INTRODUCTION

LITIGATING CRIMINAL PROCEDURE

The basic Criminal Procedure course in the United States explores the provisions of the Bill of Rights that delineate crucial aspects of the relationship between the government and its citizens and the relationships among the three branches of government. Specifically, it focuses on the protections that the federal Constitution affords against the official gathering of evidence before a person is tried on criminal charges. It deals with searches, seizures, interrogations, and some aspects of the right to counsel. In other words, Criminal Procedure is a constitutional law course. It is an introduction to the Fourth Amendment, the Fifth Amendment's Self-Incrimination Clause, and some aspects of the Sixth Amendment's Assistance of Counsel Clause.

All of the cases in this textbook are Supreme Court cases dating only as far back as the Prohibition era. This is because, before Prohibition, the federal government's involvement in criminal law enforcement was extremely limited relative to modern times.

Fourth and Fifth Amendment law was not terribly important during America's first century. Federal criminal prosecutions were rare, and federal prosecutions were the only ones to which the Fourth and Fifth Amendments applied.


As Professor Stuntz notes, the Supreme Court determined very early in the nation's history that the Bill of Rights restrained only the federal government and not the states. See, e.g., *Barron v. Baltimore*, 32 U.S. 243 (1833). Because the federal government played only a small role in the enforcement of the criminal laws during the nineteenth century, the Supreme Court did not have many opportunities to rule on Fourth and Fifth Amendment questions until the twentieth century.

As a subfield of constitutional law, constitutional criminal procedure stands as an anomaly. In many other areas of constitutional law, major Marshall Court opinions stand out and continue to frame debate both in courts and beyond. . . . But no comparable Marshall Court landmarks dot the plain of constitutional criminal procedure.
INTRODUCTION

LITIGATING CRIMINAL PROCEDURE

The basic Criminal Procedure course in the United States explores the provisions of the Bill of Rights that delineate crucial aspects of the relationship between the government and its citizens and the relationships among the three branches of government. Specifically, it focuses on the protections that the federal Constitution affords against the official gathering of evidence before a person is tried on criminal charges. It deals with searches, seizures, interrogations, and some aspects of the right to counsel. In other words, Criminal Procedure is a constitutional law course. It is an introduction to the Fourth Amendment, the Fifth Amendment’s Self-Incrimination Clause, and some aspects of the Sixth Amendment’s Assistance of Counsel Clause.

All of the cases in this textbook are Supreme Court cases dating only as far back as the Prohibition era. This is because, before Prohibition, the federal government’s involvement in criminal law enforcement was extremely limited relative to modern times.

Fourth and Fifth Amendment law was not terribly important during America’s first century. Federal criminal prosecutions were rare, and federal prosecutions were the only ones to which the Fourth and Fifth Amendments applied.


As Professor Stuntz notes, the Supreme Court determined very early in the nation’s history that the Bill of Rights restrained only the federal government and not the states. See, e.g., *Barron v. Baltimore*, 32 U.S. 243 (1833). Because the federal government played only a small role in the enforcement of the criminal laws during the nineteenth century, the Supreme Court did not have many opportunities to rule on Fourth and Fifth Amendment questions until the twentieth century.

As a subfield of constitutional law, constitutional criminal procedure stands as an anomaly. In many other areas of constitutional law, major Marshall Court opinions stand out and continue to frame debate both in courts and beyond. . . . But no comparable Marshall Court landmarks dot the plain of constitutional criminal procedure.
... For virtually the entire first century of the Bill of Rights, the United States Supreme Court lacked general appellate jurisdiction over federal criminal cases. This little-known fact helps explain why, for example, the Sedition Act Prosecutions in the late 1790s—which raised the most important and far-reaching constitutional issues of their day—never reached the Supreme Court for ultimate judicial resolution.

Akhil Reed Amar, *The Future of Constitutional Criminal Procedure*, 33 AM. CRIM. L. REV. 1123, 1123–24 (1996). Beginning in 1891 the Supreme Court was given broad appellate jurisdiction over criminal cases, creating at least one avenue for the adjudication of criminal procedure questions. Not long thereafter, the Court began to rule that the Fourteenth Amendment’s Due Process Clause made provisions in the Bill of Rights enforceable against state and local governments. The Prohibition era, from 1920 to 1933, forced the Supreme Court to contend with a rapidly expanding federal bureaucracy that sprang up to deal with the impossible challenge of enforcing the National Prohibition Act.

The brief constitutionalization of prohibition... forced Justices on both the right and the left to stop debating whether there should be an American administrative state, and required them instead to reconstruct their judicial philosophy on the assumption that the administrative state was an unalterable reality.... Prohibition also forced a rethinking of the appropriate limits of national power, as well as fundamental developments in the meaning of Fourth Amendment limitations on law enforcement.


Between 1953 and 1969, the Warren Court applied most of the clauses in the first eight amendments to the states through selective incorporation. The Supreme Court recently described that process:

In the late 19th century, the Court began to consider whether the Due Process Clause prohibits the States from infringing rights set out in the Bill of Rights. Five features of the approach taken during the ensuing era should be noted.

First, the Court viewed the due process question as entirely separate from the question whether a right was a privilege or immunity of national citizenship.

Second, the Court explained that the only rights protected against state infringement by the Due Process Clause were those rights “of such a nature that they are included in the conception
of due process of law.” While it was “possible that some of the personal rights safeguarded by the first eight Amendments against National action [might] also be safeguarded against state action,” the Court stated, this was “not because those rights are enumerated in the first eight Amendments.”

***

Third, in some cases decided during this era the Court “can be seen as having asked, when inquiring into whether some particular procedural safeguard was required of a State, if a civilized system could be imagined that would not accord the particular protection.” Thus, in holding that due process prohibits a State from taking private property without just compensation, the Court described the right as “a principle of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of its justice.” Similarly, the Court found that due process did not provide a right against compelled incrimination in part because this right “has no place in the jurisprudence of civilized and free countries outside the domain of the common law.”

Fourth, the Court during this era was not hesitant to hold that a right set out in the Bill of Rights failed to meet the test for inclusion within the protection of the Due Process Clause. The Court found that some such rights qualified. But others did not.

Finally, even when a right set out in the Bill of Rights was held to fall within the conception of due process, the protection or remedies afforded against state infringement sometimes differed from the protection or remedies provided against abridgment by the Federal Government. . . .

An alternative theory regarding the relationship between the Bill of Rights and § 1 of the Fourteenth Amendment was championed by Justice Black. This theory held that § 1 of the Fourteenth Amendment totally incorporated all of the provisions of the Bill of Rights. As Justice Black noted, the chief congressional proponents of the Fourteenth Amendment espoused the view that the Amendment made the Bill of Rights applicable to the States . . . . Nonetheless, the Court never has embraced Justice Black’s “total incorporation” theory.

While Justice Black’s theory was never adopted, the Court eventually moved in that direction by initiating what has been called a process of “selective incorporation,” i.e., the Court began to hold that the Due Process Clause fully incorporates particular rights contained in the first eight Amendments.
The decisions during this time abandoned three of the previously noted characteristics of the earlier period. The Court made it clear that the governing standard is not whether any “civilized system [can] be imagined that would not accord the particular protection.” Instead, the Court inquired whether a particular Bill of Rights guarantee is fundamental to our scheme of ordered liberty and system of justice.

The Court also shed any reluctance to hold that rights guaranteed by the Bill of Rights met the requirements for protection under the Due Process Clause. The Court eventually incorporated almost all of the provisions of the Bill of Rights. Only a handful of the Bill of Rights protections remain unincorporated.13

Finally, the Court abandoned “the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights,” stating that it would be “incongruous” to apply different standards “depending on whether the claim was asserted in a state or federal court.” Instead, the Court decisively held that incorporated Bill of Rights protections “are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.”

*McDonald v. City of Chicago*, 561 U.S. 742, 759–765 (2010) (holding that the right to keep and bear arms is applicable against the states).

Selective incorporation led to an explosion of litigation as criminal defendants used the newly applicable rights to challenge state as well as federal convictions. “With many, many more state criminal cases fueling its docket, the Warren Court proceeded to build up, in short order, a remarkable doctrinal edifice of Fourth Amendment, Fifth Amendment, and Sixth Amendment rules—the foundations of modern constitutional criminal procedure.” Amar, *The Future of Constitutional Criminal Procedure*, 33 AM. CRIM. L. REV. at 1125. That edifice forms the raw material of this book.

---

13 In addition to the right to keep and bear arms (and the Sixth Amendment right to a unanimous jury verdict), the only rights not fully incorporated are (1) the Third Amendment’s protection against quartering of soldiers; (2) the Fifth Amendment’s grand jury indictment requirement; (3) the Seventh Amendment right to a jury trial in civil cases; and (4) the Eighth Amendment’s prohibition on excessive fines.

We never have decided whether the Third Amendment or the Eighth Amendment’s prohibition of excessive fines applies to the States through the Due Process Clause.

Our governing decisions regarding the Grand Jury Clause of the Fifth Amendment and the Seventh Amendment’s civil jury requirement long predate the era of selective incorporation.
PART I

THE FOURTH AMENDMENT
Chapter 1

The Reasonableness Clause

This chapter focuses on the terms used in the Fourth Amendment’s Reasonableness Clause. It looks at the judicial debate over whether the Fourth Amendment’s protection of “persons, houses, papers, and effects” should be read narrowly or broadly in light of the amendment’s purposes. It also examines the Supreme Court’s efforts to define what actions constitute a “search” or a “seizure.”

A. “Persons, Houses, Papers, and Effects”

Most of the cases in this book concern the Fourth Amendment’s protection “against unreasonable searches and seizures. . . .” Though the Fourth Amendment is now implicated in an enormous range of encounters between government employees and individuals, scholars generally agree that the founders were concerned primarily with generalized or suspicionless searches and seizures. The Framers drafted the Fourth Amendment in direct response to the English practice of searching homes under general warrants—warrants that did not specify what was to be searched or seized—to uncover evidence of seditious libel. Despite these modest origins, scholars and jurists generally agree today that the Fourth Amendment regulates a wide array of searches and seizures; in the modern world of organized, professional police forces and extensive government regulation of everyday life through criminal and administrative regimes, an expansive reading of the Amendment provides a powerful check on official discretion.

How the Amendment should be read to afford this protection remains the source of much debate, however. Early Supreme Court decisions closely tied the Fourth Amendment’s protections to property rights—compliance with the Fourth Amendment was generally litigated as a defense to a trespass action against government agents. The Warren Court’s shift to interpreting the Amendment as guaranteeing a “right to privacy” was intended to broaden its protections beyond tangible items. Recently, the court has reemphasized the significance of property concepts. This chapter introduces the Fourth Amendment and traces the shift from the protection of tangible property to the protection of intangible privacy.
Although a general right to privacy has been read into a number of the guarantees of the bill of rights, the privacy rights of the people vis-à-vis the government are protected most fundamentally by the Fourth Amendment of the Constitution which provides:

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.

The Amendment is generally thought of as containing two clauses, one speaking to unreasonable searches and seizures, and the other discussing the requirements for the issuance of warrants. The relationship between these two clauses is murky at best and has been the topic of much controversy in the two-hundred-plus years since their drafting.22

Faced with an essentially inscrutable text, the Supreme Court has generated a number of interpretive rules that find varying degrees of support in the text of the Amendment: the Amendment expresses a strong preference for searches conducted pursuant to judicially approved warrants; all searches, whether subject to the warrant requirement or not, must generally be supported by probable cause; and the ultimate constitutional test for every search is reasonableness. Although each of these interpretations is now taken more or less as orthodox, the heuristics are inherently inconsistent and none of them is entirely free from controversy.

Thus, at its most fundamental levels—the relationship between the Amendment’s two clauses, the degree of suspicion that must be shown before a warrantless search may be conducted, and so on—it becomes clear

22 See, e.g., Nelson Lasson, The History and Development of the Fourth Amendment to the United States Constitution 100–103 (1937). Lasson writes that the confusion regarding the two clauses is essentially a result of misreporting by one of the drafters. He writes that the House of Representatives originally approved a draft of what would become the Fourth Amendment that read:

The rights of the people to be secure in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.

While the relationship between the two clauses is relatively straightforward in this draft, the House's reporting committee reported that the House had approved the version we are now familiar with, which contained amendments the House had in fact rejected. But see Thomas Y. Davies, Recovering the Original Fourth Amendment, 98 Mich. L. Rev. 547, 718–19 (1999) (arguing that the evidence that the current version of the Fourth Amendment is not the one that was approved by the House of Representatives is “inconsistent.”).
that the Fourth Amendment is hardly self-defining in its terms. These problems of construction are compounded by the fact that at the time of the Amendment’s drafting, conceptions of privacy, crime, and policing were fundamentally different than they are today. For example, there were no organized police forces during the founding period. Rather, law enforcement was handled exclusively by part-timers and amateurs. Although clearly crime as we know it today existed in colonial times, the physical fear of crime as a social phenomenon and as a political issue simply did not. Today the primary conundrum of crime in the United States is generally seen as the importance of protecting the public from predation while protecting individuals from the invasive power of the state. By contrast, crime in colonial times was feared not so much as a threat to individual safety, but as a threat to the moral and social order. Furthermore, the main privacy concern of the founders generally was not searches by police officers in pursuit of criminal prosecutions, but rather wide-ranging and unfettered searches by custom and tax inspectors or by officials of the crown looking for materials deemed seditious. Similarly, Nelson Lasson cites as the main impetus for the protections of the Fourth Amendment and its state analogues a number of cases, both from the colonies and England, involving the enforcement of unpopular tax and sedition laws. In fact, during the founding period, Fourth Amendment claims were rarely even raised in the criminal context. At that time, the legality of a search usually was contested as a defense to a civil trespass action rather than in the course of a criminal prosecution. One primary reason for this, of course, is the fact that the exclusionary rule is entirely an invention of the twentieth century; it likely would have come as a surprise to the founders that otherwise competent evidence would not be admitted in court because of the means by which it was obtained.

Even if the text of the Fourth Amendment were clear in its terms (and it is not), applying in contemporary times a document written in a very different context and addressing very different concerns is a task necessarily requiring a certain amount of inventiveness on the part of jurists. For example, how is one to determine, parsing the 54 words of the Amendment, whether or not police officers may conduct a warrantless search of a paper bag contained in the trunk of a suspicious automobile, whether federal officers may “massage” a duffle bag in the luggage compartment of a bus, or whether law enforcement officials may fly over private property in a borrowed aircraft to peer through the semi-opaque roof of a shed. The short answer, of course, is that neither the text of the Amendment nor founding-era understandings of its meaning is likely to provide consistent answers to these questions. Rather, judges must turn elsewhere to determine the scope of the Amendment’s protections in contemporary society.

The two clauses of the Fourth Amendment and the relationship between them are obscure at best. Two competing theories have arisen to
explain the relationship of the Warrant Clause and the Reasonableness Clause. The Warrant Preference Theory posits that the Fourth Amendment’s Warrant Clause modifies its Reasonableness Clause. Searches are generally unreasonable unless authorized in advance by a warrant. Warrantless searches are permitted only when so-called “exigent circumstances” or “special needs” make it impossible or impracticable to obtain a warrant in advance. These are the “well-defined exceptions” to the warrant requirement referred to toward the end of the *Katz* majority opinion. As the text of the Amendment makes clear, warrants must be supported by probable cause and particularly describe what is to be searched or seized. They provide a neutral judicial determination of whether probable cause exists as well as notice of the scope of the police’s authority.

The Reasonableness Theory, on the other hand, postulates that the Reasonableness Clause is grammatically independent of the Warrant Clause. Under this reading, the Fourth Amendment requires at bottom that all searches and seizures be reasonable. “Reasonable,” in turn, is defined on a contextual and *ad hoc* basis. Some searches, primarily those of a home, are in fact reasonable only when authorized by a warrant, but this warrant requirement is not a general rule. Nor are warrants intended primarily to provide any notice to the target of the search or seizure. The Reasonableness Theory seems to conceive of warrants as a way for judges to supervise policework, as it permits even searches based on invalid warrants, so long as the officers reasonably relied on the warrant’s validity. *See, e.g.*, *United States v. Leon*, 468 U.S. 897 (1986). Some searches are reasonable without probable cause while others never are, depending on whether privacy interests outweigh government objectives. In other words, the Reasonableness Theory evaluates every search with the balancing test that the Warrant Preference Theory reserves for “special needs” cases.

The Justices have dueled and continue to duel over which theory should guide Fourth Amendment jurisprudence. The cases in this section show the Court working to apply the Fourth Amendment’s protection of “houses, persons, papers, and effects” to a changing society. They show the justices grappling over whether “houses, persons, papers, and effects” should be read literally or liberally. In the Prohibition era, a literal reading won over a majority of the Court. By mid-century, the Court had repudiated that view. Most recently, the Court has adopted an amalgamated approach that purports to combine its 1928 Fourth Amendment test with the test that replaced it in 1967. The question that pervades these cases is how far beyond the words in the text the Court can legitimately go to give effect to the Fourth Amendment’s fundamental purpose and guarantee.
MR. CHIEF JUSTICE TAFT delivered the opinion of the court.

* * *

The petitioners were convicted in the District Court for the Western District of Washington of a conspiracy to violate the National Prohibition Act by unlawfully possessing, transporting and importing intoxicating liquors and maintaining nuisances, and by selling intoxicating liquors. Seventy-two others, in addition to the petitioners, were indicted. Some were not apprehended, some were acquitted, and others pleaded guilty.

The evidence in the records discloses a conspiracy of amazing magnitude to import, possess, and sell liquor unlawfully. It involved the employment of not less than 50 persons, of two sea-going vessels for the transportation of liquor to British Columbia, of smaller vessels for coastwise transportation to the state of Washington, the purchase and use of a branch beyond the suburban limits of Seattle, with a large underground cache for storage and a number of smaller caches in that city, the maintenance of a central office manned with operators, and the employment of executives, salesmen, deliverymen dispatchers, scouts, bookkeepers, collectors, and an attorney. In a bad month sales amounted to $176,000; the aggregate for a year must have exceeded $2,000,000.

Olmstead was the leading conspirator and the general manager of the business. He made a contribution of $10,000 to the capital; 11 others contributed $1,000 each. The profits were divided, one-half to Olmstead and the remainder to the other 11. Of the several offices in Seattle, the chief one was in a large office building. In this there were three telephones on three different lines. There were telephones in an office of the manager in his own home, at the homes of his associates, and at other places in the city. Communication was had frequently with Vancouver, British Columbia. Times were fixed for the deliveries of the “stuff” to places along Puget Sound near Seattle, and from there the liquor was removed and deposited in the caches already referred to. One of the chief men was always on duty at the main office to receive orders by the telephones and to direct their filling by a corps of men stationed in another room—the “bull pen.” The call numbers of the telephones were given to those known to be likely customers. At times the sales amounted to 200 cases of liquor per day.

The information which led to the discovery of the conspiracy and its nature and extent was largely obtained by intercepting messages on the telephones of the conspirators by four federal prohibition officers. Small wires were inserted along the ordinary telephone wires from the residences of four of the petitioners and those leading from the chief office. The insertions were made without trespass upon any property of the
defendants. They were made in the basement of the large office building. The taps from house lines were made in the streets near the houses.

The gathering of evidence continued for many months. Conversations of the conspirators, of which refreshing stenographic notes were currently made, were testified to by the government witnesses. They revealed the large business transactions of the partners and their subordinates. Men at the wires heard the orders given for liquor by customers and the acceptances; they became auditors of the conversations between the partners. All this disclosed the conspiracy charged in the indictment. Many of the intercepted conversations were not merely reports, but parts of the criminal acts. The evidence also disclosed the difficulties to which the conspirators were subjected, the reported news of the capture of vessels, the arrest of their men, and the seizure of cases of liquor in garages and other places. It showed the dealing by Olmstead, the chief conspirator, with members of the Seattle police, the messages to them which secured the release of arrested members of the conspiracy, and also direct promises to officers of payments as soon as opportunity offered.

***

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

... The Fourth Amendment may have proper application to a sealed letter in the mail, because of the constitutional provision for the Postoffice Department and the relations between the government and those who pay to secure protection of their sealed letters. It is plainly within the words of the amendment to say that the unlawful rifling by a government agent of a sealed letter is a search and seizure of the sender’s papers of 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 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.
Congress may, of course, protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation, and thus depart from the common law of evidence. But the courts may not adopt such a policy by attributing an enlarged and unusual meaning to the Fourth Amendment.

The reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house, and messages while passing over them, are not within the protection of the Fourth Amendment. Here those who intercepted the projected voices were not in the house of either party to the conversation.

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.

What has been said disposes of the only question that comes within the terms of our order granting certiorari in these cases. But some of our number, departing from that order, have concluded that there is merit in the twofold objection, overruled in both courts below, that evidence obtained through intercepting of telephone messages by government agents was inadmissible, because the mode of obtaining it was unethical and a misdemeanor under the law of Washington. To avoid any misapprehension of our views of that objection we shall deal with it in both of its phases.

[We cannot], without the sanction of congressional enactment, subscribe to the suggestion that the courts have a discretion to exclude evidence, the admission of which is not unconstitutional, because unethically secured. This would be at variance with the common-law doctrine generally supported by authority. There is no case that sustains, nor any recognized text-book that gives color to, such a view. Our general experience shows that much evidence has always been receivable, although not obtained by conformity to the highest ethics. The history of criminal trials shows numerous cases of prosecutions of oathbound conspiracies for murder, robbery, and other crimes, where officers of the law have disguised themselves and joined the organizations, taken the oaths, and given themselves every appearance of active members engaged in the promotion
of crime for the purpose of securing evidence. Evidence secured by such means has always been received.

A standard which would forbid the reception of evidence, if obtained by other than nice ethical conduct by government officials, would make society suffer and give criminals greater immunity than has been known heretofore. In the absence of controlling legislation by Congress, those who realize the difficulties in bringing offenders to justice may well deem it wise that the exclusion of evidence should be confined to cases where rights under the Constitution would be violated by admitting it.

***

MR. JUSTICE BRANDEIS (dissenting).

The defendants were convicted of conspiring to violate the National Prohibition Act. Before any of the persons now charged had been arrested or indicted, the telephones by means of which they habitually communicated with one another and with others had been tapped by federal officers. To this end, a lineman of long experience in wire tapping was employed, on behalf of the government and at its expense. He tapped eight telephones, some in the homes of the persons charged, some in their offices. Acting on behalf of the government and in their official capacity, at least six other prohibition agents listened over the tapped wires and reported the messages taken. Their operations extended over a period of nearly five months. The typewritten record of the notes of conversations overheard occupies 775 typewritten pages. By objections seasonably made and persistently renewed, the defendants objected to the admission of the evidence obtained by wire tapping, on the ground that the government's wire tapping constituted an unreasonable search and seizure, in violation of the Fourth Amendment, and that the use as evidence of the conversations overheard compelled the defendants to be witnesses against themselves, in violation of the Fifth Amendment.

The government makes no attempt to defend the methods employed by its officers. Indeed, it concedes that, if wire tapping can be deemed a search and seizure within the Fourth Amendment, such wire tapping as was practiced in the case at bar was an unreasonable search and seizure, and that the evidence thus obtained was inadmissible. But it relies on the language of the amendment, and it claims that the protection given thereby cannot properly be held to include a telephone conversation.

***

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

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. “That places the liberty of every man in the hands of every petty officer” was said by James Otis of much lesser intrusions than these. To Lord Camden a far slighter intrusion seemed “subversive of all the comforts of society.” Can it be that the Constitution affords no protection against such invasions of individual security?

* * *

In Ex parte Jackson, 96 U.S. 727 (1878), it was held that a sealed letter intrusted to the mail is protected by the amendments. The mail is a public service furnished by the government. The telephone is a public service furnished by its authority. There is, in essence, no difference between the sealed letter and the private telephone message. As Judge Rudkin said below: “True, the one is visible, the other invisible; the one is tangible, the other intangible; the one is sealed, and the other unsealed; but these are distinctions without a difference.” The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded, and all conversations between them upon any subject, and although proper, confidential, and privileged, may be overheard. Moreover, the tapping of one man’s telephone line involves the tapping of the telephone of every other person whom he may call, or who may call him. As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire tapping.

* * *

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

Applying to the Fourth and Fifth Amendments the established rule of construction, the defendants’ objections to the evidence obtained by wire tapping must, in my opinion, be sustained. It is, of course, immaterial where the physical connection with the telephone wires leading into the defendants’ premises was made. And it is also immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the government’s purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.\(^\text{12}\)

Independently of the constitutional question, I am of opinion that the judgment should be reversed. By the laws of Washington, wire tapping is a crime. To prove its case, the government was obliged to lay bare the crimes committed by its officers on its behalf. A federal court should not permit such a prosecution to continue.

* * *

Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a

\(^{12}\) The point is thus stated by counsel for the telephone companies, who have filed a brief as amici curiae: “Criminals will not escape detection and conviction merely because evidence obtained by tapping wires of a public telephone system is inadmissible, if it should be so held; but, in any event, it is better that a few criminals escape than that the privacies of life of all the people be exposed to the agents of the government, who will act at their own discretion, the honest and the dishonest, unauthorized and unrestrained by the courts. Legislation making wire tapping a crime will not suffice if the courts nevertheless hold the evidence to be lawful.”
private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

**MR. JUSTICE HOLMES (dissenting).**

My brother BRANDEIS has given this case so exhaustive an examination that I desire to add but a few words. While I do not deny it I am not prepared to say that the penumbra of the Fourth and Fifth Amendments covers the defendant, although I fully agree that courts are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them. But I think, as Mr. Justice BRANDEIS says, that apart from the Constitution the government ought not to use evidence obtained and only obtainable by a criminal act. There is no body of precedents by which we are bound, and which confines us to logical deduction from established rules. Therefore we must consider the two objects of desire both of which we cannot have and make up our minds which to choose. It is desirable that criminals should be detected, and to that end that all available evidence should be used. It also is desirable that the government should not itself foster and pay for other crimes, when they are the means by which the evidence is to be obtained. If it pays its officers for having got evidence by crime I do not see why it may not as well pay them for getting it in the same way, and I can attach no importance to protestations of disapproval if it knowingly accepts and pays and announces that in future it will pay for the fruits. We have to choose, and for my part I think it a less evil that some criminals should escape than that the government should play an ignoble part.

For those who agree with me no distinction can be taken between the government as prosecutor and the government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed. And if all that I have said so far be accepted it makes no difference that in this case wire tapping is made a crime by the law of the state, not by the law of the United States. It is true that a state cannot make rules of evidence for courts of the United States, but the state has authority over the conduct in question, and I hardly think that the United States would appear to greater advantage when paying for an odious crime against state law than when inciting to the disregard of its own. I am aware of the often-repeated statement that in a criminal proceeding the court will not take notice of the manner in which papers offered in evidence have been obtained. But that somewhat rudimentary mode of disposing of the question has been overthrown by *Weeks v. United States*, 232 U.S. 383 (1914), and the cases that have followed it. I have said that we are free to choose between two principles of policy. But if we are to confine ourselves to precedent and logic the reason for excluding evidence obtained by violating the Constitution seems to me logically to lead to excluding evidence obtained by a crime of the officers of the law.
Mr. Justice Butler (dissenting).

***

Telephones are used generally for transmission of messages concerning official, social, business and personal affairs including communications that are private and privileged—those between physician and patient, lawyer and client, parent and child, husband and wife. The contracts between telephone companies and users contemplate the private use of the facilities employed in the service. The communications belong to the parties between whom they pass. During their transmission the exclusive use of the wire belongs to the persons served by it. Wire tapping involves interference with the wire while being used. Tapping the wires and listening in by the officers literally constituted a search for evidence. As the communications passed, they were heard and taken down.

***

This court has always construed the Constitution in the light of the principles upon which it was founded. The direct operation or literal meaning of the words used do not measure the purpose or scope of its provisions. Under the principles established and applied by this court, the Fourth Amendment safeguards against all evils that are like and equivalent to those embraced within the ordinary meaning of its words.

When the facts in these cases are truly estimated, a fair application of that principle decides the constitutional question in favor of the petitioners. With great deference, I think they should be given a new trial.

Mr. Justice Stone (dissenting).

I concur in the opinions of Mr. Justice Holmes and Mr. Justice Brandeis. I agree also with that of Mr. Justice Butler so far as it deals with the merits.

Points for Discussion

1. Justice Brandeis’ Olmstead dissent proved more enduring than the majority’s opinion. See Carol S. Steiker, Brandeis In Olmstead: “Our Government Is the Potent, the Omnipresent Teacher”, 79 Miss. L.J. 149 (2009). Brandeis writes, “The door of a court is not barred because the plaintiff has committed a crime.” In fact, most Fourth Amendment claims are brought by criminal defendants who seek to keep prosecutors from introducing allegedly unconstitutionally seized evidence against them at trial. Because the contested evidence is usually probative of guilt, it is nearly always the case that the defendant seeking the suppression of evidence from her case is guilty of at least some crime, if not of exactly the crime charged. Why does Brandeis argue that these claims should be cognizable in a federal court, notwithstanding the defendant’s apparent guilt of the crime charged? Today, the other principal means for vindicating Fourth Amendment rights is through a civil suit against
the offending officers and their employers. See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001). Should it be relevant in such a suit whether incriminating evidence was found on the party asserting a violation of the Constitution?

2. How compelling is the majority’s reading of the Fourth Amendment as protecting only persons, houses, papers, and effects? Isn’t it true none of these categories includes conversations, which are consequently not protected? Under this reading of the Constitution, what else that we might seek to keep private might not be entitled to Fourth Amendment protection?

3. Justice Holmes writes separately to emphasize that evidence obtained by federal agents in violation of state law should be inadmissible just as evidence obtained in violation of the Fourth Amendment had been held inadmissible in *Weeks v. United States*, 232 U.S. 383 (1914). How is Justice Holmes’ justification for excluding evidence obtained by criminal means—“no distinction can be taken between the government as prosecutor and the government as judge”—different from Justice Brandeis’—“[t]he court protects itself”?

4. The majority and the principal dissent both deploy some staggering numbers in setting forth the facts of the case, but they emphasize different statistics. These facts are technically irrelevant to the outcome. Why, then, did Chief Justice Taft and Justice Brandeis bother to tell us how much money the conspirators made or how many pages of transcript the government compiled?

5. As Justice Brandeis’ footnote 12 observes, the Bell telephone companies filed an *amicus curiae* brief supporting the bootleggers. In their brief, they argued:

> When the lines of two “parties” are connected at the central office, they are intended to be devoted to the exclusive use, and in that sense to be turned over to the exclusive possession, of the parties. A third person who taps the lines violates the property rights of both persons then using the telephone, and of the telephone company as well.

Justice Butler’s dissent endorsed much of the telephone companies’ argument. Why did the telephone companies file a brief in the case and why did they side with the conspirators?

 Justice Brandeis’ impassioned *Olmstead* dissent memorably wedded the Fourth Amendment’s protections to the notion of privacy. At the time, the Court’s Fourth Amendment decisions, beginning with *Boyd v. United States*, 116 U.S. 616 (1886), had closely tied the Amendment’s protection to property rights. *Boyd* was a forfeiture action in which the claimants objected to an order of the trial court requiring them to produce certain invoices to be used as evidence against them. Extensively quoting from the English case *Entick v. Carrington*, (1765) 19 How. St. Tri. 1029, *reprinted in* (1765) 95 Eng. Rep. 807 (K.B.) (partial reprint), the Court held that the
search violated the Fourth and Fifth Amendments because the order to produce the papers invaded the “indefeasible right of personal security, personal liberty, and private property.” The Court’s reliance on Entick, which was undergirded by a great solicitude for property rights, fostered the conception that the Fourth Amendment’s protections were delineated by property interests.

Entick was a trespass action against messengers of the Crown who ransacked Entick’s house in a search for seditious writings. Lord Camden’s celebrated opinion upheld the jury’s verdict for Entick, stating: “The great end for which men entered into society was to secure their property... By the laws of England, every invasion of private property, be it ever so minute, is a trespass.” Relying on this reasoning, Boyd held that the government could seize only forfeitable property, i.e. items of contraband or the fruits and instrumentalities of crime, and not items of mere evidentiary value.

The pressure to scrap Boyd’s restriction of the government’s ability to seize mere evidence of a crime led to the collapse of the Fourth Amendment’s strict connection to property rights and the elevation instead of privacy as the Amendment’s core concern. In Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967), the Court held that the government could constitutionally seize items of purely evidentiary value, such as clothing described by witnesses to an armed robbery. Justice Brennan’s opinion for the Court emphasized “that the principal object of the Fourth Amendment is the protection of privacy rather than property.” The decision declared Boyd’s substantive limitation on searches and seizures to the fruits and instrumentalities of crime and contraband to be a legal fiction. Later that same term, the Fourth Amendment’s concern with privacy, which had gradually risen in prominence since Olmstead, achieved preeminence in Katz v. United States.

KATZ V. UNITED STATES
389 U.S. 347 (1967)

MR. JUSTICE STEWART delivered the opinion of the court.

The petitioner was convicted in the District Court for the Southern District of California under an eight-count indictment charging him with transmitting wagering information by telephone from Los Angeles to Miami and Boston in violation of a federal statute. At trial the Government was permitted, over the petitioner’s objection, to introduce evidence of the petitioner’s end of telephone conversations, overheard by FBI agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which he had placed his calls. In affirming his conviction, the Court of Appeals rejected the contention that the recordings had been obtained in violation of the Fourth Amendment, because “(t)here was no physical entrance into the area occupied by, (the
petitioner).” We granted certiorari in order to consider the constitutional questions thus presented.

***

The petitioner had phrased those questions 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.

We decline to adopt this formulation of the issues. 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. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person’s general right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States.

Because of the misleading way the issues have been formulated, the parties have attached great significance to the characterization of the telephone booth from which the petitioner placed his calls. The petitioner has strenuously argued that the booth was a “constitutionally protected area.” The Government has maintained with equal vigor that it was not. But this 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.

The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was as visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. No less than an individual in a business office, in a friend’s apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, 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. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.

The Government contends, however, that the activities of its agents in this case should not be tested by Fourth Amendment requirements, for the surveillance technique they employed involved no physical penetration of the telephone booth from which the petitioner placed his calls. It is true that the absence of such penetration was at one time thought to foreclose further Fourth Amendment inquiry, *Olmstead v. United States*, 277 U.S. 438, 457; *Goldman v. United States*, 316 U.S. 129, 134–36, for that Amendment was thought to limit only searches and seizures of tangible property. But “(t)he premise that property interests control the right of the Government to search and seize has been discredited.” *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 304. Thus, although a closely divided Court supposed in *Olmstead* that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested. 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 overheard without any “technical trespass under ** local property law.” *Silverman v. United States*, 365 U.S. 505, 511. Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people—and not simply “areas”—against unreasonable searches and seizures it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.

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. The Government’s activities in electronically listening to and recording the petitioner’s words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a “search and seizure” within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.

The question remaining for decision, then, is whether the search and seizure conducted in this case complied with constitutional standards. In that regard, the Government’s position is that its agents acted in an entirely defensible manner: They did not begin their electronic surveillance until investigation of the petitioner’s activities had established a strong probability that he was using the telephone in question to transmit gambling information to persons in other States, in violation of federal law. Moreover, the surveillance was limited, both in scope and in duration, to
the specific purpose of establishing the contents of the petitioner’s unlawful telephonic communications. The agents confined their surveillance to the brief periods during which he used the telephone booth, and they took great care to overhear only the conversations of the petitioner himself.

Accepting this account of the Government’s actions as accurate, it is clear that this surveillance was so narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place. . . .

***

The Government urges that, because its agents relied upon the decisions in Olmstead and Goldman, and because they did no more here than they might properly have done with prior judicial sanction, we should retroactively validate their conduct. That we cannot do. It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized. In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their activities to the least intrusive means consistent with that end. Searches conducted without warrants have been held unlawful “notwithstanding facts unquestionably showing probable cause,” for the Constitution requires “that the deliberate, impartial judgment of a judicial officer * * * be interposed between the citizen and the police * * *.” “Over and again this Court has emphasized that the mandate of the (Fourth) Amendment requires adherence to judicial processes,” and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.

***

14 Based upon their previous visual observations of the petitioner, the agents correctly predicted that he would use the telephone booth for several minutes at approximately the same time each morning. The petitioner was subjected to electronic surveillance only during this predetermined period. Six recordings, averaging some three minutes each, were obtained and admitted in evidence. They preserved the petitioner’s end of conversations concerning the placing of bets and the receipt of wagering information.
The Government does not question these basic principles. Rather, it urges the creation of a new exception to cover this case. It argues that surveillance of a telephone booth should be exempted from the usual requirement of advance authorization by a magistrate upon a showing of probable cause. We cannot agree. Omission of such authorization

bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the *** search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment.

Beck v. State of Ohio, 379 U.S. 89, 96. And bypassing a neutral predetermination of the scope of a search leaves individuals secure from Fourth Amendment violations “only in the discretion of the police.”

These considerations do not vanish when the search in question is transferred from the setting of a home, an office, or a hotel room to that of a telephone booth. Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures. The government agents here ignored “the procedure of antecedent justification *** that is central to the Fourth Amendment,” a procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case. Because the surveillance here failed to meet that condition, and because it led to the petitioner’s conviction, the judgment must be reversed.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN joins, concurring.

While I join the opinion of the Court, I feel compelled to reply to the separate concurring opinion of my Brother WHITE, which I view as a wholly unwarranted green light for the Executive Branch to resort to electronic eavesdropping without a warrant in cases which the Executive Branch itself labels “national security” matters.

Neither the President nor the Attorney General is a magistrate. In matters where they believe national security may be involved they are not detached, disinterested, and neutral as a court or magistrate must be. Under the separation of powers created by the Constitution, the Executive Branch is not supposed to be neutral and disinterested. Rather it should vigorously investigate and prevent breaches of national security and prosecute those who violate the pertinent federal laws. The President and Attorney General are properly interested parties, cast in the role of adversary, in national security cases. They may even be the intended victims of subversive action. Since spies and saboteurs are as entitled to the protection of the Fourth Amendment as suspected gamblers like
petitioner, I cannot agree that where spies and saboteurs are involved adequate protection of Fourth Amendment rights is assured when the President and Attorney General assume both the position of adversary-and-prosecutor and disinterested, neutral magistrate.

***

MR. JUSTICE HARLAN, concurring.

I join the opinion of the Court, which I read to hold only (a) that an enclosed telephone booth is an area where, like a home, and unlike a field, a person has a constitutionally protected reasonable expectation of privacy; (b) that electronic as well as physical intrusion into a place that is in this sense private may constitute a violation of the Fourth Amendment; and (c) that the invasion of a constitutionally protected area by federal authorities is, as the Court has long held, presumptively unreasonable in the absence of a search warrant.

As the Court’s opinion states, “the Fourth Amendment protects people, not places.” The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a “place.” My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first 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.” Thus a man’s home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the “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 “(o)ne 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.

***

Finally, I do not read the Court’s opinion to declare that no interception of a conversation one-half of which occurs in a public telephone booth can be reasonable in the absence of a warrant. As elsewhere under the Fourth Amendment, warrants are the general rule, to which the legitimate needs of law enforcement may demand specific exceptions. It will be time enough to consider any such exceptions when an appropriate occasion presents itself, and I agree with the Court that this is not one.
MR. JUSTICE WHITE, concurring.

I agree that the official surveillance of petitioner’s telephone conversations in a public booth must be subjected to the test of reasonableness under the Fourth Amendment and that on the record now before us the particular surveillance undertaken was unreasonable absent a warrant properly authorizing it. This application of the Fourth Amendment need not interfere with legitimate needs of law enforcement.*

In joining the Court’s opinion, I note the Court’s acknowledgment that there are circumstances in which it is reasonable to search without a warrant. . . . Wiretapping to protect the security of the Nation has been authorized by successive Presidents. The present Administration would apparently save national security cases from restrictions against wiretapping. We should not require the warrant procedure and the magistrate’s judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.

MR. JUSTICE BLACK, dissenting.

***

My basic objection is twofold: (1) I do not believe that the words of the Amendment will bear the meaning given them by today’s decision, and (2) I do not believe that it is the proper role of this Court to rewrite the Amendment in order “to bring it into harmony with the times” and thus reach a result that many people believe to be desirable.

While I realize that an argument based on the meaning of words lacks the scope, and no doubt the appeal, of broad policy discussions and philosophical discourses on such nebulous subjects as privacy, for me the language of the Amendment is the crucial place to look in construing a written document such as our Constitution. The Fourth Amendment says that

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,

* In previous cases, which are undisturbed by today’s decision, the Court has upheld, as reasonable under the Fourth Amendment, admission at trial of evidence obtained (1) by an undercover police agent to whom a defendant speaks without knowledge that he is in the employ of the police, Hoffa v. United States, 385 U.S. 293 (1966); (2) by a recording device hidden on the person of such an informant, Lopez v. United States, 373 U.S. 427 (1963); Osborn v. United States, 385 U.S. 323 (1966); and (3) by a policeman listening to the secret micro-wave transmissions of an agent conversing with the defendant in another location, On Lee v. United States, 343 U.S. 747 (1952). When one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he has heard. The Fourth Amendment does not protect against unreliable (or law-abiding) associates. It is but a logical and reasonable extension of this principle that a man take the risk that his hearer, free to memorize what he hears for later verbatim repetitions, is instead recording it or transmitting it to another. The present case deals with an entirely different situation, for as the Court emphasizes the petitioner “sought to exclude *** the uninvited ear,” and spoke under circumstances in which a reasonable person would assume that uninvited ears were not listening.
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.

The first clause protects “persons, houses, papers, and effects, against unreasonable searches and seizures.” These words connote the idea of tangible things with size, form, and weight, things capable of being searched, seized, or both. The second clause of the Amendment still further establishes its Framers’ purpose to limit its protection to tangible things by providing that no warrants shall issue but those “particularly describing the place to be searched, and the persons or things to be seized.” A conversation overheard by eavesdropping, whether by plain snooping or wiretapping, is not tangible and, under the normally accepted meanings of the words, can neither be searched nor seized. In addition the language of the second clause indicates that the Amendment refers not only to something tangible so it can be seized but to something already in existence so it can be described. Yet the Court’s interpretation would have the Amendment apply to overhearing future conversations which by their very nature are nonexistent until they take place. How can one “describe” a future conversation, and, if one cannot, how can a magistrate issue a warrant to eavesdrop one in the future? It is argued that information showing what is expected to be said is sufficient to limit the boundaries of what later can be admitted into evidence; but does such general information really meet the specific language of the Amendment which says “particularly describing”? Rather than using language in a completely artificial way, I must conclude that the Fourth Amendment simply does not apply to eavesdropping.

Tapping telephone wires, of course, was an unknown possibility at the time the Fourth Amendment was adopted. But eavesdropping (and wiretapping is nothing more than eavesdropping by telephone) was, as even the majority opinion in *Berger*, recognized, “an ancient practice which at common law was condemned as a nuisance. IV Blackstone, *Commentaries* § 168. In those days the eavesdropper listened by naked ear under the eaves of houses or their windows, or beyond their walls seeking out private discourse.” [*Berger v. State of New York*, 388 U.S. 41, 45 (1967)]. There can be no doubt that the Framers were aware of this practice, and if they had desired to outlaw or restrict the use of evidence obtained by eavesdropping, I believe that they would have used the appropriate language to do so in the Fourth Amendment. They certainly would not have left such a task to the ingenuity of language-stretching judges. No one, it seems to me, can read the debates on the Bill of Rights without reaching the conclusion that its Framers and critics well knew the meaning of the words they used, what they would be understood to mean by others, their scope and their limitations. Under these circumstances it strikes me as a charge against their scholarship, their common sense and
their candor to give to the Fourth Amendment’s language the eavesdropping meaning the Court imputes to it today.

I do not deny that common sense requires and that this Court often has said that the Bill of Rights’ safeguards should be given a liberal construction. This principle, however, does not justify construing the search and seizure amendment as applying to eavesdropping or the “seizure” of conversations. The Fourth Amendment was aimed directly at the abhorred practice of breaking in, ransacking and searching homes and other buildings and seizing people’s personal belongings without warrants issued by magistrates. The Amendment deserves, and this Court has given it, a liberal construction in order to protect against warrantless searches of buildings and seizures of tangible personal effects. But until today this Court has refused to say that eavesdropping comes within the ambit of Fourth Amendment restrictions.

***

Since I see no way in which the words of the Fourth Amendment can be construed to apply to eavesdropping, that closes the matter for me. In interpreting the Bill of Rights, I willingly go as far as a liberal construction of the language takes me, but I simply cannot in good conscience give a meaning to words which they have never before been thought to have and which they certainly do not have in common ordinary usage. I will not distort the words of the Amendment in order to “keep the Constitution up to date” or “to bring it into harmony with the times.” It was never meant that this Court have such power, which in effect would make us a continuously functioning constitutional convention.

With this decision the Court has completed, I hope, its rewriting of the Fourth Amendment, which started only recently when the Court began referring incessantly to the Fourth Amendment not so much as a law against unreasonable searches and seizures as one to protect an individual’s privacy. By clever word juggling the Court finds it plausible to argue that language aimed specifically at searches and seizures of things that can be searched and seized may, to protect privacy, be applied to eavesdropped evidence of conversations that can neither be searched nor seized. Few things happen to an individual that do not affect his privacy in one way or another. Thus, by arbitrarily substituting the Court’s language, designed to protect privacy, for the Constitution’s language, designed to protect against unreasonable searches and seizures, the Court has made the Fourth Amendment its vehicle for holding all laws violative of the Constitution which offend the Court’s broadest concept of privacy. As I said in Griswold v. State of Connecticut, 381 U.S. 479 [(1965)], “The Court talks about a constitutional ‘right of privacy’ as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the ‘privacy’ of individuals. But there is not.” I made clear in that dissent my fear of the dangers involved when this Court uses
the “broad, abstract and ambiguous concept” of “privacy” as a “comprehensive substitute for the Fourth Amendment’s guarantee against “unreasonable searches and seizures.”

The Fourth Amendment protects privacy only to the extent that it prohibits unreasonable searches and seizures of “persons, houses, papers, and effects.” No general right is created by the Amendment so as to give this Court the unlimited power to hold unconstitutional everything which affects privacy. Certainly the Framers, well acquainted as they were with the excesses of governmental power, did not intend to grant this Court such omnipotent lawmaking authority as that. The history of governments proves that it is dangerous to freedom to repose such powers in courts.

Points for Discussion

1. The *Katz* Court first concluded that the Fourth Amendment applied to the government conduct in question—electronic eavesdropping. It then concluded that the wiretap was unconstitutional because the authorities did not have a warrant to record Katz’s calls. This two-step process—determining first whether the Constitution applies and then whether it was violated—is used throughout the Court’s criminal procedure decisions. If the Constitution does apply and was violated by the challenged act, the Court now makes a third inquiry into what remedy is due the person whose rights were violated. See *United States v. Leon* 468 U.S. 897 (1984), and *Herring v. United States*, 555 U.S. 135 (2009), which appear in chapter 10.

2. Although it appeared in a concurrence, Justice Harlan’s formulation of the Court’s holding has come to be the rule cited in later decisions applying *Katz*:

   My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first 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.”

This language does not completely account for the Court’s pronouncements that “the Fourth Amendment cannot be translated into a general constitutional ‘right to privacy’” and that its “protections often have nothing to do with privacy at all.” Why might lower courts and the Supreme Court apply Justice Harlan’s *Katz* opinion in later cases rather than the majority’s? Consider this:

   The *Olmstead* decision was very divisive, and the government’s use of wiretaps continued to be controversial. In 1967, after a series of cases had begun to cast doubt on the continued constitutional viability of governmental wiretapping, the Supreme Court granted certiorari in *Katz v. United States*. In *Katz*, the Ninth Circuit affirmed a conviction obtained through the use of FBI interceptions of the defendant’s telephone conversations involving interstate betting. On
the initial petition for certiorari, Chief Justice Warren and Justices Brennan, Fortas, and Douglas voted to grant review of the lower court's decision, while Justices Stewart, Clark, Harlan, White, and Black opposed it. Justice Clark resigned on June 12, 1967, and was replaced by then Solicitor General Thurgood Marshall. Marshall recused himself from the case. . . . When the eight remaining justices conferred after oral argument on October 20, 1967, they split 4–4 along the same lines as their votes on certiorari—a split which would ordinarily mean that the underlying decision would be summarily affirmed. However, two weeks later, Justice Stewart changed his mind and joined the justices voting to reverse.

Justice Stewart circulated a proposed draft opinion and a short memorandum to explain his change of mind, both of which appear to have been initially composed by Professor Laurence Tribe who at the time was one of Justice Stewart's law clerks. According to the memorandum, Justice Stewart's change of mind appears to have come about in part because of the Wiretap Act that was debated in Congress at the time. If the tie vote had persisted, the Court's views on the constitutionality of electronic surveillance would not have been available to Congress as it worked on this important legislation. Justice Stewart also appeared to have been concerned that the Court's recent decision in <i>Berger v. New York</i> cast some doubt on the constitutionality of electronic surveillance, even when authorized by a warrant. In <i>Berger</i>, the Court struck down a state wiretapping statute on the ground that the wiretapping constituted a "general search." The facts of <i>Katz</i> were close, and reasonable people could argue it either way.

Accordingly, Justice Stewart appears to have changed his vote so the Court's views about the constitutional parameters of electronic surveillance could help inform the legislative debate. In response to Justice Stewart's memo, the justices who initially voted in favor of reversal signed onto the draft opinion. Justices White and Harlan, initially voting for affirmance, followed Stewart's lead and changed their positions. This left Justice Black as the lone dissenter in a 7–1 decision to reverse. Although several minor changes were made to the draft opinion, the final opinion of the Court appears to have remained substantially as it was when Justice Stewart's law clerk originally drafted it.

The majority opinion adopts the magisterial language, "the Fourth Amendment protects people, not places," and at first glance, appears to sweep away Olmstead's property-based regime, replacing it with a regime based on a right of privacy. But at the same time, the opinion has a reassuring conservative side, rejecting the view that wiretapping constituted an illegal "general search"; the Court explicitly held that under the facts of the <i>Katz</i> case, where the agents took extensive steps to minimize the interception of non-relevant
conversations, the electronic surveillance would have passed constitutional muster if only the FBI had obtained a warrant from a judge before beginning surveillance. The opinion also rejected the argument that the lack of notice inherent in the wiretapping presented an insurmountable hurdle to its lawfulness. *Katz* thus bears the marks of a quintessential political compromise, with both sides getting something they wanted—one side, the overthrow of the overly restrictive *Olmstead* decision; the other, a clear statement of the essential legality of electronic surveillance.

Although the majority opinion is a masterful example of judicial politics, and presents a reasoned defense of the result, it is not without its flaws. It begins with a highly unusual attack on counsel—both the petitioner’s attorneys as well as the government’s—criticizing them for framing the issue as “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.” However, this judicial “frame” was not invented by the lawyers, but had been used explicitly by the Court itself in numerous earlier Fourth Amendment cases—many of them written by some of the very justices who signed the majority opinion. Furthermore, when the Court granted certiorari, it framed the issues in precisely this manner, presumably because it was comfortable with the issues in the petition for certiorari and saw no need to reformulate them. Once the Court accepted this formulation, the parties would be expected to address only those issues in their briefs and argument.

***

There is an even more surprising mistake in the majority opinion: When one listens to the oral argument or reads the transcript, one recognizes that it was counsel for the petitioner who first took the position that the manner in which the issues had been framed (by reference to a “constitutionally protected area”) needed to be altered, and who reformulated the issues into exactly the manner ultimately adopted by the Court. It appears that the oral argument persuaded the Court to reformulate the issues. However, instead of acknowledging flaws in the earlier cases and correcting the analysis, the Court’s opinion blames counsel for getting it wrong.

***

In addition to its embarrassing attack on counsel, the majority opinion contains an important weakness in its legal analysis. The opinion creates the impression of a revolutionary upheaval of the previous regime, while using criticism of counsel to sidestep the otherwise difficult job of addressing prior inconsistent case law with candor. By dismissing precedent without adequate analysis, it loses the ballast of history. While announcing a new understanding of the
Fourth Amendment based on a right of privacy, it says nothing about how this newfound right is to be determined. In eliminating the trespass standard of *Olmstead*, it offers nothing by way of a standard to replace it. How then, has a Supreme Court case, which contains so many mistakes and which promised a legal revolution that it ultimately could never deliver, come to occupy such an unchallenged position in the modern legal Pantheon? The short answer is that the majority opinion has been largely ignored.


3. Justice Black criticizes the majority for deviating from the text of the Fourth Amendment in an attempt to keep the Constitution up to date. How valid is this criticism? How might the move from unreasonable searches and seizures to reasonable expectations of privacy fail to inure to the benefit of criminal defendants?

**OLIVER v. UNITED STATES**

466 U.S. 170 (1984)*

**JUSTICE POWELL delivered the opinion of the court.**

The “open fields” doctrine, first enunciated by this Court in *Hester v. United States*, 265 U.S. 57 (1924), permits police officers to enter and search a field without a warrant. We granted certiorari in these cases to clarify confusion that has arisen as to the continued vitality of the doctrine.

I

No. 82-15. Acting on reports that marihuana was being raised on the farm of petitioner Oliver, two narcotics agents of the Kentucky State Police went to the farm to investigate.¹

Arriving at the farm, they drove past petitioner’s house to a locked gate with a “No Trespassing” sign. A footpath led around one side of the gate. The agents walked around the gate and along the road for several hundred yards, passing a barn and a parked camper. At that point, someone standing in front of the camper shouted: “No hunting is allowed, come back up here.” The officers shouted back that they were Kentucky State Police officers, but found no one when they returned to the camper. The officers resumed their investigation of the farm and found a field of marihuana over a mile from petitioner’s home.

***

---

* The Court refers to the two cases consolidated for decision—*Oliver v. United States* and *Maine v. Thornton*—by their Supreme Court filing numbers.—Eds.

¹ It is conceded that the police did not have a warrant authorizing the search, that there was no probable cause for the search, and that no exception to the warrant requirement is applicable.
No. 82-1273. After receiving an anonymous tip that marihuana was being grown in the woods behind respondent Thornton's residence, two police officers entered the woods by a path between this residence and a neighboring house. They followed a footpath through the woods until they reached two marihuana patches fenced with chicken wire. Later, the officers determined that the patches were on the property of respondent, obtained a warrant to search the property, and seized the marihuana. On the basis of this evidence, respondent was arrested and indicted.

The trial court granted respondent's motion to suppress the fruits of the second search. The warrant for this search was premised on information that the police had obtained during their previous warrantless search, that the court found to be unreasonable. “No Trespassing” signs and the secluded location of the marihuana patches evinced a reasonable expectation of privacy. Therefore, the court held, the open fields doctrine did not apply.

***

II

The rule announced in Hester v. United States was founded upon the explicit language of the Fourth Amendment. That Amendment indicates with some precision the places and things encompassed by its protections. As Justice Holmes explained for the Court in his characteristically laconic style: “[T]he special protection accorded by the Fourth Amendment to the people in their ‘persons, houses, papers, and effects,’ is not extended to the open fields. The distinction between the latter and the house is as old as the common law.”

Nor are the open fields “effects” within the meaning of the Fourth Amendment. In this respect, it is suggestive that James Madison’s proposed draft of what became the Fourth Amendment preserves “[t]he rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures . . . .” See N. Lasson, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 100, n. 77 (1937). Although Congress’ revisions of Madison’s proposal broadened the scope of the Amendment in some respects, the term “effects” is less inclusive than “property” and cannot be said to encompass open fields. We conclude, as did the Court in deciding Hester v. United States, that the government’s intrusion upon the open fields is not one of those “unreasonable searches” proscribed by the text of the Fourth Amendment.
III

***

A

No single factor determines whether an individual legitimately may claim under the Fourth Amendment that a place should be free of government intrusion not authorized by warrant. In assessing the degree to which a search infringes upon individual privacy, the Court has given weight to such factors as the intention of the Framers of the Fourth Amendment, the uses to which the individual has put a location, and our societal understanding that certain areas deserve the most scrupulous protection from government invasion. These factors are equally relevant to determining whether the government’s intrusion upon open fields without a warrant or probable cause violates reasonable expectations of privacy and is therefore a search proscribed by the Amendment.

In this light, the rule of *Hester v. United States*, that we reaffirm today, may be understood as providing that an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home. This rule is true to the conception of the right to privacy embodied in the Fourth Amendment. The Amendment reflects the recognition of the Framers that certain enclaves should be free from arbitrary government interference. For example, the Court since the enactment of the Fourth Amendment has stressed “the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic.”

In contrast, open fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields. Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be. It is not generally true that fences or “No Trespassing” signs effectively bar the public from viewing open fields in rural areas. And both petitioner Oliver and respondent Thornton concede that the public and police lawfully may survey lands from the air. For these reasons, the asserted expectation of privacy in open fields is not an expectation that “society recognizes as reasonable.”

The historical underpinnings of the open fields doctrine also demonstrate that the doctrine is consistent with respect for “reasonable expectations of privacy.” As Justice Holmes, writing for the Court, observed in *Hester*, the common law distinguished “open fields” from the “curtilage,” the land immediately surrounding and associated with the home. The distinction implies that only the curtilage, not the neighboring open fields, warrants the Fourth Amendment protections that attach to the home. At
common law, the curtilage is the area to which extends the intimate activity associated with the “sanctity of a man’s home and the privacies of life,” *Boyd v. United States*, 116 U.S. 616, 630 (1886), and therefore has been considered part of home itself for Fourth Amendment purposes. Thus, courts have extended Fourth Amendment protection to the curtilage; and they have defined the curtilage, as did the common law, by reference to the factors that determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private. Conversely, the common law implies, as we reaffirm today, that no expectation of privacy legitimately attaches to open fields.

We conclude, from the text of the Fourth Amendment and from the historical and contemporary understanding of its purposes, that an individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers.

B

Petitioner Oliver and respondent Thornton contend, to the contrary, that the circumstances of a search sometimes may indicate that reasonable expectations of privacy were violated; and that courts therefore should analyze these circumstances on a case-by-case basis. The language of the Fourth Amendment itself answers their contention.

Nor would a case-by-case approach provide a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment. Under this approach, police officers would have to guess before every search whether landowners had erected fences sufficiently high, posted a sufficient number of warning signs, or located contraband in an area sufficiently secluded to establish a right of privacy. The lawfulness of a search would turn on “[a] highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions . . . .” This Court repeatedly has acknowledged the difficulties created for courts, police, and citizens by an ad hoc, case-by-case definition of Fourth Amendment standards to be applied in differing factual circumstances. The ad hoc approach not only makes it difficult for the policeman to discern the scope of his authority; it also creates a danger that constitutional rights will be arbitrarily and inequitably enforced.

IV

In any event, while the factors that petitioner Oliver and respondent Thornton urge the courts to consider may be relevant to Fourth Amendment analysis in some contexts, these factors cannot be decisive on the question whether the search of an open field is subject to the Amendment. Initially, we reject the suggestion that steps taken to protect privacy establish that expectations of privacy in an open field are legitimate. It is true, of course, that petitioner Oliver and respondent
Thornton, in order to conceal their criminal activities, planted the marihuana upon secluded land and erected fences and “No Trespassing” signs around the property. And it may be that because of such precautions, few members of the public stumbled upon the marihuana crops seized by the police. Neither of these suppositions demonstrates, however, that the expectation of privacy was legitimate in the sense required by the Fourth Amendment. The test of legitimacy is not whether the individual chooses to conceal assertedly “private” activity. Rather, the correct inquiry is whether the government’s intrusion infringes upon the personal and societal values protected by the Fourth Amendment. As we have explained, we find no basis for concluding that a police inspection of open fields accomplishes such an infringement.

Nor is the government’s intrusion upon an open field a “search” in the constitutional sense because that intrusion is a trespass at common law. The existence of a property right is but one element in determining whether expectations of privacy are legitimate. “The premise that property interests control the right of the Government to search and seize has been discredited.” Katz, 389 U.S., at 353 (quoting Warden v. Hayden, 387 U.S. 294, 304 (1967)). “[E]ven a property interest in premises may not be sufficient to establish a legitimate expectation of privacy with respect to particular items located on the premises or activity conducted thereon.”

The common law may guide consideration of what areas are protected by the Fourth Amendment by defining areas whose invasion by others is wrongful. The law of trespass, however, forbids intrusions upon land that the Fourth Amendment would not proscribe. For trespass law extends to instances where the exercise of the right to exclude vindicates no legitimate privacy interest. Thus, in the case of open fields, the general rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment.

V

We conclude that the open fields doctrine, as enunciated in Hester, is consistent with the plain language of the Fourth Amendment and its historical purposes. Moreover, Justice Holmes’ interpretation of the Amendment in Hester accords with the “reasonable expectation of privacy”

---

15 The law of trespass recognizes the interest in possession and control of one’s property and for that reason permits exclusion of unwanted intruders. But it does not follow that the right to exclude conferred by trespass law embodies a privacy interest also protected by the Fourth Amendment. To the contrary, the common law of trespass furthers a range of interests that have nothing to do with privacy and that would not be served by applying the strictures of trespass law to public officers. Criminal laws against trespass are prophylactic: they protect against intruders who poach, steal livestock and crops, or vandalize property. And the civil action of trespass serves the important function of authorizing an owner to defeat claims of prescription by asserting his own title. See, e.g., O. Holmes, The Common Law 98–100, 244–246 (1881). In any event, unlicensed use of property by others is presumptively unjustified, as anyone who wishes to use the property is free to bargain for the right to do so with the property owner. For these reasons, the law of trespass confers protections from intrusion by others far broader than those required by Fourth Amendment interests.
analysis developed in subsequent decisions of this Court. We therefore affirm Oliver v. United States; Maine v. Thornton is reversed and remanded for further proceedings not inconsistent with this opinion.

**Justice White, concurring in part and concurring in the judgment.**

I concur in the judgment and join Parts I and II of the Court’s opinion. These Parts dispose of the issue before us; there is no need to go further and deal with the expectation of privacy matter. However reasonable a landowner’s expectations of privacy may be, those expectations cannot convert a field into a “house” or an “effect.”

**Justice Marshall, with whom Justice Brennan and Justice Stevens join, dissenting.**

In each of these consolidated cases, police officers, ignoring clearly visible “No Trespassing” signs, entered upon private land in search of evidence of a crime. At a spot that could not be seen from any vantage point accessible to the public, the police discovered contraband, which was subsequently used to incriminate the owner of the land. In neither case did the police have a warrant authorizing their activities.

The Court holds that police conduct of this sort does not constitute an “unreasonable search” within the meaning of the Fourth Amendment. The Court reaches that startling conclusion by two independent analytical routes. First, the Court argues that, because the Fourth Amendment by its terms renders people secure in their “persons, houses, papers, and effects,” it is inapplicable to trespasses upon land not lying within the curtilage of a dwelling. Second, the Court contends that “an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home.” Because I cannot agree with either of these propositions, I dissent.

I

The first ground on which the Court rests its decision is that the Fourth Amendment “indicates with some precision the places and things encompassed by its protections,” and that real property is not included in the list of protected spaces and possessions. This line of argument has several flaws. Most obviously, it is inconsistent with the results of many of our previous decisions, none of which the Court purports to overrule. For example, neither a public telephone booth nor a conversation conducted therein can fairly be described as a person, house, paper, or effect; yet we have held that the Fourth Amendment forbids the police without a warrant to eavesdrop on such a conversation. *Katz v. United States*, 389 U.S. 347 (1967). Nor can it plausibly be argued that an office or commercial establishment is covered by the plain language of the Amendment; yet we have held that such premises are entitled to constitutional protection if
they are marked in a fashion that alerts the public to the fact that they are private.²

Indeed, the Court’s reading of the plain language of the Fourth Amendment is incapable of explaining even its own holding in this case. The Court rules that the curtilage, a zone of real property surrounding a dwelling, is entitled to constitutional protection. We are not told, however, whether the curtilage is a “house” or an “effect”—or why, if the curtilage can be incorporated into the list of things and spaces shielded by the Amendment, a field cannot.

The Court’s inability to reconcile its parsimonious reading of the phrase “persons, houses, papers, and effects” with our prior decisions or even its own holding is a symptom of a more fundamental infirmity in the Court’s reasoning. The Fourth Amendment, like the other central provisions of the Bill of Rights that loom large in our modern jurisprudence, was designed, not to prescribe with “precision” permissible and impermissible activities, but to identify a fundamental human liberty that should be shielded forever from government intrusion. We do not construe constitutional provisions of this sort the way we do statutes, whose drafters can be expected to indicate with some comprehensiveness and exactitude the conduct they wish to forbid or control and to change those prescriptions when they become obsolete. Rather, we strive, when interpreting these seminal constitutional provisions, to effectuate their purposes—to lend them meanings that ensure that the liberties the Framers sought to protect are not undermined by the changing activities of government officials.⁵

The liberty shielded by the Fourth Amendment, as we have often acknowledged, is freedom “from unreasonable government intrusions into . . . legitimate expectations of privacy.” That freedom would be incompletely protected if only government conduct that impinged upon a person, house, paper, or effect were subject to constitutional scrutiny. Accordingly, we have repudiated the proposition that the Fourth Amendment applies only to a limited set of locales or kinds of property. In Katz v. United States, we expressly rejected a proffered locational theory of the coverage of the Amendment, holding that it “protects people, not places.” Since that time we have consistently adhered to the view that the applicability of the provision depends solely upon “whether the person

² On the other hand, an automobile surely does constitute an “effect.” Under the Court’s theory, cars should therefore stand on the same constitutional footing as houses. Our cases establish, however, that car owners’ diminished expectations that their cars will remain free from prying eyes warrants a corresponding reduction in the constitutional protection accorded cars.

⁵ Our rejection of the mode of interpretation appropriate for statutes is perhaps clearest in our treatment of the First Amendment. That Amendment provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press” but says nothing, for example, about restrictions on expressive behavior or about access to the courts. Yet, to give effect to the purpose of the Amendment, we have applied it to regulations of conduct designed to convey a message and have accorded constitutional protection to the public’s “right of access to criminal trials.”
invoking its protection can claim a ‘justifiable,’ a ‘reasonable,’ or a ‘legitimate expectation of privacy’ that has been invaded by government action.” Smith v. Maryland, 442 U.S. 735, 740 (1979). 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 this line of cases and with the understanding of the nature of constitutional adjudication from which it derives.

**II**

The second ground for the Court’s decision is its contention that any interest a landowner might have in the privacy of his woods and fields is not one that “society is prepared to recognize as ‘reasonable.’” The mode of analysis that underlies this assertion is certainly more consistent with our prior decisions than that discussed above. But the Court’s conclusion cannot withstand scrutiny.

**A**

We have frequently acknowledged that privacy interests are not coterminous with property rights. However, because “property rights reflect society’s explicit recognition of a person’s authority to act as he wishes in certain areas, [they] should be considered in determining whether an individual’s expectations of privacy are reasonable.” Indeed, the Court has suggested that, insofar as “[o]ne of the main rights attaching to property is the right to exclude others, . . . 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.”

It is undisputed that Oliver and Thornton each owned the land into which the police intruded. That fact alone provides considerable support for their assertion of legitimate privacy interests in their woods and fields. But even more telling is the nature of the sanctions that Oliver and Thornton could invoke, under local law, for violation of their property rights. In Kentucky, a knowing entry upon fenced or otherwise enclosed land, or upon unenclosed land conspicuously posted with signs excluding the public, constitutes criminal trespass. The law in Maine is similar. An

---

10 The Court today seeks to evade the force of this principle by contending that the law of property is designed to serve various “prophylactic” and “economic” purposes unrelated to the protection of privacy. Such efforts to rationalize the distribution of entitlements under state law are interesting and may have some explanatory power, but cannot support the weight the Court seeks to place upon them. The Court surely must concede that one of the purposes of the law of real property (and specifically the law of criminal trespass) is to define and enforce privacy interests—to empower some people to make whatever use they wish of certain tracts of land without fear that other people will intrude upon their activities. The views of commentators, old and new, as to other functions served by positive law are thus insufficient to support the Court’s sweeping assertion that “in the case of open fields, the general rights of property . . . have little or no relevance to the applicability of the Fourth Amendment.”
intrusion into “any place from which [the intruder] may lawfully be excluded and which is posted in a manner prescribed by law or in a manner reasonably likely to come to the attention of intruders or which is fenced or otherwise enclosed” is a crime. Thus, positive law not only recognizes the legitimacy of Oliver’s and Thornton’s insistence that strangers keep off their land, but subjects those who refuse to respect their wishes to the most severe of penalties—criminal liability. Under these circumstances, it is hard to credit the Court’s assertion that Oliver’s and Thornton’s expectations of privacy were not of a sort that society is prepared to recognize as reasonable.

B

The uses to which a place is put are highly relevant to the assessment of a privacy interest asserted therein. If, in light of our shared sensibilities, those activities are of a kind in which people should be able to engage without fear of intrusion by private persons or government officials, we extend the protection of the Fourth Amendment to the space in question, even in the absence of any entitlement derived from positive law.

Privately owned woods and fields that are not exposed to public view regularly are employed in a variety of ways that society acknowledges deserve privacy. Many landowners like to take solitary walks on their property, confident that they will not be confronted in their rambles by strangers or policemen. Others conduct agricultural businesses on their property. Some landowners use their secluded spaces to meet lovers, others to gather together with fellow worshippers, still others to engage in sustained creative endeavor. Private land is sometimes used as a refuge for wildlife, where flora and fauna are protected from human intervention of any kind.  

Our respect for the freedom of landowners to use their posted “open fields” in ways such as these partially explains the seriousness with which the positive law regards deliberate invasions of such spaces and substantially reinforces the landowners’ contention that their expectations of privacy are “reasonable.”

C

Whether a person “took normal precautions to maintain his privacy” in a given space affects whether his interest is one protected by the Fourth Amendment. The reason why such precautions are relevant is that we do not insist that a person who has a right to exclude others exercise that

---

14 We accord constitutional protection to businesses conducted in office buildings; it is not apparent why businesses conducted in fields that are not open to the public are less deserving of the benefit of the Fourth Amendment.

15 This last-mentioned use implicates a kind of privacy interest somewhat different from those to which we are accustomed. It involves neither a person’s interest in immunity from observation nor a person’s interest in shielding from scrutiny the residues and manifestations of his personal life. It derives, rather, from a person’s desire to preserve inviolate a portion of his world. The idiosyncracy of this interest does not, however, render it less deserving of constitutional protection.
right. A claim to privacy is therefore strengthened by the fact that the claimant somehow manifested to other people his desire that they keep their distance.

Certain spaces are so presumptively private that signals of this sort are unnecessary; a homeowner need not post a “Do Not Enter” sign on his door in order to deny entrance to uninvited guests. Privacy interests in other spaces are more ambiguous, and the taking of precautions is consequently more important; placing a lock on one’s footlocker strengthens one’s claim that an examination of its contents is impermissible. Still other spaces are, by positive law and social convention, presumed accessible to members of the public unless the owner manifests his intention to exclude them.

Undeveloped land falls into the last-mentioned category. If a person has not marked the boundaries of his fields or woods in a way that informs passersby that they are not welcome, he cannot object if members of the public enter onto the property. There is no reason why he should have any greater rights as against government officials. Accordingly, we have held that an official may, without a warrant, enter private land from which the public is not excluded and make observations from that vantage point. Fairly read, the case on which the majority so heavily relies, *Hester v. United States*, 265 U.S. 57 (1924), affirms little more than the foregoing unremarkable proposition. From augh that appears in the opinion in that case, the defendants, fleeing from revenue agents who had observed them committing a crime, abandoned incriminating evidence on private land from which the public had not been excluded. Under such circumstances, it is not surprising that the Court was unpersuaded by the defendants’ argument that the entry onto their fields by the agents violated the Fourth Amendment.

* * *

A very different case is presented when the owner of undeveloped land has taken precautions to exclude the public. As indicated above, a deliberate entry by a private citizen onto private property marked with “No Trespassing” signs will expose him to criminal liability. I see no reason why a government official should not be obliged to respect such unequivocal and universally understood manifestations of a landowner’s desire for privacy.

* * *

III

A clear, easily administrable rule emerges from the analysis set forth above: Private land marked in a fashion sufficient to render entry thereon a criminal trespass under the law of the State in which the land lies is protected by the Fourth Amendment’s proscription of unreasonable searches and seizures. One of the advantages of the foregoing rule is that it draws upon a doctrine already familiar to both citizens and government
officials. In each jurisdiction, a substantial body of statutory and case law defines the precautions a landowner must take in order to avail himself of the sanctions of the criminal law. The police know that body of law, because they are entrusted with responsibility for enforcing it against the public; it therefore would not be difficult for the police to abide by it themselves.

By contrast, the doctrine announced by the Court today is incapable of determinate application. Police officers, making warrantless entries upon private land, will be obliged in the future to make on-the-spot judgments as to how far the curtilage extends, and to stay outside that zone. In addition, we may expect to see a spate of litigation over the question of how much improvement is necessary to remove private land from the category of “unoccupied or undeveloped area” to which the “open fields exception” is now deemed applicable.

* * *

Points for Discussion

1. The Court writes in *Oliver* that the government’s intrusion upon the open fields is not one of those ‘unreasonable searches’ proscribed by the text of the Fourth Amendment.” Does the majority mean that what the police did was not a search or that it was not unreasonable? Does it matter?

2. In part III.B of its opinion, the Court holds not only that Oliver and Thornton failed to demonstrate a reasonable expectation of privacy in their fields, but that no homeowner can reasonably expect privacy in such areas. The Court justifies this conclusion with reference to the Fourth Amendment’s text and on the ground that an “ad hoc approach not only makes it difficult for the policeman to discern the scope of his authority; it also creates a danger that constitutional rights will be arbitrarily and inequitably enforced.” What are the comparative advantages of a bright-line rule versus case-by-case adjudication guided by general principles?

3. What is the appropriate role of property rights in determining whether or not a particular government action infringes upon a reasonable expectation of privacy? How does Justice Marshall’s conception of the interplay between property law and the protection of privacy differ from the majority’s?

**UNITED STATES V. JONES**

565 U.S. 400 (2012)

**JUSTICE SCALIA delivered the opinion of the court.**

* * *

I

In 2004 respondent Antoine Jones, owner and operator of a nightclub in the District of Columbia, came under suspicion of trafficking in narcotics