Forgotten "People": Reviving Textualism in the Fourth Amendment

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I. INTRODUCTION

> 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.[1]

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

"Proper interpretation" of a constitutional provision "must begin with the constitutional text."[2] Affording the text paramount importance flows from two truths—that the Constitution is both supreme and written.[3] And recognizing that the Constitution structures government by defining and limiting power informs how the constitutional text is construed.[4] These interpretive principles have found particular force in Fourth Amendment jurisprudence. As a matter of structure, the Supreme Court has largely construed the Fourth Amendment not as a right held by the people, but as a limit on government power.[5] As a matter of textualism, disagreements

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2. Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1894 (2021) (Alito, J., concurring in the judgment) (cleaned up) (discussing the Free Exercise Clause and noting that, although "we now have a thick body of precedent regarding the meaning of most provisions of the Constitution, our opinions continue to respect the primacy of the Constitution's text"); *see also, e.g.*, Torres v. Madrid, 141 S. Ct. 989, 1006 (2021) (Gorsuch, J., dissenting) (discussing seizures of persons under the Fourth Amendment and advocating that any Fourth Amendment analysis must "[s]tart with the text"); TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021) (starting an Article III standing analysis "with the text of the Constitution"); Gamble v. United States, 139 S. Ct. 1960, 1965 (2019) (construing the Double Jeopardy Clause by "start[ing] with the text of the Fifth Amendment"); N.L.R.B. v. Noel Canning, 573 U.S. 513, 573 (2014) (Scalia, J., concurring in the judgment) (discussing the Recess Appointments Clause and the Court's "duty to interpret the Constitution in light of its text, structure, and original understanding"); McDonald v. City of Chicago, 561 U.S. 742, 813 (2010) (Thomas, J., concurring in part and concurring in the judgment) ("[S]et[ing the Court's Privileges or Immunities Clause] aside for the moment and begin[ing] with the text."); City of Boerne v. Flores, 521 U.S. 507, 519 (1997) ("In assessing the breadth of [Eighteenth Amendment] § 5's enforcement power, we begin with its text."), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. §§ 2000cc to 2000cc-5).

3. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("[A]ll those who have framed *written* constitutions contemplate them as forming the fundamental and *paramount* law of the nation.") (emphasis added).

4. *See id.* at 176 ("Th[e people's] original and supreme will organizes the government, and assigns, to different departments, their respective powers. It may . . . establish certain limits not to be transcended by those departments.").

5. *See, e.g.*, Hernandez v. Mesa, 140 S. Ct. 735, 756 (2020) (Ginsburg, J., dissenting) ("[The] primary conduct constrained by the Fourth Amendment is an *officer*'s unjustified resort to excessive force."); Maryland v. King, 569 U.S. 435, 446–47 (2013) ("The Fourth Amendment's proper function is to constrain . . . ." (quoting Schmerber v. California, 384 U.S. 757, 768 (1966))); Chandler v. Miller, 520 U.S. 305, 323 (1997) (Rehnquist, C.J., dissenting) ("[D]rug testing in the private sector [is] a domain unguarded by Fourth Amendment constraints."); California v. Acevedo, 500 U.S. 565, 586 (1991) (Stevens, J., dissenting) ("The Fourth Amendment is a restraint on Executive power. The Amendment constitutes the Framers' direct constitutional response to the unreasonable law enforcement practices employed by agents of the British Crown."); United States v. Verdugo-Urquidez, 494 U.S. 259, 287–88 (1990) (Brennan, J., dissenting) ("The focus of the Fourth Amendment is on *what* the Government can and cannot do, and *how* it may act, not on *against whom* these actions may be taken."); United States v. Jacobsen, 466 U.S. 109, 130 (1984) (White, J., concurring in part and concurring in the judgment) ("[T]he Fourth Amendment proscribes . . . governmental action." (first citing Burdeau v. McDowell, 256 U.S. 465 (1921); and then citing Coolidge v. New Hampshire, 403 U.S. 443, 487–90 (1971)));

among the justices frequently circle textual idiosyncrasies, from the relationship between the Unreasonableness and Warrant Clauses[6] to the scope of words

Rakas v. Illinois, 439 U.S. 128, 166 (1978) (White, J., dissenting) ("As a control on governmental power, the Fourth Amendment assures that some expectations of privacy are justified and will be protected from official intrusion."); Marshall v. Barlow's, Inc., 436 U.S. 307, 325–26 (1978) (Stevens, J., dissenting) ("The Fourth Amendment contains two separate Clauses, each flatly prohibiting a category of governmental conduct."); United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976) ("The Fourth Amendment imposes limits on search-and-seizure powers . . . ."); Terry v. Ohio, 392 U.S. 1, 28–29 (1968) ("The Fourth Amendment proceeds as much by limitations upon the scope of governmental action as by imposing preconditions upon its initiation. . . . [The exclusionary rule] rests on the assumption that 'limitations upon the fruit to be gathered tend to limit the quest itself.'" (quoting United States v. Poller, 43 F.2d 911, 914 (2d Cir. 1930))); *see also* Tonja Jacobi & Jonah Kind, *Criminal Innovation and the Warrant Requirement: Reconsidering the Rights-Police Efficiency Trade-Off*, 56 WM. & MARY L. REV. 759, 771 (2015) ("The Fourth Amendment sets broad limits on federal and state law-enforcement conduct during the investigation of crime . . . ."); Lawrence Rosenthal, *Binary Searches and the Central Meaning of the Fourth Amendment*, 22 WM. & MARY BILL RTS. J. 881, 885–88 (2014) (discussing competing views of the Fourth Amendment, among which is the "essentially libertarian" view that the Fourth Amendment "establish[es] a constitutional boundary of the government's investigative powers," which is reflected in the Court's both foundational and recent caselaw); Thomas K. Clancy, *The Purpose of the Fourth Amendment and Crafting Rules to Implement That Purpose*, 48 U. RICH. L. REV. 479, 483 (2014) (noting how the Court has construed "the Fourth Amendment as designed to regulate police actions"); Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 295 (1993) ("The Fourth Amendment exists for the very purpose of enhancing individual liberty by constraining government power.").

6. *See, e.g.*, Groh v. Ramirez, 540 U.S. 551, 571–73 (2004) (Thomas, J., dissenting) ("Instead of adding to this confusing jurisprudence, as the Court has done, I would turn to first principles in order to determine the relationship between the Warrant Clauses and the Unreasonableness Clause."); *Acevedo*, 500 U.S. at 587 n.1 (Stevens, J., dissenting) ("There is . . . a strong historical connection between the Warrant Clause and the initial clause of the Fourth Amendment." (quoting United States v. Chadwick, 433 U.S. 1, 8 (1977))); New Jersey v. T.L.O., 469 U.S. 325, 359 (1985) (Brennan, J., concurring in part and dissenting in part) ("Our holdings that probable cause is a prerequisite to a full-scale search are based on the relationship between the two Clauses . . . . The First Clause . . . states the purpose of the Amendment and its coverage. The Second Clause . . . gives content to the word 'unreasonable' in the first Clause."); United States v. Rabinowitz, 339 U.S. 56, 66 (1950) ("The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable."); *see also* Jacobi & Kind, *supra* note 5, at 771 ("[The Fourth Amendment's] seemingly straightforward language leaves many questions unanswered, including the definition of a 'search' and the relationship between the Reasonableness Clause and the Warrant Clause." (footnote omitted)); Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 556 (1999) (arguing that, from an originalist perspective, the "warrant-preference construction is more faithful to the Framers' concerns than the generalized-reasonableness construction"); Tracey Maclin, *When the Cure for the Fourth Amendment is Worse Than the Disease*, 68 SO. CAL.

like "searches," "seizures," "houses, papers, and effects."[7] Yet, despite this focus on the text, Supreme Court jurisprudence bounces awkwardly between theories of the Fourth Amendment[8] and struggles to adapt to

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L. REV. 1, 20–21 (1994) ("[T]he Warrant Clause defines and interprets the Reasonableness Clause."); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 782 (1994) ("The 'probable cause' standard applies only to 'warrants,' not to all 'searches' and 'seizures.'"); Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1471–72 (1985) (suggesting models to reconcile competing views of the relationship between warrants and reasonableness).

7. *Compare* Kyllo v. United States, 533 U.S. 27, 34 (2001) (tethering what "constitutes a search" with emerging technologies to whether the technology is "in general public use"), United States v. Karo, 468 U.S. 705, 712 (1984) ("A 'seizure' of property occurs when 'there is some meaningful interference with an individual's possessory interests in that property.'" (quoting *Jacobsen*, 466 U.S. at 113)), Oliver v. United States, 446 U.S. 170, 176 (1984) (rejecting the notion that open fields are "effects"), Smith v. Maryland, 442 U.S. 735, 745–46 (1979) (holding that the use of a pen register to ascertain numbers dialed from a private telephone was not a "search"), *superseded by statute*, The Electronic Communication Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (codified as amended at 18 U.S.C. §§ 2510–2523), Katz v. United States, 389 U.S. 347, 350 (1967) (rejecting the physical-intrusion predicate to search and seizures), *and* Olmstead v. United States, 277 U.S. 438, 466 (1928) (holding that searches and seizures require physical intrusion), *overruled by Katz*, 389 U.S. 347, *and* Berger v. New York, 388 U.S. 41 (1967), *with Kyllo*, 533 U.S. at 47 (Stevens, J., dissenting) ("[The general public use] criterion is somewhat perverse because it seems likely that the threat to privacy will grow, rather than recede, as the use of intrusive equipment becomes more readily available."), *Karo*, 468 U.S. at 729 (Stevens, J., concurring in part and dissenting in part) (arguing that an owner's "right to exclude" should further define what constitutes a seizure), *Oliver*, 446 U.S. at 188 (Marshall, J., dissenting) ("The Court's contention that, because a field is not a house or effect, it is not covered by the Fourth Amendment is inconsistent with [precedent] and with the understanding of the nature of constitutional adjudication from which it derives."), *Smith*, 442 U.S. at 750 (Marshall, J., dissenting) ("[T]o make risk analysis dispositive in assessing the reasonableness of privacy expectations would allow the government to define the scope of Fourth Amendment protections."), *Katz*, 389 U.S. at 365 (Black, J., dissenting) ("[The first clause of the Fourth Amendment] connote[s] the idea of tangible things with size, form, and weight, things capable of being searched, seized, or both."), *and Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting) (arguing that the Fourth Amendment affords broader protection than just from physical intrusion).

8. *See* Carpenter v. United States, 138 S. Ct. 2206, 2223–24 (2018) (Kennedy, J., dissenting) (arguing that the majority's reasonable expectation of privacy approach to third-party cell-site records "unhinges Fourth Amendment doctrine from the property-based concepts that have long grounded the analytical framework"); *id.* at 2236 (Thomas, J., dissenting) ("The *Katz* test has no basis in the text or history of the Fourth Amendment. . . . Until we confront the problems with this test, *Katz* will continue to distort Fourth Amendment jurisprudence."); United States v. Jones, 565 U.S. 400, 418–19 (2012) (Alito, J., concurring) (arguing that relying on "18th-century tort law" to address "21st-century surveillance technique[s]" is "unwise" and that it would be better to keep *Katz*'s "reasonable expectations of privacy" approach than to apply trespass law); *see* also Denae Kassotis, Note, *The Fourth Amendment and Technological Exceptionalism After* Carpenter*: A Case Study on Hash-Value Matching*, 29 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1243, 1288–89 & n.286 (2019) ("The Court's ad hoc approach to invoking the

"seismic shifts" in evolving technologies.[9] The problem is a failure to attend to *all* of the text, specifically to the opening phrase, "[t]he right of the people."[10] To paraphrase Justice Scalia, "there can be no clarity" until the Court's decisions fully "comport" with those textualist and originalist principles the Court espouses.[11] So true. There can be no clarity in Fourth Amendment jurisprudence until the Supreme Court's decisions fully comport with those textualist and originalist principles that justices like Justice Scalia successfully entrenched in the Court's jurisprudential methodology. But, as it stands, the core problem with Fourth Amendment constitutional law is precisely that Court rationalizations fail to comport with those first principles.

This Article takes a theoretical approach to the construction of the Fourth Amendment that can provide jurists with practical solutions to lingering and emerging Fourth Amendment puzzles. Part II considers textualist and originalist support for a communitarian as well as an individualistic reading of the Fourth Amendment. Part III then surveys the Court's existing

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warrant requirement has thus forged hundreds of seemingly unrelated rules—frustrating scholars, judges, and citizens alike."); Laura K. Donohue, *Functional Equivalence and Residual Rights Post-*Carpenter*: Framing a Test Consistent with Precedent and Original Meaning*, 2018 SUP. CT. REV. 347, 347 (2018) ("The evolution of Fourth Amendment doctrine over the past century bears a striking resemblance to Hamlet's descent into insanity."); Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO L.J. 19, 20 (1988) ("[T]here is virtual unanimity, transcending normal ideological dispute, that the Court simply has made a mess of search and seizure law.").

9. *See Carpenter*, 138 S. Ct. at 2219; *see also Jones*, 565 U.S. at 415 (Sotomayor, J., concurring) ("In cases of electronic or other novel modes of surveillance that do not depend upon a physical invasion of property, the . . . trespassory test may provide little guidance."); Tonja Jacobi & Dustin Stonecipher, *A Solution for the Third-Party Doctrine in a Time of Data Sharing, Contract Tracing, and Mass Surveillance*, 97 NOTRE DAME L. REV. 823, 824–27, 850 (2022) (noting the Justices' struggles with technology, most significantly with third-party doctrine, and arguing that the solution lies in a recommitment to *Katz*'s core principles, particularly the requirement that, to diminish one's reasonable expectation of privacy, there must be a "knowing exposure to the public").

10. For similar critiques, see David Gray, *Collective Rights and the Fourth Amendment After* Carpenter, 79 MD. L. REV. 66 (2019) [hereinafter *Collective Rights*] (noting the Court's recent decisions in *United States v. Jones*, *Riley v. California*, and *Carpenter v. United States*, as evincing a willingness to protect collective rights under the Fourth Amendment); David Gray, *Collective Standing Under the Fourth Amendment*, 55 AM. CRIM. L. REV. 77, 97 (2018) [hereinafter *Collective Standing*] (arguing that the crisis in Fourth Amendment jurisprudence that started with *Katz* can be solved via "an originalist reading of the Fourth Amendment that takes seriously its text and history").

11. *Acevedo*, 500 U.S. at 583 (Scalia, J., concurring) ("There can be no clarity . . . unless the principles we express comport with the actions we take.").

gloss on the "right of the people" language. And, finally, Part IV explores how giving content to the Fourth Amendment's full text can help solve three jurisprudential problems: (A) reigning in "Big Brother" and the ever increasingly pervasive surveillance state, (B) reconciling the third-party doctrine with emerging technologies, and (C) finding a powerful and proper role for the exclusionary rule.

II. TEXTUALISM & ORIGINALISM SUPPORTING "THE PEOPLE"

Textually, it is beyond reason to reconstruct the Fourth Amendment's text to limit governmental action against individuals and not against communities. The Fourth Amendment's plain language rejects such a construction.[12] Still, the Court repeatedly eschews honoring the text's plain meaning.[13]

As Justice Kennedy blithely asserted, "Fourth Amendment rights, after all, are *personal* . . . . protect[ing] only a person's own 'persons, houses, papers, and effects.'"[14] No doubt, the greater includes the lesser, and "the people" surely includes the "individuals" who, together, constitute "the people." But focusing on individuals, while not attending to the community, effectively writes "the people" out of the Fourth Amendment and leaves the Court in contortions as it tries to reconcile an abridged text with real-world problems that implicate communitarian interests. The Framers did not enshrine "the right of *individuals*" in the Constitution. They chose the words "people" and "their" carefully, and that textual commitment to the community must be respected.[15]

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12. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 65–68 (1998); *Collective Rights*, *supra* note 10, at 86 (arguing that a complete reading of the Fourth Amendment "rightly emphasiz[es] [its] collective dimensions"); *Collective Standing*, *supra* note 10, at 98 ("By its text, the Fourth Amendment guarantees a right 'of the people.'" (quoting U.S. CONST. amend. IV)); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 438–39 (1974) (noting that the Court has "never question[ed] an atomistic notion of the Fourth Amendment" and arguing that the Fourth Amendment "demands . . . more" than protecting only "oppressed individual citizens").

13. *See* Thomas P. Crocker, *The Political Fourth Amendment*, 88 WASH. U. L. REV. 303, 311, 354–71 (2010) ("[T]he Fourth Amendment's protection of a 'right of the people' is textually significant and mostly ignored or misread by scholars and courts." (quoting U.S. CONST. amend. IV)).

14. *Carpenter*, 138 S. Ct. at 2227 (Kennedy, J., dissenting) (emphasis added) (quoting U.S. CONST. amend. IV).

15. James Madison, who drafted the Fourth Amendment, was keenly aware of colonial predicates to the Bill of Rights, including the Virginia ratifying convention's declaration of rights, which spoke of the right of "every *freeman* . . . to be secure from all unreasonable searches and siezures [*sic*] of his person," and other ratifying conventions that followed similar formulations. AMAR, *supra* note 12, at 65 (quoting EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 184 (Greenwood Press 1979) (1957)). And Madison's decision to deploy the collective-sounding "the people" was not just

Unfortunately, textualists like Justice Scalia deride attending to the Amendment's entire text as "absurd."[16] In *Minnesota v. Carter*, Justice Scalia "acknowledged that the phrase 'their . . . houses' . . . is, in isolation, ambiguous."[17] On his reading, the Fourth Amendment may protect each person either "only in his *own* house," or "when visiting the house of someone else."[18] But with great certainty, Justice Scalia found that only one reading could prevail: "it is not linguistically possible to give the provision the latter, expansive interpretation with respect to 'houses' without giving it the same interpretation with respect to the nouns that are parallel to 'houses'—'persons, . . . papers, and effects.'"[19] Such an interpretation, Justice Scalia urged, "would give [an individual] a constitutional right not to have [another] person unreasonably searched."[20] The idea that the Fourth Amendment might actually protect "people, not places,"[21] shielding an individual regardless of their location, was, to Justice Scalia, "so absurd that it ha[d] to [his] knowledge never been contemplated."[22] Actually, it had.[23] Regardless, this Article suggests that we contemplate it now. But first, let's consider Justice Scalia's false dichotomy.

Justice Scalia suggested that one might be protected only in their own house or in somebody else's house as well.[24] But this is a crabbed reading of the textual ambiguity. It is to wake up to an alarm clock blinking 12:00 and assume that it is either 5:00 or 8:00. Obviously, there are more possibilities. As are there here. The Fourth Amendment's text lends itself

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"sloppy draftsmanship." *Id.*; *see also* Crocker, *supra* note 13, at 311–12 (arguing the Fourth Amendment's "linguistic choices are not accidents of drafting").

16. *See* Minnesota v. Carter, 525 U.S. 83, 92 (1998) (Scalia, J., concurring).

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. Justice Ginsburg charged Justice Scalia with "undervalu[ing] the clear opinion of [the *Katz*] Court that 'the Fourth Amendment protects people, not places.'" *Id.* at 111 n.3 (Ginsburg, J., dissenting) (quoting Katz v. United States, 389 U.S. 347, 351 (1967)).

22. *Id.* at 92 (Scalia, J., concurring).

23. *See, e.g.*, Donald L. Doernberg, *"The Right of the People": Reconciling Collective and Individual Interests Under the Fourth Amendment*, 58 N.Y.U. L. REV. 259, 259–60 (1983); Richard B. Kuhns, *The Concept of Personal Aggrievement in Fourth Amendment Standing Cases*, 65 IOWA L. REV. 493, 495–96 (1980); Amsterdam, *supra* note 12, at 438–39; *see also* Jeffrey Bellin, *Fourth Amendment Textualism*, 118 MICH. L. REV. 233, 267–68 (2019) (noting that although contrary interpretation to textual interpretation of the Fourth Amendment exists, textualism offers the "most faithful interpretation") (citing *Carter*, 525 U.S. at 92 (Scalia, J., concurring)).

24. *See Carter*, 525 U.S. at 92 (Scalia, J., concurring).

to at least a third possibility that Justice Scalia never considered: it might be read to protect *all* houses held by the people, regardless of who possesses them or who is in them. But that possibility is lost when a "more majestic conception"[25] is discounted as "absurd" via half-hearted contextualization. While Justice Scalia was willing to contextualize with respect to parallel nouns, he avoided the Fourth Amendment's full text. But if textualism as a jurisprudential value is to have any meaning, we cannot pick and choose which parts of the text to consider. We must attend to *all* of the relevant text.

Originalist scholarship supports this approach. Many of the colonial predicates from which James Madison drew inspiration for the Fourth Amendment spoke of individual rights—e.g., "every *freeman* has a right"—but Madison did not haphazardly replace such individualistic formulations with the more collective-sounding language of "the people."[26] Nor was Madison oblivious to the distinct connotations flowing from expressions like "the people" and "person." At the Founding, constitutions from "state after state" deployed language like "the people" to connote "the sovereign citizenry, described collectively," while "person" ordinarily "describe[d] individual rights."[27] Still, Madison's choice did not reflect an intent to establish a purely communitarian right; rather, Madison meant "to protect both individual persons and the collective people."[28]

In recent electronic surveillance cases, the Court has hinted that it may be starting to realize the originalist underpinnings of a collective Fourth Amendment right.[29] In *Riley v. California*, for example, the Court implicitly tethered its approach to searches of cell phones incident to arrest to the context in which the Fourth Amendment was framed.[30] First, the Court emphasized the ubiquity of "cell phones, which are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might

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25. Herring v. United States, 555 U.S. 135, 151 (2009) (Ginsburg, J., dissenting) (quoting Arizona v. Evans, 514 U.S. 1, 18 (1995) (Stevens, J., dissenting) ("The Court seems to assume that the Fourth Amendment . . . has the limited purpose of deterring police misconduct. Both the constitutional text and the history of its adoption . . . identify a more majestic conception.")).

26. *See* AMAR, *supra* note 12, and accompanying text.

27. *Id.* at 64–65 (quoting Lawrence Delbert Cress, *An Armed Community: The Origins and Meaning of the Right to Bear Arms*, 71 J. AM. HIST. 22, 31 (1984)) (cleaned up).

28. *Id.* at 67–68; *see also* Crocker, *supra* note 13, at 345 ("American courts established important precedents vindicating revolutionary colonists' claims of freedom from arbitrary and intrusive . . . searches and seizures by governing officials. In the beginning, political liberty was a central issue because abusive searches and seizures undermined 'the People's' political and private security." (footnote omitted)).

29. *Collective Rights*, *supra* note 10, at 66.

30. *Id.* at 76–77.

conclude they were an important feature of human anatomy."[31] The Court then grounded its protection against warrantless searches of cell phones to the Fourth Amendment's catalyst—"the reviled 'general warrants' and 'writs of assistance' of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity."[32]

In *Carpenter v. United States*, the Court continued leaning into this connection between collective interests and the Fourth Amendment's original backdrop.[33] Again, the Court set the communitarian stage by noting that "[t]here are 396 million cell phone service accounts in the United States—for a Nation of 326 million people."[34] The Court then underscored that the Framers meant "to place obstacles in the way of a too permeating police surveillance" and noted that it keeps "this attention to Founding-era understandings in mind when applying the Fourth Amendment to innovations in surveillance tools."[35] While the Court has yet to draw an explicit connection between the Fourth Amendment's protection of collective interests and its reference to "the people," exponentially advancing technologies may, nevertheless, be forcing the Court to the "inevitable discovery" of "the right of the people" in the Fourth Amendment's text.[36] The Court is already cognizant of the originalist assumption of some collective right; it just has not taken the leap to translate its originalist understanding into textual fidelity.[37]

III. THE EXISTING JUDICIAL GLOSS ON "THE RIGHT OF THE PEOPLE"

While the Court has generally left unaddressed "the right of the people" language in its Fourth Amendment jurisprudence,[38] where it has relied on the Amendment's opening phrase is telling. The Court's most extensive discussion of the meaning of "the people" comes in *United States v. Verdugo-*

31. Riley v. California, 573 U.S. 373, 385 (2014).
32. *Id.* at 403.
33. *Collective Rights*, *supra* note 10, at 77.
34. Carpenter v. United States, 138 S. Ct. 2206, 2211 (2018).
35. *Id.* at 2214 (quoting United States v. Di Re, 332 U.S. 581, 595 (1948)).
36. *See* Justin F. Marceau, *The Fourth Amendment at a Three-Way Stop*, 62 ALA. L. REV. 687, 696–704, 734–36 (2011).
37. *See Collective Rights*, *supra* note 10, at 66–67, 76–77.
38. Crocker, *supra* note 13, at 359 ("Little judicial attention has been paid to the . . . significance of 'the People' when considering the constitutional meaning of their protected rights . . . .").

Urquidez.[39] There, the Court considered whether the Fourth Amendment limits federal law enforcement action taken abroad against a nonresident alien.[40] In rationalizing why the Fourth Amendment does not so operate, Chief Justice Rehnquist proceeded by comparative analysis, suggesting that the text of the Fourth Amendment, "by contrast with [that of] the Fifth and Sixth Amendments, extends its reach *only* to 'the [American] people.'"[41] To Chief Justice Rehnquist, because the Fifth Amendment applies to all criminal defendants, regardless of nationality, the Fourth Amendment's reference to "the people" must be read to constrict the Fourth Amendment's applicability.[42] After surveying other constitutional references to "the people,"[43] Chief Justice Rehnquist found that the phrase "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[44] Chief Justice Rehnquist thus used "the people" language

39. United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

40. *Id.* at 261.

41. *Id.* at 265 (cleaned up).

42. *Id.* at 264–65.

43. *Id.* at 265 (considering the Preamble, the First, Second, Ninth, and Tenth Amendments, and Article I, Section 2 of the U.S. Constitution).

44. *Id.* While it is beyond the scope of this paper, it is too important not to acknowledge a further normative problem in defining "the people." Even if we agree on a collective or communitarian facet expressed in "the right of the people" language, we must ask, "which people?" As Justice Thurgood Marshall implied, dissenting in *Schneckloth v. Bustamonte*, Fourth Amendment jurisprudence can apply differently to different groups: "the holding today confines the protection of the Fourth Amendment . . . to the sophisticated, the knowledgeable, and, I might add, the few." 412 U.S. 218, 289 (1973) (Marshall, J., dissenting); *see also* MARY ANNE FRANKS, THE CULT OF THE CONSTITUTION 10, 21 (2019) ("[T]he creation, interpretation, and application of constitutional rights have all primarily served the interests of the Americans who most closely resemble the founding fathers."); Sara K. Rankin, *Civilly Criminalizing Homelessness*, 56 HARV. C.R.-C.L. L. REV. 367, 393 (2021) (noting that the Equal Protection Clause does protect against the criminalization of homelessness) (citing Jennifer E. Watson, Note, *When No Place Is Home: Why the Homeless Deserve Suspect Classification*, 88 IOWA L. REV. 501, 521 (2003)); Jessica Neuwirth, *Time for the Equal Rights Amendment*, 43 HARBINGER 155, 157 (2019) (discussing women's status "as second-class citizens"); Tonja Jacobi, Song Richardson & Gregory Barr, *The Attrition of Rights Under Parole*, 87 S. CAL. L. REV. 887, 889–90 (2014) (discussing how the subjection of parolees to extensive conditions, in concert with "other permissive search and seizure jurisprudence and police targeting of parolee-dense neighborhoods for nonrandomized stops," significantly undermines the constitutional rights not only of parolees but also of the communities in which they live); Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 392 (1998) ("[M]inority persons, particularly black men, are deemed second-class citize[ns] in the eyes of law enforcement."); Meher Babbar, Note, *The Fourth Amendment Stripped Bare: Substantiating Prisoners' Reasonable Right to Bodily Privacy*, 115 NW. U. L. REV. 1737 (2021) (addressing prisoners' limited rights to bodily privacy under the Fourth Amendment).

to answer the question presented,[45] but he never considered the text beyond the Court's already-existing focus on individuals. Note how—despite twice using the word "community" to help define "the people"—Chief Justice Rehnquist could not help but define "the people" in terms of sub-units: "class[es] of persons."[46]

Like Chief Justice Rehnquist, the Court as a whole has failed to consider how the Fourth Amendment's text operates as both a communitarian and an individual constitutional shield. When considering the meaning of "the people" across distinct constitutional provisions, the Court's reading has been unequivocal: the language "unambiguously refer[s] to individual rights, not 'collective' rights."[47] It should be no surprise that this dismissive gloss comes from none other than Justice Scalia, who—despite his insistence on textual primacy—remained strategically averse to honoring the full text.[48] While this quote from *District of Columbia v. Heller* is only dicta, it likely signals an arduous road for the realization of communitarian Fourth Amendment rights.

IV. SOLVING FOURTH AMENDMENT PUZZLES VIA "THE RIGHT OF THE PEOPLE"

As difficult as upending the Court's Freudianly ego-centric construction of the Fourth Amendment's text may prove, the ramifications of such a metamorphosis go well beyond scholarly debate. That the text of the Fourth Amendment plainly presents both communitarian and individual rights is not merely a theoretical point. Respect for the text in its entirety

45. Within the particular context of *Verdugo-Urquidez*, invoking a limited conception of "the people" was perhaps the surest way to dodge those limitations on government power already shaped by the rest of the Fourth Amendment. Previously unaddressed, "the people" language offered fertile ground to broaden the scope of permissible government action. *See generally* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

46. *See id.* at 265.

47. District of Columbia v. Heller, 554 U.S. 570, 579 (2008) (construing the meaning of the "right of the people" language in the Second Amendment and grouping that language alongside the same language in the First Amendment's Assembly-and-Petition Clause and the Fourth Amendment's Search-and-Seizure Clause). For a critique of *Heller*'s individual-rights construction of the Second Amendment, see FRANKS, *supra* note 44, at 70–75.

48. *See* FRANKS, *supra* note 44, at 74 (calling Justice Scalia's *Heller* opinion a "selective, ahistorical, and illogical interpretation of the Second Amendment"); *see also* Crocker, *supra* note 13, at 364 ("Justice Scalia is reading the Constitution to say what he thinks it ought to say rather than what it actually says.").

has the potential to solve both nagging and developing Fourth Amendment puzzles, and the practical effects would likely be significant. This Part addresses three confounding areas of Fourth Amendment jurisprudence where a proper reading of the Fourth Amendment could dramatically enhance analytical clarity and practical simplicity: (A) reigning in Big Brother and the ever more pervasive surveillance state, (B) reconciling the third-party doctrine with emerging technologies, and (C) finding a powerful and proper role for the exclusionary rule.

A. Reigning in Big Brother

At least some justices have long understood an inherently communitarian component to the Fourth Amendment. At the dawn of the Cold War, Justice Jackson articulated the danger of cataloging Fourth Amendment protections as "second-class rights."[49] "Among deprivations of rights, none" would be "so effective in cowing a *population*, crushing the spirit of the *individual* and putting terror in every heart" as to countenance "uncontrolled search and seizure."[50] Justice Jackson's rhetoric thus encompassed both the collective and individual right to be free from unwarranted searches and seizures. Two decades later, Justice Douglas echoed this warning in *Terry v. Ohio*, arguing that, "[t]o give the police greater power than a magistrate is to take a long step down the totalitarian path."[51] But these justices wrote only in dissent.

Yet there are signs of hope. As already noted, Court majorities have recently insinuated recognition of a collective Fourth Amendment right that operates to restrain the government from using rapidly evolving technologies to engage in mass, or individual, surveillance.[52] Law enforcement can still use evolving technologies and search aggregated data held by private citizens or corporations, but in these cases, "the Government's obligation is a familiar one—get a warrant."[53] Warrantless searches of cell phones

49. Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

50. *Id.* (emphasis added). "[T]he human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police." *Id.* at 180–81.

51. Terry v. Ohio, 392 U.S. 1, 38 (1968) (Douglas, J., dissenting). Justice Douglas would again emphasize the danger to both individual and collective liberty in *United States v. White*: Fourth Amendment protections "vanish completely when we slavishly allow an all-powerful government . . . to penetrate all the walls and doors . . . . That is why a 'strict construction' of the Fourth Amendment is necessary if every man's liberty and privacy are to be constitutionally honored." 401 U.S. 745, 756 (1971) (Douglas, J., dissenting). "[T]he technology we exalt today is *everyman's master*." *Id.* at 757 (emphasis added).

52. *See supra* Part II.

53. Carpenter v. United States, 138 S. Ct. 2206, 2221 (2018).

obtained incident to arrest[54] and searches of historical cell-site data are generally unreasonable.[55] In these contexts, the Court has refused to draw exceptions to the presumptive warrant requirement and has repeatedly grounded its reluctance in the ubiquity of the technology and the scope of intimate detail housed in the devices or data.[56] This trend implies at least a passive recognition that government action must be limited not only against the suspect individual, but against the innocent citizenry as well, for "[a]wareness that the government may be watching chills associational and expressive freedoms."[57]

The next logical step for a court committed to textualism is to actively ground these protections in "the right of the people" language and apply the lessons of modern surveillance jurisprudence to previously presumably settled areas of constitutional law. Though beyond the scope of this Article, such applications may include revisiting—among others—the constitutionality of checkpoints, which the *Michigan Department of State Police v. Sitz* Court found "potentially subject the *general public* to arbitrary or harassing conduct by the police,"[58] and *Terry* stops, which have been used not only to stop criminal activity, but to "instill fear in" Black and Brown communities

54. Riley v. California, 573 U.S. 373, 385–86 (2014).

55. *Carpenter*, 138 S. Ct. at 2221–22.

56. In *Riley*, the Court couched its atomistic protection in facts speaking to the collective: "A smart phone . . . was unheard of ten years ago; a significant majority of American adults now own such phones. . . . Cell phones place vast quantities of personal information literally in the hands of individuals." 573 U.S. at 385–86. And in *Carpenter*, the majority opinion discoursed on the ubiquity of cell phones and cell-site towers: "Although cell sites are usually mounted on a tower, they can also be found on light posts, flagpoles, church steeples, or the sides of buildings." 138 S. Ct. at 2211. Four decades earlier, "few could have imagined a society in which a phone goes wherever its owner goes, conveying . . . a detailed and comprehensive record of the person's movements." *Id.* at 2217. "[T]he time-stamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his 'familial, political, professional, religious, and sexual associations.'" *Id.* (quoting United States v. Jones, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring)).

57. *Jones*, 565 U.S. at 416 (Sotomayor, J., concurring).

58. Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 458 (1990) (Brennan, J., dissenting) (emphasis added); *see also id.* at 465 (Stevens, J., dissenting) ("Unwanted attention from the local police need not be less discomforting simply because one's secrets are not the stuff of criminal prosecutions. Moreover, those who have found—by reason of prejudice or misfortune—that encounters with the police may become adversarial or unpleasant without good cause will have grounds for worrying at any stop designed to elicit signs of suspicious behavior."); City of Indianapolis v. Edmond, 531 U.S. 32, 56 (2000) (Thomas, J., dissenting) ("I rather doubt that the Framers . . . would have considered 'reasonable' a program of indiscriminate stops of individuals not suspected of wrongdoing.").

that "every time they leave their home, they could be stopped by the police."[59] Indeed, the *Terry* Court itself came close to recognizing that stop-and-frisk might violate the Fourth Amendment's communitarian element when it wrote that "the degree of community resentment aroused by particular practices is clearly relevant to an assessment of the quality of the intrusion upon reasonable expectations of personal security."[60]

In the area of rapidly evolving technologies, the Court has shown a willingness to return to a strict construction by honoring its repeated contention "that searches conducted outside the judicial process . . . are per se unreasonable."[61] The Court thus seems to perceive the need for a robust warrant requirement when decidedly communitarian interests are at stake. This connection is natural. The "terror in every heart" of which Justice Jackson spoke,[62] the "fear and surprise engendered in [the] law-abiding" citizen that the *Sitz* Court recognized regarding checkpoints,[63] and the "fear" the N.Y.C. Police Commissioner sought to "instill" in Black and Brown communities via *Terry* stops all speak to communitarian, not individual, interests. But the knowledge that the government must "get a warrant"[64] allays that fear and protects "the right of the people to be *secure*."

B. The Third-Party Doctrine

As the Court begins considering communitarian interests within the Big Brother context, it also shows signs of abrogating the third-party doctrine. In *Carpenter*, the majority dodged the third-party issue by viewing government access to third-party cell-site records as lying "at the intersection of two lines of cases"[65] and then declining to extend the third-party case line into a new area while expanding the scope of that case line directed at an individual's expectation of privacy.[66] But dissenting justices were not so polite about trying to reconcile the third-party doctrine with the communitarian concerns new technologies implicate.[67] As Justice Gorsuch put it, "the

59. Devon W. Carbado, *From Stop and Frisk to Shoot and Kill:* Terry v. Ohio*'s Pathway to Police Violence*, 64 UCLA L. REV. 1508, 1539 (2017) (quoting Floyd v. City of New York, 959 F. Supp. 2d 540, 606 (S.D.N.Y. 2013) (quoting New York City Police Commissioner Kelly)).

60. Terry v. Ohio, 392 U.S. 1, 17 n.14 (1968).

61. Katz v. United States, 389 U.S. 347, 357 (1967) (emphasis omitted).

62. Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

63. *Sitz*, 496 U.S. at 452.

64. Carpenter v. United States, 138 S. Ct. 2206, 2221 (2018).

65. *Id.* at 2214.

66. *See id.* at 2216–17.

67. Three justices—Kennedy, Alito, and Thomas—believed that the third-party doctrine should have applied. But Justice Gorsuch argued that the third-party doctrine should

'third-party doctrine is not only wrong, but horribly wrong.'"[68] Today, we keep "[e]ven our most private documents . . . on third party servers," and although the third-party doctrine tells us "that the police can review all of this material, on the theory that no one reasonably expects any of it will be kept private[,] . . . no one believes that, if they ever did."[69] Between the majority's refusal to extend the third-party doctrine and Justice Gorsuch's evisceration of it—the third-party doctrine's days may be numbered. And this is a good thing.

A right accruing to "the people" knows no third parties. There are only two: the people and the government. The Fourth Amendment's plain text shields both individuals and the people as a whole from government intrusion. This atomistic *and* communitarian reading provides a textual basis for rejecting any governmental attempt to obtain information about one person from another because doing so violates both the individual *and* the collective right. As with the Court's evolving technology jurisprudence, communitarian interests are knocking on the door of third-party constitutional law. While the Court has cracked that door, thorough attention to the Fourth Amendment's text can break it down.

C. The Exclusionary Rule

The exclusionary rule has been controversial since it was first made applicable against the states.[70] Jurists and scholars alike have debated the

be abandoned in the face of modern technology's ubiquity and the possessory interests retained by those who share information with others. *Id.* at 2262–71 (Gorsuch, J., dissenting).

68. *Id.* at 2262 (quoting Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 564 (2009)).

69. *Id.*

70. When the Court barred the states from using "evidence secured by official lawlessness in flagrant abuse of [the Fourth Amendment's] basic right," *Mapp v. Ohio*, 367 U.S. 643, 654–55 (1961), the majority faced fierce opposition from Justice Harlan, who—joined by Justices Frankfurter and Whittaker—argued that it was inappropriate to foist a judicially created remedy on the states in violation of principles of federalism and judicial restraint, *id.* at 672–84 (Harlan, J., dissenting).

rule's merits,[71] its scope of application,[72] and who may claim its protection.[73] A construction of the Fourth Amendment that explicitly embraces its protection of both individuals and the citizenry at large has the power to resolve these disputes.

At the exclusionary rule's inception, the Court justified its creation as helping to avoid implicating the judicial power in Fourth Amendment violations.[74] In order "to forever secure the people . . . against all unreasonable searches and seizures," the Fourth Amendment placed "limitations and restraints" on the exercise of both executive and judicial power.[75] While the Court understood that Fourth Amendment protections "reach[] all alike, whether accused of crime or not," the Court fashioned an in-court remedy that would necessarily protect only the "accused."[76] This was within the Court's power, and for a time, the remedy was sweeping, precluding all

71. *See, e.g.*, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 419–20 (1971) (Burger, J., dissenting) (criticizing the exclusionary rule as "an unworkable and irrational concept" that "neither deters errant officers nor affords a remedy to the totally innocent victims of official misconduct"); *see also, e.g.*, Amar, *supra* note 6, at 785 ("The modern Court . . . has distorted Fourth Amendment remedies . . . [by] concoct[ing] the awkward and embarrassing remedy of excluding reliable evidence of criminal guilt . . . ."); Amsterdam, *supra* note 12, at 438 (arguing for an expansion of the rule, particularly in light of *Terry v. Ohio*).

72. *See, e.g.*, Davis v. United States, 564 U.S. 229 (2011) (asking whether the exclusionary rule applies where the police rely on circuit precedent); Herring v. United States, 555 U.S. 135 (2009) (considering whether the rule applies when officers rely on incorrect information from police employees); Arizona v. Evans, 514 U.S. 1 (1995) (debating the rule's scope where officers rely on incorrect information from judicial employees); Illinois v. Krull, 480 U.S. 340 (1987) (asking whether the rule applies when officers relied upon a mistake of law made in good faith); United States v. Janis, 428 U.S. 433 (1976) (considering the rule's scope in civil proceedings), *superseded by statute*, 26 U.S.C. § 7491; United States v. Calandra, 414 U.S. 338 (1974) (considering the rule's scope in grand jury proceedings); *Mapp*, 367 U.S. at 645–46 (determining whether the rule applies against the State's prosecution of state crimes); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) (asking whether the rule applies to corporations even if the entity is not protected by the Fifth Amendment).

73. *See, e.g.*, Byrd v. United States, 138 S. Ct. 1518 (2018) (determining whether the driver of another's car has standing to challenge a police search); Minnesota v. Carter, 525 U.S. 83 (1998) (determining whether short-term commercial visitors to a residence can claim a legitimate expectation of privacy necessary to argue for exclusion); Rawlings v. Kentucky, 448 U.S. 98 (1980) (determining whether a possessory interest affords protection where there is no expectation of privacy); Rakas v. Illinois, 439 U.S. 128 (1978) (determining whether targets of a search who have no expectation of privacy in the area searched or possessory interest in the thing seized have vicarious standing to exclude evidence); Alderman v. United States, 394 U.S. 165 (1969) (determining whether exclusion extends to co-conspirators).

74. Weeks v. United States, 232 U.S. 383, 392, 394 (1914).

75. *Id.* at 391–92.

76. *Id.* at 392.

tainted evidence.[77] Within the judicial sphere—its jurisdiction—the rule protected *all* people who faced prosecution. But over time, this justification was abandoned, replaced with a monolithic notion of deterrence.[78] That change in justification has eroded the rule's protection even of the accused.[79] While the principle that the judiciary will not sanction a constitutional violation can justify an air-tight exclusionary rule that protects all people charged with crimes—even if it does nothing for the great mass of "law-abiding" citizens—a general deterrence justification is much easier to poke holes in, especially when the individual representative of the people's right is a criminal defendant.[80] Given how unsympathetic many criminal defendants can be, the Court has had few qualms about setting general deterrence aside and carving out exceptions to the exclusionary rule.[81]

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77. *See id.* ("The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find *no* sanction in . . . the courts . . . .") (emphasis added); *Mapp*, 367 U.S. at 655 ("We hold that *all* evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court.") (emphasis added); *see also Calandra*, 414 U.S. at 357 (Brennan, J., dissenting) ("Since . . . those judges were without power to direct or control the conduct of law enforcement officers, the enforcement tool had necessarily to be one capable of administration by judges. The exclusionary rule . . . enabl[es] the judiciary to avoid the taint of partnership in official lawlessness . . . .").

78. *See, e.g.*, *Mapp*, 367 U.S. at 648 (referring to the exclusionary rule as a "deterrent safeguard"); Wolf v. Colorado, 338 U.S. 25, 32 (1949) (calling the rule a "deterrent remedy"), *overruled by Mapp*, 367 U.S. at 643.

79. As Justice Brennan noted in his dissenting opinion in *United States v. Calandra*:

> [D]owngrading . . . the exclusionary rule to a determination whether its application in a particular type of proceeding furthers deterrence of future police misconduct reflects a startling misconception, unless it is a purposeful rejection, of the historical objective and purpose of the rule. . . . [T]here is no evidence that the possible deterrent effect of the rule was given any attention by the judges chiefly responsible for its formulation. Their concern . . . was to fashion an enforcement tool to give content and meaning to the Fourth Amendment's guarantees.

Calandra, 414 U.S. at 356 (Brennan, J., dissenting); *see also* Amar, *supra* note 6, at 785 (arguing that the Court has "water[ed] down" the exclusionary rule "in ad hoc ways").

80. *See* Amar, *supra* note 6, at 796–97 ("Deterrence is concerned with the government; it is concerned with systemic impact. It treats the criminal defendant merely as a surrogate for the larger public interest in restraining the government. The criminal defendant is a kind of private attorney general. But the worst kind. He is self-selected and self-serving. He is often unrepresentative of the larger class of law-abiding citizens, and his interests regularly conflict with theirs. Indeed, he is often despised by the public . . . . In sum, when it comes to private attorneys general, the exclusionary rule's deterrence rationale looks in the wrong place—to paradigmatically guilty criminal defendants rather than to prototypically law-abiding civil plaintiffs.").

81. *See, e.g.*, Herring v. United States, 555 U.S. 135 (2009) (finding that enhanced officer culpability is necessary to justify deterrence through exclusion); Arizona v. Evans,

Thus unmoored from its original justification, the exclusionary rule lacks the power to resist these persistent erosions.

But attending to "the right of the people" language demands a return to the Court's original justification and, with it, an undiminished rule. While some argue that the exclusionary rule fails because it does not afford a remedy to those *not* charged with crimes,[82] in its pristine form, the rule does protect all of those people who are. Such a remedy is distinct from other judicially created remedies like a *Bivens* right of action because it is solely within the Court's jurisdiction, immunizing it to the kinds of judicial attacks levied against remedies like *Bivens*.[83] And while it cannot succeed in deterring police misconduct that does not lead to criminal prosecution, the rule—applied without exception—protects "the right" of *all* "people" accused of crimes from *court-sanctioned* constitutional

514 U.S. 1 (1995) (creating good faith exception where judicial employees provide incorrect information to law enforcement due to lack of deterrent effect); Murray v. United States, 487 U.S. 533 (1988) (creating exception to exclusionary rule where illegally seized evidence may be legally reseized and admitted); Illinois v. Krull, 480 U.S. 340, 349–53 (1987) (providing good faith exception to exclusion where officers relied on subsequently invalidated statute); United States v. Leon, 468 U.S. 897, 916–17, 920–21 (1984) (refusing to apply exclusionary rule because police misconduct would not be deterred where the mistake was the magistrate's); Nix v. Williams, 467 U.S. 431 (1984) (discussing the "inevitable discovery" doctrine in a case involving the brutal murder of a 10-year-old girl); Rakas v. Illinois, 439 U.S. 128, 137 (1978) (refusing to grant standing to "vicarious Fourth Amendment claims" due to lack of deterrent values) (citing Alderman v. United States, 394 U.S. 165, 174–75 (1968)); United States v. Janis, 428 U.S. 433, 454 (1976) (refusing to extend exclusionary rule to civil proceedings because the deterrent effect was outweighed by social costs), *superseded by statute*, 26 U.S.C. § 7491; *Calandra*, 414 U.S. at 351 ("Any incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best."); *Alderman*, 394 U.S. at 174 ("There is no necessity to exclude evidence against one defendant in order to protect the rights of another.").

82. *See, e.g.*, Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting) ("[The exclusionary rule's ineffectiveness] is illustrated by the paradox that an unlawful act against a totally innocent person—such as petitioner claims to be—has been left without an effective remedy . . . ."); *id.* at 417–18 ("[T]he exclusionary rule's deterrent impact is diluted by the fact that there are large areas of police activity that do not result in criminal prosecution—hence the rule has virtually no applicability and no effect in such situations." (citing Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 720–24 (1970))).

83. *See, e.g.*, Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) ("*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action."); *Bivens*, 403 U.S. at 411–24 (Burger, C.J., dissenting) (criticizing both the exclusionary rule and the implied right of action or remedy created by the majority as "beyond judicial power"); *see also* Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 52 (1985) ("[In *Bivens*,] the Supreme Court, by suggesting that a federal remedy should be created even where it would not be necessary to preserve the right, enunciated a standard that sanctions illegitimate judicial lawmaking." (footnote omitted)).

violations.[84] Just as the Fourth Amendment speaks of "the right of the people," so too does it *not* speak of law enforcement. Its commands apply to all branches of government, and through a robust exclusionary rule grounded in the full constitutional text, the judicial power can police its own.[85] The unabridged text thus supports an unabridged exclusionary remedy grounded in avoiding judicial participation in Fourth Amendment violations.

Likewise, the unabridged text nullifies a Fourth Amendment standing requirement, whether as a threshold inquiry or a substantive element. Naturally, a right held by "the people" is not a purely "personal right that must be invoked by an individual."[86] Vicarious assertion[87] is an inherently alien concept to a collective right. And this logical reality is not unknown to constitutional law. In the First Amendment context, for example, those who lack cognizable Article III injury may still facially challenge a law that is overbroad.[88] Much of this standing exception is "aimed at preventing a 'chilling effect'" on protected speech.[89] The same concern should animate

84. *See* Mapp v. Ohio, 367 U.S. 643, 654–55 (1961).

85. This is not to suggest that the judiciary plays no role in preventing Fourth Amendment violations detached from criminal prosecutions. Were the Court to recoil from its judge-made doctrine of qualified immunity, it would allow congressionally created remedies—i.e., the pursuit of damages via § 1983—to achieve their goal: enabling citizens to police the police through the courts. But, perhaps this is too optimistic a view so early in the twenty-first century, for the Supreme Court does seem to possess a "Janus-faced attitude to the business of judicial lawmaking," by "embrac[ing] judge-made law with gusto in adapting the rules of qualified immunity" while "express[ing] a grave reluctance to recognize what it chooses to characterize as new rights of action under *Bivens* to enforce the Constitution." James E. Pfander, Iqbal*,* Bivens*, and the Role of Judge-Made Law in Constitutional Litigation*, 114 PENN. ST. L. REV. 1387, 1405 (2010).

86. Minnesota v. Carter, 525 U.S. 83, 88 (1998).

87. *See* Alderman v. United States, 394 U.S. 165, 174 (1969) ("We adhere . . . to the general rule that Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted." (first citing Simmons v. United States, 390 U.S. 377 (1968); and then citing Jones v. United States, 362 U.S. 257 (1960), *overruled by* United States v. Salvucci, 448 U.S. 83 (1980)).

88. *See, e.g.*, Toni M. Massaro, *Chilling Rights*, 88 U. COLO. L. REV. 33, 56–57 (2017). Whether such challenges are characterized as third-party or first-party challenges, the result is the same: standing doctrine operates "with a looser grip than in other areas of constitutional law." *Id.* at 57; *see also* Richard H. Fallon, Jr., Commentary, *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1359–64 (2000) (discussing how different facial challenges can be conceived of as involving either third-party or first-party standing, or both).

89. *See* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 855 (1991).

relaxed standing requirements under the Fourth Amendment, where unconstitutional searches and seizures have the potential to "cow[] a population"[90]—the equivalent of "chilling" speech. But beyond these substantive concerns, there is a further textual basis for allowing those *not* subjected to unconstitutional practices to seek suppression of unconstitutionally obtained evidence.

Standing doctrine, generally, is grounded in Article III's broad language, which limits the exercise of the "judicial Power" to "Cases" and "Controversies."[91] In its generic sense, the Court's standing doctrine requires a *personal* injury as a predicate to Article III jurisdiction.[92] But the Fourth Amendment's text is more specific than Article III's, arguably rendering standing's "particularization" requirement inapplicable.[93] Once the *entire* text of the Fourth Amendment is acknowledged, and read in context with the Constitution as a whole,[94] the "right of the people" language can be construed as overcoming standing's particularization requirement and the associated bar to "generalized grievances."[95]

As a collective right against unreasonable searches and seizures, the Fourth Amendment, like the First Amendment, compels the courts to remedy violations, regardless of whether those remedies would seem to accrue only to those whose rights were violated by law enforcement. As Justice Fortas noted in *Alderman v. United States*—the wellspring of Fourth Amendment standing jurisprudence—the Fourth Amendment "is a general prohibition, a fundamental part of the constitutional compact, the observance of which is essential to the welfare of all persons."[96] Justice Fortas recognized—in an electronic surveillance context no less—that an individual standing requirement was incompatible with the breadth of the Fourth Amendment's "guarantee."[97] He saw that the "legalism of 'standing'" cannot be reconciled

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90. Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

91. U.S. CONST. art. III, § 2; *see* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (describing standing as an "irreducible constitutional minimum").

92. *See Defs. of Wildlife*, 504 U.S. at 560 (finding that an injury must be "particularized").

93. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 183 (2012) ("If there is a conflict between a general provision and a specific provision, the specific provision prevails . . . .").

94. *See id.* at 167 ("Perhaps no interpretive fault is more common than failing to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.").

95. *See* Flast v. Cohen, 392 U.S. 83, 106 (1968).

96. Alderman, v. United States, 394 U.S. 165, 205 (1969) (Fortas, J., concurring in part and dissenting in part).

97. *See id.*

with the Fourth Amendment's text.[98] Justice Fortas was right. And by returning to the text—in all its "primacy"—we can make good on that guarantee.

V. CONCLUSION

As noted in the Introduction, pragmatic force attends the theoretical approach espoused in this Article. In a recent Fourth Circuit case, all three Fourth Amendment puzzles were implicated, and all three were resolved in favor of a collective right.[99]

In *Leaders of a Beautiful Struggle v. Baltimore Police Department*, community activists challenged the Baltimore Police Department's implementation of an aerial surveillance program that capitalized on advanced photographic technology.[100] Sitting en banc, the court held that the program's "warrantless operation" violated the Fourth Amendment and that "accessing its data" constituted a "search."[101] *Carpenter* "squarely" controlled, for the aerial surveillance program "'track[ed] every movement' of every person outside in Baltimore," creating "a 'detailed, encyclopedic,' record of where everyone came and went within the city."[102] As the court rationalized its holdings, it bounced back and forth between valuing communitarian and individual interests: "the government . . . recorded *everyone's* movements[,] . . . open[ing] 'an intimate window' into a person's associations and activities."[103] A Fourth Amendment that protects both individual and communitarian rights was at work.

While the similarities between *Beautiful Struggle* and *Carpenter* motivated the Fourth Circuit's holding, the differences between the cases motivate further contemplation. Consider first *who* brought the challenge. In *Carpenter*, it was a criminal defendant seeking the remedial protection of the exclusionary rule, and the undiminished force of that rule was brought to bear.[104] In *Beautiful Struggle*, however, it was a collection of community advocates who brought the challenge, seeking an injunction to stop the program, not the introduction of evidence obtained through

98. *Id.* at 201.
99. *See* Leaders of a Beautiful Struggle v. Balt. Police Dep't., 2 F.4th 330 (4th Cir. 2021) (en banc).
100. *Id.* at 333–35.
101. *Id.* at 346.
102. *Id.* at 341 (quoting Carpenter v. United States, 138 S. Ct. 2206, 2215, 2216 (2018)).
103. *Id.* at 342 (quoting *Carpenter*, 138 S. Ct. at 2217).
104. *See Carpenter*, 138 S. Ct. at 2212.

it.[105] The Fourth Circuit flirted with standing's requisite particularization, noting that the plaintiffs' "advocacy necessarily involves traveling through and being present outdoors in areas with high rates of violent crime," areas presumably of particular interest to the Baltimore Police Department even though about 90% of the city was being photographed each day,[106] but the court did not indulge that justiciability issue. Standing—though not in question—was, therefore, effectively granted to everyone in the City of Baltimore. And the remedy to protect the community was to block not just the fruits of the practice, but the practice itself.

Next, consider the *nature* of the practice and the challenge to it. Precluded from accessing mass-surveillance data via third parties without a warrant under *Carpenter*, the Baltimore Police Department took matters into its own hands, gathering the data itself.[107] The Fourth Circuit refused to bless the Department's workaround. To allow the program to go unchallenged would have ignored the original purpose of the Fourth Amendment—to "respon[d] to the reviled 'general warrants' and 'writs of assistance' of the colonial era."[108] As the federal judiciary works to adapt to evolving technologies, courts are realizing that who gathers the data matters. In *Carpenter*, the criminal defendant challenged the government's *use* of data gathered by a third party,[109] but in *Beautiful Struggle*, the community challenged the government's *gathering* of data, not just its use.[110]

Seen in this light, *Carpenter* and *Beautiful Struggle* combine to shape a collective Fourth Amendment right—a right of "the people." It's a two-party system—just the people and the government; there are no "third" parties. The people hold all the rights, individually and collectively, and the government must get a warrant against an individual in order to overcome both the individual and the collective right. "We the People" may gather data on and for ourselves, but the government may only gather or use such data when it "get[s] a warrant."[111] *Beautiful Struggle* should give us hope, for federal courts are already in the process of nurturing that communitarian right which is so explicitly encompassed by the plain text of the Fourth Amendment.

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105. *See Leaders of a Beautiful Struggle*, 2 F.4th at 333, 335.
106. *Id.* at 334–35.
107. *See id.* at 333–34.
108. *Id.* at 340 (quoting *Carpenter*, 138 S. Ct. at 2213).
109. *Carpenter*, 138 S. Ct. at 2214.
110. *See Leaders of a Beautiful Struggle*, 2 F.4th at 333.
111. *Carpenter*, 138 S. Ct. at 2221.