last fifty years. In justifying the conclusion that the installation and use of the GPS device was a search, Justice Scalia climbs into a jurisprudential time machine, resuscitating cases that had been viewed by many as the jetsam of modern Fourth Amendment jurisprudence.

Further, and in a bit of jurisprudential legerdemain, Justice Scalia paints Katz as an interloper in an unbroken line of common-law, property-based decisions in the Fourth Amendment arena:

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

As part of this retro-analysis of Fourth Amendment jurisprudence, Justice Scalia discusses and relies upon the Court’s decision in Olmstead v. United States. However, Scalia gives relatively short shrift to post-Katz opinions, which recognized that Katz overruled Olmstead and Goldman and relegated notions of trespass to the status of a mere factor in the overall Katz determination of a reasonable expectation of privacy. For example, the majority in Knotts observed: “Nearly 40 years later, in Katz v. United States, the Court overruled Olmstead saying that the Fourth Amendment’s reach ‘cannot turn upon the presence or absence of a physical intrusion into any given enclosure.’”

Additionally, the majority in Kyllo, after acknowledging that the

181. See discussion infra Part III.D.
182. See discussion supra Part I.D.
184. 277 U.S. 438 (1928); see discussion supra Part I.A.1.
185. See Katz, 389 U.S. 347, 353 (1967) (“We conclude that the underpinnings of Olmstead and Goldman have been so eroded by our subsequent decisions that the ‘trespass’ doctrine there enunciated can no longer be regarded as controlling.”).
186. Justice Scalia has previously been criticized issuing a majority opinion that largely ignored the broad principles of Katz, relying instead on cases and principles that pre-dated Katz. See, e.g., California v. Hodari D., 499 U.S. 621, 637 n.11 (1991) (Stevens, J., dissenting) (“It is noteworthy that the Court has relied so heavily on cases and commentary that antedated Katz and Terry [v. Ohio].”)
188. See Kyllo v. United States, 533 U.S. 27 (2001). Justice Scalia authored the majority opinion in Kyllo. Id. at 29.
early history of the Court’s Fourth Amendment decisions “was tied to common-law trespass”189 (citing the decisions in Goldman190 and Olmstead), observed: “We have since decoupled violation of a person’s Fourth Amendment rights from trespassory violation of his property.”191 Kyllo relied for this proposition on Rakas v. Illinois.192 Rakas involved the search of a car and the seizure of items within the car, which were later introduced into evidence against the passenger.193 The issue presented was whether the passenger, who had no ownership or possessory interest in the car searched or the items seized, could challenge the search and seizure. Rakas is generally cited for its reformation of the concept of the Fourth Amendment’s so-called standing requirement,194 a concept first expressed in Jones v. United States.195 In its discussion of this issue, the Rakas Court explained:

We think that Jones on its facts merely stands for the unremarkable proposition that a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable governmental intrusion into that place. In defining the scope of that interest, we adhere to the view expressed in Jones and echoed in later cases that arcane distinctions developed in property and tort law between guests, licensees, invitees, and the like, ought not to control.196

189. Id. at 31–32.
193. See id.
194. See id. The Rakas Court held:

[The question is whether the challenged search or seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it. That inquiry in turn requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect. We are under no illusion that by dispensing with the rubric of standing used in Jones we have rendered any simpler the determination of whether the proponent of a motion to suppress is entitled to contest the legality of a search and seizure. But by frankly recognizing that this aspect of the analysis belongs more properly under the heading of substantive Fourth Amendment doctrine than under the heading of standing, we think the decision of this issue will rest on sounder logical footing.]

Id. at 140.
195. Jones v. United States, 362 U.S. 257, 261 (1960), overruled by United States v. Salvucci, 448 U.S. 83 (1980). In Jones, the Court held that the defendant could raise a Fourth Amendment challenge to a search conducted if they “have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.” Id.
196. Rakas, 439 U.S. at 142–43 (citations omitted).
The *Rakas* Court continued, describing the reach and resonance of *Katz*:

*Katz* provides guidance in defining the scope of the interest protected by the Fourth Amendment. In the course of repudiating the doctrine derived from *Olmstead*... and *Goldman*, that if police officers had not been guilty of a common-law trespass they were not prohibited by the Fourth Amendment from eavesdropping, the Court in *Katz* held that capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place. Viewed in this manner, the holding in *Jones* can best be explained by the fact that Jones had a legitimate expectation of privacy in the premises he was using and therefore could claim the protection of the Fourth Amendment with respect to a governmental invasion of those premises, even though his “interest” in those premises might not have been a recognized property interest at common law.\(^\text{197}\)

Additional examples of cases which expose the fallacy of Justice Scalia’s premise can be found in *Oliver v. United States*,\(^\text{198}\) in which the Court held that the search of an open field did not violate the Fourth Amendment, even though law enforcement committed a trespass upon the defendant’s property, and the defendant had made every effort to conceal the activity taking place there. In finding proof of a trespass insufficient, the Court noted:

Nor is the government’s intrusion upon an open field a “search” in the constitutional sense. The existence of a property right is but one element in determining whether the expectation of privacy is legitimate. The premise that property interests control the right of the Government to search and seize has been discredited.\(^\text{199}\)

And, finally, the Court in *Oliver* observed: “[E]ven a property interest in premises may not be sufficient to establish a legitimate expectation of privacy with regard to particular items located on the premises or activity conducted thereon.”\(^\text{200}\) By characterizing *Katz* as a decision that “deviated” from an otherwise uniform property-based approach, Justice Scalia undervalues the primacy of *Katz*’s “reasonable expectation of privacy” test and overvalues the minor role enjoyed by property concepts and subsumed within the *Katz* test. In doing so, Justice Scalia quickly dispatches the Government’s central argument: that under *Katz*, no search occurred in this

\(^{197}\) Id. at 143.
\(^{199}\) Id. at 183.
\(^{200}\) Id. (quoting *Rakas*, 439 U.S. at 143 n.12).
case, because Jones did not have a reasonable expectation of privacy in the undercarriage of the vehicle where the device was installed or in the movements of the vehicle on the public roads, which were "knowingly exposed to the public."201 Within this analysis, Justice Scalia begins his formulation of a test, intended to stand alongside Katz, for determining whether the actions of the government constitute a search under the Fourth Amendment.

In reaching this conclusion, Justice Scalia reasserts that Katz was never intended to displace the role of trespass or property law in Fourth Amendment analysis. Instead, Scalia posits, Katz merely provided an alternative calculus for analyzing potential Fourth Amendment violations in the absence of a trespass. Justice Scalia observes:

As Justice Brennan explained in his concurrence in Knotts, Katz did not erode the principle "that, when the Government does engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the fourth Amendment." We have embodied that preservation of past rights in our very definition of "reasonable expectation of privacy" which we have said to be an expectation "that has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." Katz did not narrow the Fourth Amendment's scope.202

Scalia is correct in the proposition that consideration of property concepts remains relevant, and he cites, for example, Justice Rehnquist's majority opinion in Rakas. Justice Scalia and Justice Sotomayor both rely upon this language in their opinions in Jones: "Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society."203

But while citing this excerpt from Rakas, Justice Scalia fails to acknowledge that the Rakas Court was explaining the dual prongs of the Katz legitimate-expectation-of-privacy test. The full quote provides the proper context and, once again, undercuts the fundamental proposition of Justice Scalia's opinion in Jones:

[A] "legitimate" expectation of privacy by definition means more than a subjective of not being discovered. A burglar plying his trade in a summer cabin during the off season may have a thoroughly justified

203. Rakas, 439 U.S. at 143 n.12; see Jones, 132 S. Ct. at 951.
subjective expectation of privacy, but it is not one which the law recognizes as "legitimate." His presence, in the words of Jones, is "wrongful"; his expectation is not "one that society is prepared to recognize as 'reasonable.'" And it would, of course, be merely tautological to fall back on the notion that those expectations of privacy which are legitimate depend primarily on cases deciding exclusionary-rule issues in criminal cases. Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others, and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude. Expectations of privacy protected by the Fourth Amendment, of course, need not be based on a common-law interest in real or personal property, or on the invasion of such an interest. These ideas were rejected both in Jones and Katz. But by focusing on legitimate expectations of privacy in Fourth Amendment jurisprudence, the Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by that Amendment.204

As Katz held, and Rakas reaffirmed, in assessing whether the expectation is reasonable, one must look beyond the text of the Fourth Amendment to sources that help inform our understandings of what society has traditionally accepted as an objectively reasonable expectation of privacy. This is a steadfast position from which the Court has not strayed for the last fifty years. But it is a far cry indeed from Justice Scalia’s contention that trespass or other property concepts should apply as a stand-alone test.

However, Justice Scalia’s treatment of Katz and its reasonable-expectation-of-privacy formula should come as no surprise to those who closely follow his opinions in this area. Justice Scalia has, on multiple occasions, assailed the Katz formula as, among other things, "circular,"205 "fuzzy,"206 "self-indulgent,"207 and "notoriously unhelpful."208 It may well

204. Rakas, 439 U.S. at 143 n.12 (citations omitted).
207. Id. at 97.
208. Id. Justice Scalia explains that, in applying Katz, the Court "leaps to apply the fuzzy standard of 'legitimate expectation of privacy'—a consideration that is often relevant to whether a search or seizure covered by the Fourth Amendment is 'unreasonable' to the threshold question whether a search or seizure covered by the Fourth Amendment has occurred." Id. at 91–92. This is but a fragment of Justice Scalia’s misgivings with the Court’s Fourth Amendment jurisprudence. Justice Scalia is concerned more broadly with the conflation of the Fourth Amendment’s "unreasonable searches and seizures" clause and the warrants clause, which (wrongly he contends) has led the Court to conclude that a warrantless search is presumptively unreasonable and
be that the opinion in Jones represents a first step in formalizing an
approach that Justice Scalia has advanced in his opinions for more than twen-
ty years: "In my view, the path out of this confusion [of Fourth Amend-
ment jurisprudence] should be sought by returning to the first principle that
the 'reasonableness' requirement of the Fourth Amendment affords the pro-
tection that the common law afforded."\(^{209}\)

And again, in a later concurring opinion, Justice Scalia writes:

I join the opinion of the Court because I believe it accurately applies
our recent case law . . . . I write separately to express my view that that
case law—like the submissions of the parties in this case—gives short
shift to the text of the Fourth Amendment, and to the well and long
understood meaning of that text. Specifically, it leaps to apply the
fuzzy standard of "legitimate expectation of privacy"—a consideration
that is often relevant to whether a search or seizure covered by the
Fourth Amendment is "unreasonable" to the threshold question wheth-
er a search or seizure covered by the Fourth Amendment has occurred.
If that last question is addressed first and analyzed under the text of the
Constitution as traditionally understood, the present case is not re-
metly difficult.\(^{210}\)

It is in this fashion that Justice Scalia considers the Katz test a "back-

Scalia believes that the two clauses of the Fourth Amendment are separate and independent,
and that the Fourth Amendment was never intended to create a general warrant requirement for
all searches. Id. at 583–84. Rather, he posits, once it is determined that a Fourth Amendment
search has occurred, the next determination should simply be whether that search was "reason-
able." Id. Because of the legal presumption of unreasonableness that attaches to a warrantless
search, the Court has developed a number of exceptions to the warrant requirement, which con-
tinues to grow and, in Justice Scalia's mind, has swallowed up the rule. Commentators have also
noted the growing list of "exceptions" that have overtaken the warrant requirement. See, e.g.,
Craig M. Bradley, Two Models of the Fourth Amendment, 83 MICH. L. REV. 1468, 1473–74
Scalia has thus observed that the Court has often found some actions of law enforcement not to be
"a 'search' at all—perhaps in order to preserve somewhat more intact our doctrine that war-
nantless searches are presumptively unconstitutional." Kyllo, 533 U.S. at 32; see also Acevedo,
500 U.S. at 583.

\(^{209}\) Acevedo, 500 U.S. at 583 (1991) (Scalia, J., concurring); see also, e.g., Arizona v. Gant,
556 U.S. 332, 351 (2009) (Scalia, J., concurring) ("To determine what is an 'unreasonable' search
within the meaning of the Fourth Amendment, we look first to the historical practices the Framers
sought to preserve; if those provide inadequate guidance, we apply traditional standards of rea-
'against unreasonable searches and seizures' of (among other things) the person. In determining
whether a search or seizure is unreasonable, we begin with history. We look to the statutes and
common law of the founding era to determine the norms that the Fourth Amendment was meant

\(^{210}\) Carter, 525 U.S. at 91–92 (Scalia, J., concurring).
ward” formula. For Scalia, the first question to be answered is whether or not a Fourth Amendment search occurred at all. This, he asserts, cannot be answered by application of the Katz test. Rather, such a threshold question should be answered, if possible, by application of the actions of the police to the “well and long understood meaning” of the text of the Fourth Amendment.

1. Turning An Old Test Into A New Test

Justice Scalia takes this kernel of truth—that concepts of property law still play some role in Fourth Amendment jurisprudence—and proceeds to construct a “new” test that is purely property-rights driven. In his ensuing discussion, Scalia abandons the previously-established and limited role of common-law property concepts: “[A]s we have discussed, the Katz reasonable-expectation-of-privacy test has been added to, not substituted for, the common-law trespassory test.”

This is a turning point of Justice Scalia’s majority opinion, and the starting point for the emergence, or perhaps re-emergence, of a “trespass-first” test. What Scalia had “discussed” was simply a recognition that Katz did not abandon all property-related concepts in Fourth Amendment analysis. And indeed, there remains a recognized place for such concepts in the “legitimation” of a reasonable expectation of privacy; that is, in deciding whether society is willing to accept the expectation of privacy as an objectively legitimate one, “reference to concepts of real or personal property law” is a proper consideration. Justice Scalia, however, contemplates a much more prominent role for his common-law trespassory test.

As we will see later in our discussion, Justice Alito, in his concurring opinion, raises the “particularly vexing problems” in applying Scalia’s trespassory test to cases such as those involving electronic monitoring, but which do not involve a physical or trespassory violation. Scalia responds to this concern:

The concurrence faults our [trespassory test] approach for “present[ing] particularly vexing problems” in cases that do not involve physical contact, such as those that involve the transmission of electronic signals. We entirely fail to understand that point. For unlike the concurrence, which would make Katz the exclusive test, we do not make trespass the exclusive test. Situations involving merely the transmission of electronic signals without trespass would remain sub-

211. Jones, 132 S. Ct. at 952.
ject to Katz analysis.\textsuperscript{213}

Instead of simply relying on property concepts as a factor in determining whether society is willing to recognize the expectation of privacy as objectively reasonable, Scalia considers the trespassory violation in Jones as an independent test in establishing the existence of a Fourth Amendment search. First, Scalia notes the Government’s contention that no search occurred because Jones had no reasonable expectation of privacy in the undercarriage of the vehicle or in the public locations or public movements of the vehicle. Scalia quickly dispatches this contention: “[W]e need not address the Government’s contentions because Jones’s Fourth Amendment rights do not rise or fall with the Katz formulation. At bottom, we must ‘assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.’”\textsuperscript{214}

In this manner, Scalia fashions a trespassory test intended to stand on equal footing with Katz’s reasonable-expectation-of-privacy test. But there’s more: inherent in this analysis is the proposition that the trespassory test should be applied before one resorts to the Katz formulation. Only if the actions of the police do not amount to a Fourth Amendment “search” under the trespassory test would we need to apply the Katz test.\textsuperscript{215}

2. The Construct of the Trespass-First Test

Justice Scalia thus uses his majority opinion in Jones to construct a “trespass-first test.” This threshold test would be applied without regard to, and before resort to, the Katz formulation and would involve answering the following four questions:

1. \textit{Did the government commit a trespass, or some other violation of property law recognized in 1791?}

After Justice Scalia describes the actions of the police in Jones, he observes: “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.”\textsuperscript{216}

\textsuperscript{213} Jones, 132 S. Ct. at 953.
\textsuperscript{214} Id. at 951 (quoting Kyllo, 533 U.S. at 34).
\textsuperscript{215} Justice Scalia does not explain why he believes the Court would resort to the Katz test after application of the trespassory test results in a finding of no Fourth Amendment search. Moreover, Justice Scalia’s suggestion of such an application of Katz cannot be reconciled with his position that the Katz test is relevant only in assessing whether a search was “reasonable,” not in determining whether a search occurred.
\textsuperscript{216} Jones, 132 S. Ct. at 949; see also Minnesota v. Dickerson, 508 U.S. 366, 380–81 (1993)
2. Was it a meaningful interference with an individual’s possessory interests in that property more than a technical trespass?

Justice Scalia points out that “our theory is not that the Fourth Amendment is concerned with ‘any technical trespass that led to the gathering of evidence.’”

3. Was it committed upon a “person, house, paper or effect?”

Justice Scalia notes: “The Fourth Amendment protects against trespassory searches only with regard to those items (‘persons, houses, papers, and effects’) that it enumerates.” In restricting this test only to items expressly enumerated in the text of the Fourth Amendment, Scalia distinguished cases such as *Oliver v. United States,* which involved law enforcement’s intrusion into an open field to make observations and gather information. Although the Government’s actions would have been considered a trespass at common law, Justice Scalia observed that “an open field, unlike the curtilage of a home, is not one of those protected areas enumerated in the Fourth Amendment.” Scalia concluded: “The trespass that occurred in *Oliver* may properly be understood as a ‘search,’ but not one ‘in the constitutional sense.’”

4. Was it done in an attempt to find something or to obtain information?

In support of this element, Justice Scalia observes:

The concurrence notes that post-*Katz* we have explained that “an actual trespass is neither necessary nor sufficient to establish a constitutional violation.” That is undoubtedly true, and undoubtedly irrelevant. *Karo* was considering whether a seizure occurred, and as the concurrence explains, a seizure of property occurs, not when there is a trespass, but “when there is some meaningful interference with an individual’s possessory interests in that property.” Likewise with a search. Trespass alone does not qualify, but there must be conjoined

(Scalia, J., concurring). Justice Scalia noted:

*When the Fourth Amendment provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated” (emphasis added), it is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted. The purpose of the provision, in other words, is to preserve that degree of respect for the privacy of persons and the inviolability of their property that existed when the provision was adopted—even if a later, less virtuous age should become accustomed to considering all sorts of intrusion “reasonable.”*

Dickerson, 508 U.S. at 380–81 (citations omitted).

217. *Jones,* 132 S. Ct. at 953 n.8.
218. *Id.*
220. *Jones,* 132 S. Ct. at 953 (citation omitted).
221. *Id.* at 953 n.8 (quoting *Oliver v. United States,* 466 U.S. 170, 183 (1984)).
with that what was present here: an attempt to find something or obtain information.\footnote{222}{Id. at 951 n.5.}

If the answer to each of the above questions is “yes,” then under Scalia’s test there has been a “search” within the meaning of the Fourth Amendment. If the answer to any of these questions is “no,” it does not necessarily mean that no Fourth Amendment search has occurred; it merely means that it is not a Fourth Amendment search under the “trespass-first” test. Under these circumstances, one would then apply the \textit{Katz} reasonable-expectation-of-privacy test to determine whether a Fourth Amendment search occurred. The idea that the trespassory test must come first would necessarily flow from the suggestion offered by Justice Scalia as to how the \textit{Katz} test and the trespassory test could co-exist: “[U]nlike the concurrence, which would make \textit{Katz} the exclusive test, we do not make trespass the exclusive test. Situations involving merely the transmission of electronic signals without trespass would remain subject to \textit{Katz} analysis.”\footnote{223}{Id. at 951 n.5.}

It would make little sense, under Justice Scalia’s paradigm, to apply the \textit{Katz} test before the trespassory test. Only if one first concludes that no search occurred under the trespassory test would we resort to the \textit{Katz} analysis.\footnote{224}{\textit{Kyllo}, 533 U.S. at 32.} Perhaps now we understand why, in granting review, the Supreme Court added the second “Question Presented.”\footnote{225}{Id. at 953.} Moreover, we now understand why Justice Scalia merged the two questions presented (installation and use), rather than subjecting each to separate consideration and analysis. By applying the trespass-first test, and combining the installation of the GPS (trespass upon an effect) with the use of the GPS (an attempt to find something or obtain information), the result is a Fourth Amendment search under this trespass-first test.

This renders unnecessary any resort to a \textit{Katz} analysis. It also avoids the more difficult question of whether, absent a trespass, there is a reasonable expectation of privacy from long-term GPS monitoring of a vehicle’s movements upon the public roads (the question left open in \textit{Knotts}). However, in criticizing the view that \textit{Katz} should remain the exclusive test, Justice Scalia may be telegraphing his position on this still-unresolved issue:

\begin{itemize}
  \item \textit{Kyllo}, 533 U.S. at 32. Indeed, this conclusion is consistent with Justice Scalia’s long-running disdain for the \textit{Katz} test, which he has described the Court as applying “somewhat in reverse.” \textit{Id.} Justice Scalia believes that the \textit{Katz} test cannot be applied to determine whether a search has occurred, but simply whether, given the existence of a search, it was reasonable under the Fourth Amendment. \textit{See} discussion \textit{supra} note 208 and accompanying text.
  \item \textit{See} \textit{supra} text accompanying note 171.
\end{itemize}
In fact, it is the concurrence’s insistence on the exclusivity of the *Katz* test that needlessly leads us into “particularly vexing problems” in the present case. This Court has to date not deviated from the understanding that mere visual observation does not constitute a search. We accordingly held in *Knotts* that “[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.” Thus, even assuming that the concurrence is correct to say that “[t]raditional surveillance” of Jones for a 4-week period “would have required a large team of agents, multiple vehicles, and perhaps aerial assistance,” our cases suggest that such visual observation is constitutionally permissible. *It may be that achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question.*

We do not know whether Justice Scalia would in fact agree that *Katz* compels a conclusion that the police action in *Jones*, without an accompanying trespass, violates the Fourth Amendment, or whether perhaps Justice Scalia included this language in an effort to court Justice Sotomayor’s vote in forming a majority for his opinion.


It would be logical at this point to discuss Justice Sotomayor’s concurrence, as her vote created the majority for Justice Scalia’s opinion. However, her concurrence and her reasons for joining the majority opinion will be better understood if we first discuss Justice Alito’s opinion.

Justice Alito concurred in judgment only and was joined by Justices Ginsburg, Breyer, and Kagan. The disagreement between Justices Alito and Scalia is not over the “what,” but the “how.” Both Justices and, in fact, all nine justices ultimately concluded that what occurred in *Jones* was a Fourth Amendment search. But how Justice Scalia and Justice Alito each reached this conclusion is markedly different, and it is this difference in approach between Scalia’s opinion and Alito’s opinion which helps shed light on Justice Sotomayor’s decision to join (and thereby create) the Scalia majority.

Justice Alito begins by lamenting that Scalia and the *Jones* majority restores common-law property concepts long ago jettisoned from this Court’s Fourth Amendment analysis:

This case requires us to apply the Fourth Amendment’s prohibition of unreasonable searches and seizures to a 21st-century surveillance tech-

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nique, the use of a Global Positioning System (GPS) device to monitor a vehicle’s movements for an extended period of time. Ironically, the Court has chosen to decide this case based on 18th-century tort law. By attaching a small GPS device to the underside of the vehicle that respondent drove, the law enforcement officers in this case engaged in conduct that might have provided grounds in 1791 for a suit for trespass to chattels. And for this reason, the Court concludes, the installation and use of the GPS device constituted a search.\(^{227}\)

For Justice Alito, there is no basis to resurrect the ghosts of *Olmstead* and *Goldman*, which relied upon concepts long ago abandoned and expressly overruled by *Katz* forty-five years ago. Instead of focusing, as the majority did, on the trespass committed through the installation of the device, Alito’s analysis focuses on whether Jones’s “reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove.”\(^{228}\)

Framed in this way, it is clear that Alito believes: (1) this case is easily decided by simple resort to the tried-and-true *Katz* formula; and (2) there is no need to consider the installation of the GPS device (and the corollary trespassory test applied by the majority). Justice Alito makes this abundantly clear in the final paragraph of his concurring opinion: “I conclude that the *lengthy monitoring that occurred in this case constituted a search under the Fourth Amendment*. I therefore agree with the majority that the decision of the Court of Appeals must be affirmed.”\(^{229}\)

Justice Alito spends most of his opinion addressing Scalia’s new trespassory test, a test that serves as the reason for Alito’s description of the majority opinion as “unwise,” “highly artificial,” “straining the language of the Fourth Amendment,” and “with little if any support in current Fourth Amendment case law.”\(^{230}\) First, Justice Alito takes Justice Scalia to task for his proposed view of property law concepts as they existed at the time of the adoption of the Fourth Amendment:

The Court’s theory seems to be that the concept of a search, as originally understood, comprehended any technical trespass that led to the gathering of evidence, but we know that this is incorrect. At common law, any unauthorized intrusion on private property was actionable, but a trespass on open fields, as opposed to the “curtilage” of a home, does not fall within the scope of the Fourth Amendment because private property outside the curtilage is not part of a “hous[e]” within the

\(^{227}\) *Id.* at 957–58 (Alito, J., concurring) (footnotes omitted).

\(^{228}\) *Id.* at 958.

\(^{229}\) *Id.* at 964 (emphasis added).

\(^{230}\) *Id.*
meaning of the Fourth Amendment.\textsuperscript{231}

Next, Justice Alito exposes the primary weakness of the majority opinion: the idea that an independent, trespass-based test survives \textit{Katz}. After reviewing the early history of applying property-based concepts in Fourth Amendment analysis, Justice Alito observed that \textit{Katz} "finally did away with the old approach, holding that a trespass was not required for a Fourth Amendment violation."\textsuperscript{232} Alito then summarizes the primary post-\textit{Katz} cases that reinforced the \textit{Katz} analysis, and especially the conclusion in \textit{Karo} that "an actual trespass is neither necessary \textit{nor sufficient} to establish a constitutional violation."\textsuperscript{233} And finally, Justice Alito discounts the two post-\textit{Katz} cases relied upon by the majority for the proposition that the existence of a technical trespass can alone establish a Fourth Amendment search.

The first case, \textit{Soldal v. Cook County},\textsuperscript{234} is, as Justice Alito briefly notes, inapposite in its holding. \textit{Soldal} involved the seizure and towing of a trailer home from a trailer park during the pendency of an eviction proceeding. The removal of the trailer was accomplished with the aid of law enforcement and without the owner’s consent or a warrant. The homeowner brought a civil action against the Cook County Sheriff’s Office pursuant to the Federal Civil Rights Act.\textsuperscript{235} The trial court dismissed the action, and the court of appeals affirmed. The Supreme Court granted review, and the question presented was "whether the seizure and removal of the Soldals’ trailer home implicated their Fourth Amendment rights."\textsuperscript{236}

As Justice Alito correctly noted, the opinion in \textit{Soldal} involved the question of whether a seizure, not a search, occurred. By contrast, the issue determined by the majority in \textit{Jones} is whether a search, not a seizure, occurred. However, Justice Scalia cited \textit{Soldal} not for its strict holding, but for its observations that \textit{Katz} represented a "shift in emphasis from property to privacy" but had not "snuffed out the previously recognized protection for property under the Fourth Amendment."\textsuperscript{237}

The second post-\textit{Katz} case, \textit{Alderman v. United States},\textsuperscript{238} was likewise cited by Scalia for the limited purpose of bolstering his argument that

\textsuperscript{231} \textit{Id.} at 958–59 (citation omitted).
\textsuperscript{232} \textit{Jones}, 132 S. Ct. at 959.
\textsuperscript{233} \textit{Id.} at 960 (quoting United States v. Karo, 468 U.S. 705, 713 (1984)).
\textsuperscript{234} 506 U.S. 56 (1992).
\textsuperscript{236} \textit{Soldal}, 506 U.S. at 60.
\textsuperscript{237} \textit{Id.} at 64.
\textsuperscript{238} 394 U.S. 165 (1969).
property concepts remain relevant under the *Katz* test. In *Alderman*, the Court said: “Nor do we believe that *Katz*, by holding that the Fourth Amendment protects persons and their private conversations, was intended to withdraw any of the protection which the Amendment extends to the home . . . .”

Again, this is a relatively unremarkable proposition, but simply another part of the tapestry woven by Justice Scalia in an effort to support his trespass-first test. But as Justice Alito correctly notes, *Alderman* has since been cited by the Court as reaffirming that “the Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by that Amendment.”

The opinions of Justices Alito and Scalia certainly disagree on this point: Justice Alito contends that common law property concepts have, at best, limited relevance in the *Katz* analysis, but they certainly do not coalesce into a test independent of *Katz*. As we have discussed earlier, Justice Scalia not only believes in the continued viability of such concepts, but also asserts that such considerations are separate and distinct from *Katz*, with a trespass test preceding the *Katz* test. Yet, the cases cited by Scalia in support of his trespass-first test do not withstand careful scrutiny. As we previously addressed, the post-*Katz* cases he cites in support of his proposition indicate clearly that *Katz*’s reasonable-expectation-of-privacy test incorporates property concepts simply as one factor in determining whether the claimed expectation of privacy is one that society is willing to recognize as reasonable or legitimate. In expressly overruling *Olmstead* and *Goldman*, *Katz* made clear that considerations of property notions are relevant only in determining the objective prong; that is, whether the expectation of privacy is “one that society is prepared to recognize as reasonable.” Scalia’s assertion (joined in by Sotomayor) that the “*Katz* reasonable-expectation-of-privacy test has been added to, not substituted

239. *Id.* at 180.
241. *Jones*, 132 S. Ct. at 958–60. In fact, one of Justice Sotomayor’s stated reasons for joining the majority (and not creating a majority with Justice Alito’s opinion) was her conclusion that “Justice Alito’s approach, which discounts altogether the constitutional relevance of the Government’s physical intrusion on Jones’ jeep, erodes that longstanding protection for privacy expectations inherent in terms of property that people possess or control.” *Id.* at 955; see discussion infra Part III.E.
244. *See Rakas*, 439 U.S. at 144 n.12.
for, the common-law trespassory test,\footnote{Jones, 132 S. Ct. at 951; cf. id. at 955 (Sotomayor, J., concurring) ("As the majority’s opinion makes clear, however, Katz’s reasonable-expectation-of-privacy test augmented, but did not displace or diminish the common-law trespassary test that preceded it.")} appears to be unsupported by Katz or its progeny. Most importantly, neither Katz nor any case since Katz applied or approved the trespass-first test fashioned in Jones.

Given what appears to be well-settled law in this area, it is difficult to discern why a trespass-based test would be embraced by a majority of the Court. Perhaps more puzzling is that this test is introduced in a case in which all nine justices agreed that a search occurred, and in which application of Katz would appear sufficient to reach this narrow but unanimous conclusion. Justice Alito sought to address the broader issue presented in Jones, and in this regard notes that the majority largely disregards what is really important (the use of a GPS for the purpose of long-term tracking) and instead attaches great significance to something that most would view as relatively minor (attaching to the bottom of a car a small, light object that does not interfere in any way with the car’s operation).\footnote{Jones, 132 S. Ct. at 961 (Alito, J., concurring).}

Of course, had Justice Scalia sought to resolve these issues in his opinion, it is evident that the decision would not have been a “unanimous” one, and it is less than clear whether Scalia would have been in the majority.\footnote{See supra discussion accompanying note 204 (surmising it is quite likely that the narrow nature of the opinion written by Justice Scalia proved the only way he could reach this result and form a majority that included Justice Sotomayor). Justice Sotomayor joined in the judgment, but wrote separately to address the broader issues. Jones, 132 S. Ct. at 954–58 (Sotomayor, J., concurring).}

E. JUSTICE SOTOMAYOR CONCURRING

Justice Sotomayor, although concurring with Justice Scalia and providing the critical fifth vote for the Jones majority, gives relatively short shrift to explaining her reason for joining Justice Scalia’s opinion. She spends the rest of her concurrence explaining why she agrees and disagrees with portions of the opinions of both Justice Scalia and Justice Alito. A review of her concurrence reinforces why the majority opinion was necessarily narrow, limiting itself primarily to the trespassory nature of the installation and avoiding the larger issue of the use of the GPS and the long-term nature of the electronic monitoring. It appears that, in crafting the majority opinion in this manner, Justice Scalia was able to procure Justice Sotomayor’s vote and, with it, a majority.

\footnote{Jones, 132 S. Ct. at 951; cf. id. at 955 (Sotomayor, J., concurring) ("As the majority’s opinion makes clear, however, Katz’s reasonable-expectation-of-privacy test augmented, but did not displace or diminish the common-law trespassary test that preceded it.")}

\footnote{Jones, 132 S. Ct. at 961 (Alito, J., concurring).}

\footnote{See supra discussion accompanying note 204 (surmising it is quite likely that the narrow nature of the opinion written by Justice Scalia proved the only way he could reach this result and form a majority that included Justice Sotomayor). Justice Sotomayor joined in the judgment, but wrote separately to address the broader issues. Jones, 132 S. Ct. at 954–58 (Sotomayor, J., concurring).}
Justice Sotomayor gave her avowed reason for joining in the majority opinion of Justice Scalia: "I join the Court's opinion because I agree that a search within the meaning of the Fourth Amendment occurs, at a minimum, '[w]here, as here, the Government obtains information by physically intruding on a constitutionally protected area."" Citing Silverman, Justice Sotomayor concludes that the Government's installation and use of the GPS "'usurped Jones' [sic] property for the purpose of conducting surveillance on him, thereby invading privacy interests long afforded, and undoubtedly entitled to, Fourth Amendment protection.'" Thus, Sotomayor's primary rationale for joining Justice Scalia appears to be her agreement that, contrary to Justice Alito's assertion, property concepts continue to be viable in the post-Katz world. Moreover, she agrees with Justice Scalia that "'Katz's reasonable-expectation-of-privacy test augmented, but did not displace or diminish the common-law trespassory test that preceded it.'" It is here that Justice Sotomayor has a fundamental disagreement with Justice Alito's approach which, in her estimation, "'discounts altogether the constitutional relevance of the Government's physical intrusion on Jones' [sic] Jeep, [and] erodes that longstanding protection for privacy expectations inherent in items of property that people possess or control.'"253

However, in fairness to Justice Alito, he never posits that Katz eliminated altogether any consideration of property concepts. He merely reiterates that which the Court has stated on any number of occasions in its explication of the Katz formula: Considerations of property concepts are relevant in determining whether an expectation of privacy is objectively reasonable. But the existence of a trespass cannot, standing alone, constitute a violation of the Fourth Amendment. Therefore, Justice Alito concluded, the trespassory test advanced by Justice Scalia is unnecessary and unsupportable under Katz and its progeny.

Nevertheless, Justice Sotomayor sees Justice Alito's concurrence as an abandonment of all property concepts. She chooses, therefore, to embrace Justice Scalia's opinion and the test it espouses. Perhaps more telling, however, is that Justice Sotomayor views the trespassory test as a floor, not a ceiling; it stands as an "irreducible constitutional minimum:

252. Id. at 955.
253. Id.
When the Government physically invades personal property to gather information a search occurs." For Justice Sotomayor, the trespass-first test is merely one of many ways that she could conclude the actions of the police in Jones constituted a search. For Justice Scalia and perhaps other members of the majority, the trespass-first test is perhaps the only way that they could conclude the actions of the police in Jones constituted a search.

For Justice Sotomayor, the trespassory test serves as a baseline of Fourth Amendment analysis. While that test provides all that is necessary for her to conclude a Fourth Amendment search occurred here, it is merely the starting point for her concurrence. The balance of Justice Sotomayor’s opinion wades into the murkier waters avoided by the majority’s opinion. First, she takes on the question of long-term GPS monitoring accomplished without a physical trespass. It appears that all nine justices agree that this type of surveillance would be subject to the Katz reasonable-expectation-of-privacy test. However, the majority does not actually reach the issue of whether long-term GPS monitoring, absent a trespass, would pass muster under Katz (one of the issues avoided by the majority’s narrow holding). In this regard, Sotomayor agrees with Justice Alito’s observation that “longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.”

But Justice Sotomayor did not stop at long-term GPS monitoring. She addresses short-term GPS monitoring, as well. In doing so, she is the only justice to affirmatively embrace the mosaic theory which, as we discussed earlier, played a central role in the Court of Appeals’ opinion in Maynard:

In cases involving even short-term monitoring, some unique attributes of GPS surveillance relevant to the Katz analysis will require particular attention. GPS monitoring generates a precise, comprehensive record of a person’s public movements that reflects a wealth of detail about her familial political, professional, religious, and sexual associations. The Government can store such records and efficiently mine them for information years into the future. 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.”

Justice Sotomayor concludes that GPS monitoring—of any length—may well violate a reasonable expectation of privacy and constitute an un-

254. Id.
255. Id. (quoting Jones, 132 S. Ct. at 964) (Alito, J., concurring).
256. Id. at 955–56 (citations omitted) (quoting Illinois v. Lidster, 540 U.S. 419, 426 (2004)).
reasonable search under the Fourth Amendment.\textsuperscript{257} Justice Sotomayor agrees with another aspect of the Maynard opinion: the mere fact that the same information could theoretically be obtained by traditional surveillance methods is not dispositive of the Katz analysis.\textsuperscript{258} In this regard, Justice Sotomayor is troubled by the majority opinion’s apparent position that had police acquired the same information from traditional surveillance over the same period of time, no search would be found. The majority opinion observed:

This Court has to date not deviated from the understanding that mere visual observation does not constitute a search. We accordingly held in Knotts that “[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.” Thus even assuming that the concurrence is correct to say that “[t]raditional surveillance” of Jones for a 4-week period “would have required a large team of agents, multiple vehicles, and perhaps aerial assistance,” our cases suggest that such visual observation is constitutionally permissible. It may be that achieving the same result through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy, but the present case does not require us to answer that question.\textsuperscript{259}

Justice Sotomayor would not appear to be in agreement with this supposition:

I do not regard as dispositive the fact that the Government might obtain the fruits of GPS monitoring through lawful conventional surveillance techniques. See Kyllo, 533 U.S. at 35 n.2 (leaving open the possibility that duplicating traditional surveillance “through electronic means, without an accompanying trespass, is an unconstitutional invasion of privacy”). I would also consider the appropriateness of entrusting to the Executive, in the absence of any oversight from a coordinate branch, a tool so amenable to misuse, especially in light of the Fourth Amendment’s goal to curb arbitrary exercises of police power to and prevent “a too permeating police surveillance.”\textsuperscript{260}

These larger concerns may well underscore the motivation for Justice Sotomayor’s concurrence: her suggestion that, ultimately, it “may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties.”\textsuperscript{261}

\textsuperscript{257} Id.
\textsuperscript{258} Id. at 956; see Maynard, 615 F.3d at 565–66.
\textsuperscript{259} Jones, 132 S. Ct. at 953–54 (emphasis added) (citations omitted).
\textsuperscript{260} Id. at 956 (citations omitted).
\textsuperscript{261} Id. at 957. This suggestion calls into question the holdings in cases such as Smith v. Maryland, 442 U.S. 735 (1979), and United States v. Miller, 425 U.S. 435 (1976), and is beyond
Such a proposition, she asserts, can no longer be sustained given the quality and quantity of electronic information we convey in the course of our daily lives. She concludes:

I for one doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited in the last week, month, or year. But whatever the societal expectations, they can attain constitutionally protected status only if our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite to privacy. I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection.262

And so for Justice Sotomayor, the finding of a search in Jones was a relatively easy call through application of Justice Scalia’s trespass-first test. It is the larger, and more universal issues of non-trespassory surveillance, and particularly privacy protection of information voluntarily disclosed to third parties, that cause greater concern for Justice Sotomayor. There can be little doubt that the Court will eventually be called upon to answer many of the questions left unresolved in Jones.

IV: CONCLUSION

Although strictly speaking the decision in Jones is unanimous, such a characterization is misleading. The only aspect of unanimity is the ultimate conclusion that the combined actions of law enforcement in installing and using the GPS device for long-term monitoring constituted a Fourth Amendment search. There is much more contained within the majority and concurring opinions that give us food for thought (or perhaps tea leaves for reading) about the larger issues left unresolved.

Jones, like its predecessor Knotts, is as significant for what it did not decide as for what it did decide. Remember that in Knotts the defendant did not challenge the installation of the beeper itself. Rather, he challenged the surveillance data that was acquired as a result of the use of the beeper. Thus, the Knotts Court had no reason to address whether the installation of the beeper was itself (or in combination with its use) a Fourth Amendment event.

By addressing and focusing on the installation of the GPS device (rather than its use), the majority in Jones was able to easily distinguish Knotts, while avoiding the more significant issue of whether the long-term warrantless use of GPS to remotely monitor a vehicle’s public movements
violates the Fourth Amendment.263 This also allowed the Court to avoid having to reconcile its decision with the plain holding of Katz: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."264

By limiting its decision to avoid the larger issue left open in Knotts, and the apparent difficulties of applying Katz and Knotts to 21st century technology, the majority opinion in Jones not only leaves us wanting more answers, but also leaves us asking more questions than we had before Jones was decided. And while the concurring opinions provide additional insight into some of the Justice’s individual positions, there remain several important questions that need to be answered before we can assess the true significance of Jones. These important questions include:

Absent a trespass, is the use of electronic monitoring a search? In other words, is the warrantless use of the GPS device (apart from its installation) a Fourth Amendment search? If so, is any warrantless use of GPS monitoring a Fourth Amendment search? If the answer depends upon the length of the monitoring (short-term v. longer-term v. long-term), what is the length of time before such monitoring is transformed into a Fourth Amendment event?

Even if the installation and use of a GPS device (or either act individually) constitutes a Fourth Amendment search, can it nevertheless be “reasonable” under the Fourth Amendment if it was conducted upon reasonable suspicion or probable cause to believe Jones was engaged in a criminal offense?265 If so, is the “reasonableness” of the search dependent

263. See generally id. There is some irony in Scalia’s carefully crafted and narrow decision, given his concurring opinion in City of Ontario, California v. Quon, a case addressing whether a public employee had a reasonable expectation of privacy in text messages sent on a city-issued pager. 130 S. Ct. 2619 (2010). According to Justice Scalia:

Applying the Fourth Amendment to new technologies may sometimes be difficult, but when it is necessary to decide a case we have no choice. The Court’s implication that where electronic privacy is concerned we should decide less than we otherwise would (that is, less than the principle of law necessary to resolve the case and guide private action)—or that we should hedge our bets by concocting case-specific standards issuing opaque opinions—is in my view indefensible. The-times-they-are-a-changin’ is a feeble excuse for disregard of duty.

Id. at 2635 (Scalia, J., concurring) (citation omitted).


265. See generally Jones, 132 S. Ct. at 954 (noting that, although the Government raised this argument before the Supreme Court, it failed to raise it below and was therefore deemed “forfeited”).
upon the length (short-, longer- or long-term) of the monitoring?

Is there any circumstance under which traditional surveillance, conducted without GPS or other electronic monitoring, would violate the Fourth Amendment?

Will the Court recede from, or otherwise revise, its position on whether the Fourth Amendment protects private information voluntarily disclosed to third parties? In other words, will the Court find Fourth Amendment protection can exist for actions or information that “a person knowingly exposes to the public”? 266

Has Justice Scalia found a majority willing to elevate the role of trespass and other property concepts in Fourth Amendment jurisprudence?

Will this trespass-first test be embraced in future Fourth Amendment cases? If so, what impact will such a test have on the viability of Katz and its reasonable-expectation-of-privacy test?

This last question is perhaps the most intriguing. As we have discussed, Justice Scalia has been acutely critical of the Katz test, and has consistently questioned the legitimacy of applying Katz in determining whether, in the first instance, a Fourth Amendment search occurred. 267 Nevertheless, Justice Scalia’s opinion in Jones acknowledges that if the trespassory test yields no resulting Fourth Amendment search, resort to the Katz test would be appropriate. Justice Scalia does not explain why he believes the Court would resort to the Katz test after application of the trespassory test results in a finding of no Fourth Amendment search. Moreover, such a suggested application of Katz cannot be reconciled with his position that the Katz test is relevant only in assessing whether a search was “reasonable,” not in determining whether a search occurred. 268 While this may simply be a recognition of the Court’s existing precedent, it is clear that Justice Scalia believes that this precedent should change.

I believe that the trespassory test espoused in Jones is the first step in a proposed paradigm shift by Justice Scalia in Fourth Amendment analysis. Weaving together Justice Scalia’s positions as set forth in his previous opinions (and as previously discussed), it appears that Justice Scalia would propose the following Fourth Amendment analysis:

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266. Katz, 389 U.S. at 351.
267. See Minnesota v. Carter, 525 U.S. 83, 91–92 (1998) (Scalia, J., concurring) (stating that, in applying Katz, the Court “leaps to apply the fuzzy standard of ‘legitimate expectation of privacy’—a consideration that is often relevant to whether a search or seizure covered by the Fourth Amendment is ‘unreasonable’ to the threshold question whether a search or seizure covered by the Fourth Amendment has occurred”).
268. See id.
(1) Applying the Jones trespassory test, did a Fourth Amendment search occur?

(2) If application of the trespassory test yields a Fourth Amendment search (and assuming it was made without a warrant), was the search reasonable?269

(3) In determining whether a warrantless Fourth Amendment search was “reasonable,” the Katz reasonable-expectation-of-privacy test would serve simply as one of many factors to be considered as part of the totality-of-the-circumstances analysis.

These and other questions remain in the wake of Jones, and it is hoped that the Court will answer them sooner rather than later if the lower courts are to have the necessary guidance to continue applying Fourth Amendment jurisprudence in a consistent and uniform manner.

269. See discussion supra notes 196–97. Under Justice Scalia’s reasoning, a warrantless search is not presumptively unreasonable, because the Fourth Amendment does not contain a general warrant requirement, and the warrant clause is separate from, and independent of, the “unreasonable searches and seizures” clause of the Fourth Amendment. See discussion supra notes 198–99; cf. California v. Acevedo, 500 U.S. 565, 582–84 (Scalia, J., concurring). This would render unnecessary any resort to the so-called “exceptions” to the warrant requirement, and the validity of a warrantless Fourth Amendment search would instead be measured under traditional standards of reasonableness in consideration of the totality of the circumstances. See Acevedo, 500 U.S. at 582–84.