

**JUSTICE SCALIA:
TEXTUALISM V. TECHNOLOGY**

by
Liam Phibbs

A thesis submitted to the Faculty of the University of Delaware in partial fulfillment of the requirements for the degree of Bachelor of Arts in Political Science with Distinction

Spring 2012

© 2012 Liam Phibbs
All Rights Reserved

**JUSTICE SCALIA:
TEXTUALISM V. TECHNOLOGY**

by

Liam Phibbs

Approved: _____
James Magee, Ph.D.
Professor in charge of thesis on behalf of the Advisory Committee

Approved: _____
Wayne Batchis, Ph.D.
Committee member from the Department of Political Science &
International Relations

Approved: _____
Eric Rise, Ph.D.
Committee member from the Board of Senior Thesis Readers

Approved: _____
Donald Sparks, Ph.D.
Chair of the University Committee on Student and Faculty Honors

ACKNOWLEDGMENTS

I would like to thank Dr. James Magee for all of the insight he has provided throughout my research. His guidance, encouragement and friendship have been invaluable not only throughout the writing of this thesis, but also throughout the last two years of my college experience. Thank you to Dr. Wayne Batchis and Dr. Eric Rise for always being more than happy to discuss my research and providing me with fresh perspectives on how to approach this thesis.

Thank you Margaret Meiman and everyone else in the Undergraduate Research Program, who made available all of the research opportunities I have had. Finally, I would like to thank my family for their unwavering support and help throughout my research and writing.

TABLE OF CONTENTS

ABSTRACT	v
1.....	
<u>INTRODUCTION</u>	1
2.....	
<u>JUSTICE SCALIA, THE JURIST</u>	4
3.....	
<u>LIVING CONSTITUTION V. SCALIA</u>	12
4.....	
<u>SCALIA AND THE FOURTH AMENDMENT</u>	17
5.....	
<u>TECHNOLOGY AND THE FOURTH AMENDMENT</u>	24
6.....	
<u>SCALIA AND TECHNOLOGY</u>	31
AVIATION.....	32
THERMAL IMAGING	37
DOGS	47
GPS TRACKING	52
7.....	
<u>THE FUTURE</u>	61
8.....	
<u>SHOULD ORIGINALISM BE APPLIED</u>	64
REFERENCES	68

ABSTRACT

Throughout his legal career, Supreme Court Justice Antonin Scalia has attempted to champion a style of textual interpretation that examines the original meaning of the text in question. In particular the Constitution of the United States is most often scrutinized through different lenses of interpretation. Scalia argues that his textual originalist manner of interpretation will provide the most objective outcomes in relation to other modes of interpreting texts like the Constitution.

This thesis examines the objectivity and legitimacy of Scalia's textual originalism in relation to Fourth Amendment technology cases. These cases deal with issues that the Framers of the Constitution could have never foreseen, which will always be an issue when trying to apply the "original" meaning of an eighteenth century text. The precedent for Fourth Amendment technology cases that has been set over the past five decades has amalgamated into an almost incoherent doctrinal mess that has made very difficult deciding future cases according to precedent, as courts are expected to do. Justice Scalia's own decisions within these cases have contributed to the confusion of precedent.

Two of the most important Fourth Amendment technology opinions were written by Scalia, one of which fails to appropriately apply the philosophy he advocates for and the most recent that actually follows his textual originalism but fails to address important privacy concerns. These opinions continue to confuse the Fourth Amendment precedent and question the applicability of using textual originalism in such contemporary cases. Ultimately, Scalia's application of textual originalism

proves to be as subjective as other modes of interpretation, logically questionable and even when it is accurately applied, fails to address privacy concerns associated with the Fourth Amendment.

Chapter 1

INTRODUCTION

Over the past quarter century there has been a dramatic shift in how the U.S. Supreme Court has rendered decisions on constitutional cases. Gone are the days of the Warren Court where the justices seemed to trust their views of morality and “evolving standards” over a strict allegiance to stare decisis. The rise of “originalism” has coincided with the advancement of political conservatism and has had a tremendous impact on constitutional interpretation. The philosophy of textual originalism requires the Court to begin with the text of the Constitution as it was written in the 18th century and then to determine the meaning of the text as they feel it was understood at the time it was written.¹ Originalism opposes the notion of the Constitution as a “living” document that changes as our society evolves. Originalists feel that this view will decrease the influence of social mores in determining the outcome of important questions that affect government and American society and thus maintain consistency and fairness—the “rule of law”—within the Court. Opponents see originalism as conservative values clad in the rhetoric of historicism in an effort to infuse them into the basic law of the country. ²

¹ Scalia, Antonin, and Amy Gutmann. *A Matter of Interpretation: Federal Courts and the Law : An Essay*. Princeton, NJ: Princeton UP, 1998. Print.

² Levinson, Tom, “Confrontation, Fidelity, Transformation: The ‘Fundamentalist’ Judicial Persona of Justice Antonin Scalia” (2006). *Pace Law Review*. Paper 535

Supreme Court Justice Antonin Scalia has played an integral role in the popularization of originalism. During the past twenty-six years he has argued that it is the “lesser of evils” when it comes to the interpretation of the Constitution and that it is the most effective way to eliminate political bias from this important role that the Supreme Court plays.³ One can see an example of Justice Scalia’s originalism in the majority opinion that he wrote for the gun right’s case of *District of Columbia v. Heller*. Rather than taking a federalist approach or allowing for the people's elected representatives to decide what sort of gun control their region should have, Scalia posited a textual originalist argument, claiming that the Second Amendment entitled individuals to own handguns. The crux of his opinion focused on the actual wording of the Second Amendment and utilized the legal philosophy of Sir William Blackstone, a 17th century English authority, to validate the argument that the right of the people to keep and bear arms may not be infringed by local authorities,⁴ even though there is a prefatory clause to the amendment that links gun ownership to militia activity.

This thesis examines Justice Scalia’s application of his textualist and originalist philosophies. One of the most salient criticisms of these philosophies stems from the difficulty of adapting 18th century textual concepts to modern developments and legal needs that the framers of the Constitution could never have foreseen. A prime example of this problem can be found in the application of the Fourth Amendment to a rapidly changing society. The amendment reads: “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

³ *Matter of Interpretation*

⁴ *District of Columbia v. Heller*, 554 U.S. 570 (2008)

probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”⁵

Fourth Amendment cases almost always deal with the police search or seizure of a private citizen and their possessions. Over time, the police have discovered increasingly more useful and invasive tools with which to conduct these searches, tools that the framers of the Constitution could never have anticipated. The adversarial nature to Fourth Amendment cases, pitting individual against state interest, combined with the significant relevance that new technologies have played in these cases, means that they provide the ideal set of cases for examining how Justice Scalia has applied his version of originalism.

Some of the questions that will be explored here include the following: How has Justice Scalia ruled on these cases? Has he taken a relatively active role? How did he apply his originalist philosophy in these cases? Finally, is originalism an appropriate standard to review these cases? As we begin to review some of these cases, it seems that Justice Scalia’s jurisprudence differs from the originalist jurisprudence that he purports to follow. In one particular case, *Kyllo v. United States*, he has advocated an evolving meaning for the Fourth Amendment, which is about the furthest thing from an originalist’s approach to adjudication. This thesis will examine the role that Justice Scalia has played in the recent interpretation of the Fourth Amendment and whether or not he has followed his purported principles.

⁵ United States Constitution Amendment IV

Chapter 2

JUSTICE SCALIA, THE JURIST

Justice Scalia has had a distinguished career in law. After graduating from Harvard University's Law School he began working at a prestigious law firm in Cleveland, followed by teaching at various law schools, service as the assistant attorney general for the United States, a judgeship on the US Court of appeals for the DC circuit and finally, he was successfully nominated by President Ronald Reagan to the Supreme Court. Scalia is currently the longest serving member of this Supreme Court. He first sat at the bench on September 26, 1986 and still plays a vital role in the Court to this day.

In his 26 years of service he has been identified as one of the Court's conservative anchors. He was central to the creation of the opinion in *Bush v Gore* (2000), which awarded George W. Bush the presidency by ending the recounts in Florida. In cases where there are social interests at stake, Scalia regularly rules in favor of the more traditionally conservative values. He believes there is no constitutional right to privacy that allows a woman to choose to have an abortion or prevents government from punishing private homosexual behavior between consenting adults, supports certain questionable forms of speech, has voted against affirmative action, and usually supports police actions. ⁶

⁶ Biskupic, Joan. *American Original: The Life and Constitution of Supreme Court Justice Antonin Scalia*. New York: Sarah Crichton /Farrar, Straus And Giroux, 2009. Print.

As a jurist, Justice Scalia has proven to be a very interesting figure. His book *A Matter of Interpretation* had a significant impact on the legal community and has reached a wider general audience. The first sentence of this book reads: “The following essay attempts to explain the current neglected state of the science of construing legal texts, and offers a few suggestions for improvement.” This accurately sets the tone for the rest of the essay.⁷ By explaining the current state of interpreting legal texts and providing suggestions on how to improve it, Justice Scalia does much to lay out who he really is as a jurist.

In the beginning of his essay, Justice Scalia describes and analyzes common law. He identifies the common law system as the starting point for anyone interested in learning about the law, due to its historical foundation and significant contemporary role. The most important feature for him of the common law system is the strict degree to which it is bound to and grows from past precedent. Since no two cases are carbon copies of one another there will always be a degree of subjectivity when it comes to a judge determining which precedent is appropriate to apply in future cases. Scalia describes the growth of the common law system through the use of judicial precedent as resembling a “scrabble board” since judges have over time added more while erasing nothing. It is then the duty of a good common law judge to examine all relevant precedent, determine which past cases are most applicable then utilize these established laws to create an impartial and consistent ruling. In any common law system there will always be a level of subjectivity since not every jurist will interpret precedent in the same way.

⁷ *A Matter of Interpretation*

Following precedent is important, since it maintains consistency. However, Scalia discusses another component found in the common law system that refutes the idea that the common law system maintains fairness. He claims that judges in common law courts are often “making” the law rather than interpreting the facts and history of the case, in order to come to an acceptable conclusion. To Justice Scalia, “judge-made law” is a blight upon the justice system. He thinks that it erodes reason out of decision-making and allows for the judges’ biases to play a role in what is supposed to be an objective process. Allowing judges to create law in this manner is what he describes as “a sure recipe for incompetence and usurpation.”⁸

In the realm of interpreting statutes passed by Congress, which involves much of the Court’s work, Scalia advocates a “scientific” approach to eliminate “judge-made law.” He tries to eliminate the fickle variables of bias and politics, while also trying to create a system that will produce consistent results. There is no unanimously accepted theory of statutory interpretation and what the main role of a judge is supposed to be. One thing that is often agreed upon, is that understanding the “intent of the legislature” is a vital element when interpreting statutes. Deciding what the intent is, can lead to further conflict, since this, too, can be a very subjective process. Scalia rejects the concept of “legislative intent” because he does not believe that there is any one “intent” that can be discovered. He argues, instead, for the *plain text* as the basis of determining the meaning of the legislation in question. This is the basis for his philosophy of “originalism.”

⁸ Ibid.

Another philosophy of statutory interpretation is to try and analyze what the purpose of the law was according to the lawmaker. Some believe that this is an accurate way of implementing the law as it was originally intended. Justice Scalia is definitely not one of these people who believe that trying to divine the original purpose is appropriate. His belief is firmly that it is “the law that governs, not the intent of the lawmaker.” When a piece of legislation is brought into question it should be the text of the legislation that is analyzed rather than the lawmaker, in order to understand what the law means. He is of the opinion that if you allow common law judges to try and psychoanalyze lawmakers it will allow them to incorporate their own objectives and desires, even if they don’t necessarily mean to.

Scalia rejects a broad construction of the text and, instead, advocates literal reading of texts. However, although he may view textualism as the most appropriate means to judge a case, he thinks that this philosophy needs to be tempered since its most extreme form, *strict* constructionism, can be detrimental in his eyes. In fact, he rejects the use of the term “strict construction” bandied about by politicians and others in favor of what he calls a reasonable interpretation. The case that Scalia cites as defining the line between reasonable textual analysis and draconian strict constructionism is *Smith v. United States*. In this case, Smith was involved in a cocaine deal with undercover police. Rather than offering money to pay for the cocaine, Smith offered to trade a MAC-10 submachine gun. Beyond getting arrested for drug and firearm charges, Smith was also charged under a federal statute that would dramatically increase the penalty of his sentence. This statute stated that if “during and in relation to... [a] drug trafficking crime” a defendant “uses... a firearm” that their jail term will be subject to increased sentencing. Since the gun in question is

technically considered a machine gun, the minimum sentence that Smith would face under this statute would be thirty years in prison.⁹

What Scalia finds disagreeable with this case, is the manner in which the word “used” is being interpreted. The petitioner did not “use” a firearm in its traditional sense, that is, firing or threatening to fire the weapon. Justice O’Connor wrote the majority opinion of the Court, upholding the sentence enhancement. She cited the fact that Congress intentionally made the word “used” to have a broad meaning when it wrote the law so that it doesn’t require the defendant actually to use the gun as a weapon. The manner of interpretation involved with the Court’s decision seems to reflect the philosophy discussed earlier, where the original intent of the law is considered heavily. The same conclusion could be achieved by adopting a strict constructionist philosophy, by rigidly applying the word “used” in all of its definitions. Scalia disagrees with both of these ideas. His style of textualism would interpret the word “used” in the context of the rest of the statute to restrict its definition to being used as a weapon. The analogy Scalia makes to prove why his interpretation is the most appropriate is that when you ask someone if they “use a cane” you are not asking them if they have hung up a family cane on the wall of their home.¹⁰

Even though Scalia tries to provide some sense of leniency when it comes to his interpretation, the crux of his philosophy always comes back to a set of formalistic and necessary rules of law. Without these set forms there would be no established rule

⁹ Smith v. United States, 507 U.S. 197 (1993)

¹⁰ *A Matter of Interpretation*

of law according to Scalia. Coherency within the justice system as well as within the government as a whole relies on consistent forms and rules.

As a jurist Scalia attempts to maintain the integrity and consistency he finds in textualism while also tempering the textualist philosophy to avoid nit picking and to provide what he sees as a sense of reason. What Scalia has ultimately designed as a means of legislative interpretation faces its ultimate test of applicability with the Constitution of the United States. What makes the Constitution such a tricky document is that it is the “supreme law of the land.” There will always be conflicts when it comes to interpreting any legal document since there are so many ways to approach the subject, and this is only exacerbated when interpreting the Constitution. The power contained within the document is so vast that it provides the outline of the American governmental system as well as establishes the basic rights of all Americans. However, the Constitution does this in very broad strokes. If the framers had set out to accomplish their goals in such a detailed way that little debate could occur as to their meaning, the Constitution could have been transformed into a labyrinth of legal codes that would be utterly incomprehensible. Justice Scalia felt that Chief Justice Marshall said this best in his decision for *McCulloch v. Maryland* (1819):

A Constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American Constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the 9th

section of the 1st article, introduced? It is also, in some degree, warranted, by their having omitted to use any restrictive term, which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is a Constitution we are expounding.¹¹

In an attempt to make practical sense of the broad strokes in which the Constitution is written, Justice Scalia applies his originalist approach when there is no conflict with the past precedent of the Court (though he sometimes will vote to overrule established precedent). This is how he tries to balance his originalist and textualist beliefs with the consistency that comes from the common law system. This is also one of the questionable attributes of Justice Scalia's philosophy, since deciding whether or not there is conflict within the precedent is a subjective process itself.

Justice Scalia approaches the important task of interpreting the Constitution by focusing on the principle that he applied in the *Smith* case discussed above. The starting point is always the text itself. Context is integral in defining the nature of the constitutional conflict since it will narrow the understanding of broadly used words while also avoiding the strict constructionist approach, which he regards as unreasonable. Scalia calls this being a reasonable constructivist.

When the text even in context is unclear, then Scalia tries to find what the text was originally understood to mean at the time it was written. He looks to a plethora of different sources to provide original meaning. The Constitution itself is probably the most valuable resource for this. However, he also takes into consideration many documents from around the time the Constitution was framed. In particular, he mentions Hamilton, Madison, Jefferson and Jay. This is a tactic that verges on being

¹¹ *McCulloch v. Maryland*, 17 U.S. 316 (1819)

construed as relying on legislative history or intent, both of which Scalia has continually discounted as being inaccurate modes of interpreting legislation. However, he defends this practice by stating that these writings “display how the text of the Constitution was originally understood.”¹² This allows him to find the original meaning of the constitutional clause in question.

Discovering the original meaning of the Constitution is the means with which Scalia hopes to achieve his goals of interpreting the Constitution with consistency and reason. It is also what he views as the much more appropriate alternative to adopting a “current meaning” of the Constitution. To implement the “current meaning” of the Constitution rather than the original meaning is the tenet of a different philosophy of interpretation known as “the living Constitution.”¹³

¹² *A Matter of Interpretation*

¹³ *Ibid.*

Chapter 3

LIVING CONSTITUTION V. SCALIA

The first time that the idea of a living Constitution was really discussed was during the 1920's and 1930's. The concept of a living Constitution lies in the notion that modern social values and ideas should in some cases be considered when interpreting the Constitution since it was drafted in the late 18th century. The age of the text leads to the belief that the Constitution may in some cases be ineffective in solving contemporary dilemmas. Having a living Constitution means that the Constitution must evolve over time in order to best adapt to the respective issues that occur over time. ¹⁴

One of the clearest examples of applying the living Constitution philosophy occurs during an examination of the eighth amendment. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."¹⁵ The word "and" between cruel and unusual is the key phrase. A strict textualist would read this as the punishment having to be both cruel as well as unusual for it to be unconstitutional, so a punishment could be exceedingly cruel but as long as it is not unusual then it is totally fine.

¹⁴ "The Living Constitution." *University of Chicago Law School*. Web. 23 Sept. 2011. <<http://www.law.uchicago.edu/alumni/magazine/fall10/strauss>>.

¹⁵ United States Constitution Amendment VIII

A living constitutionalist would approach this issue in a very different way. One of the most notable living Constitution cases was *Trop v. Dulles*. In this case Trop had deserted during his service in the military, for which he served three years of hard labor as a punishment. A new piece of legislation essentially revoked the citizenship of anyone who had deserted and had been dishonorably discharged. The Warren Court ultimately ruled that this was a violation of the eighth amendment and that “The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”¹⁶

The focus of this thesis is on the Fourth Amendment, which protects citizens from unreasonable searches and seizures. Over the 20th century there were numerous cases that evolved this amendment and made it much more relevant to contemporary society rather than trying to preserve it in its 18th century context. The most important one of these cases was *Katz v. United States* (1967). In this case, police, without a warrant, attached a listening device to a glass telephone booth that Charles Katz used in order to illegally communicate gambling information. Was attaching this surveillance equipment to the glass booth, where anyone could see Katz, an unreasonable search of Katz according to the Fourth Amendment? Should a public place such as a telephone booth be considered a place where there is a constitutionally expected right to privacy?

Justice Potter Stewart wrote the opinion for this case holding that Katz’s rights had indeed been violated by law enforcement. When Katz entered the phone booth and closed the door behind him, he expected “the words he utters into the mouth-piece will not be broadcast to the world.” This case was heard by the Warren Court, which was

¹⁶ *Trop v. Dulles*, 356 U.S. 86 (1958)

considered a very progressive Court that at times advanced the living Constitution. Rather than dwelling over the order of the words or what they might have meant in 1791, the Court focused on what they felt the amendment was generally trying to protect. In this case, when one goes into a phone booth and shuts the door behind them their natural reaction is to think that they have privacy and can speak freely without being concerned that there is someone listening in. The Fourth Amendment guarantees citizens the protection against “unreasonable searches” and since there is an understood element of privacy in entering a phone booth and shutting the door, listening to that person’s phone calls without a proper warrant is an unreasonable course of action that law enforcement took.¹⁷

Most of the applicable precedent from the Katz case that has been used in future cases did not actually come from the majority decision, but rather the concurring opinion that Justice John Marshall Harlan wrote. Justice Stewart’s majority opinion came to the conclusion that the government had violated the Fourth Amendment, but his rationale focused on the principle that the Fourth Amendment protects people and not places. Very little was done in the majority opinion to outline privacy according to the Fourth Amendment. Justice Harlan tackled this issue in his concurrence where he stated that his “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 has been a major factor for determining whether or not an individual had a right to privacy in future Fourth Amendment cases.

¹⁷ Katz v. United States, 389 U.S. 347 (1967)

The only justice to dissent from the majority opinion was Justice Hugo L. Black. He is interesting in that he helped pioneer the way for Justice Scalia and his textualism. Justice Black was a strong supporter of textualism and believed that there is no explicit right to privacy from the Constitution since it is not expressly outlined in the text. This was Justice Black's rationale for writing a dissent in *Katz*. Black was interested in the plain meaning of the words of the Fourth Amendment and did not feel that the police attaching a listening device to a public place, to overhear a conversation, was a violation according to the plain text of the Fourth Amendment. For Black there had to be a physical invasion, a search and seizure of physical evidence for it to be a Fourth Amendment issue. In this case the only thing being seized is a man's conversation, which to Justice Black is intangible and therefore not protected by the terms of the Fourth Amendment. ¹⁸

The decision in this case was critical in creating a modern right to privacy for all citizens. It took what everyone would consider to be a natural right, that you don't always have to be on alert in case someone is watching or listening, and turned that into a justiciable issue within the Fourth Amendment. This is actually the second reason for Justice black's dissent. He felt that the Court was taking an immensely active role in essentially rewriting the amendment to make it fit more appropriately within modern times. This was not the role of the Court according to Black and according to Justice Scalia as well.

In his book on constitutional interpretation Scalia had this to say about a living constitutionalist approach: "The reality of the matter is that, generally speaking,

¹⁸ Ibid. (Dissenting Opinion by Justice Black)

devotees of the living Constitution do not seek to facilitate social change but to prevent it.”¹⁹ This is an extremely bold and questionable statement, in light of some of the most monumental social changes that have occurred in the past decades due to the Supreme Court. *Brown v. Board of Education* (I and II) in 1954 and *Griswold v. Connecticut* (1965), are cases decided during the Warren Court that relied on not only stare decisis and past precedent but also the expectations that modern society holds.

Justice Scalia concludes that a living constitutional approach will threaten individual’s rights. He provides the Second Amendment as an example of this. By claiming that “we value the right to bear arms less than did the founders” and that this is an individual liberty being stripped by believers in the living Constitution. Even if society likes the limiting of the right to bear arms, in the end it is still a reduction of individual rights. These values are paramount for Justice Scalia’s philosophy; however, the application of these values is what is questionable when examining how Scalia has approached technology’s role in the 4th amendment.

¹⁹ *A Matter of Interpretation*

Chapter 4

SCALIA AND THE FOURTH AMENDMENT

My project examines not only qualitative but quantitative evidence regarding Justice Scalia's treatment of the Fourth Amendment. I examined every Supreme Court case since Justice Scalia first sat on the bench on September 26, 1986, and pulled out all the cases that dealt with Fourth Amendment issues. The databases used to compile this case list were the Chicago Kent College of Law Database and The Supreme Court Database (funded by the National Science Foundation). From this case list I then used the Cornell Legal Information Institute to read the cases and create a synopsis of each that provides an overall understanding of how the Court and Justice Scalia have ruled on the Fourth Amendment over the past quarter century. This document serves as the primary source of qualitative evidence and provided the means to create my quantitative analysis. Multiple Excel spreadsheets were created and then compressed into two separate breakdowns that examine a variety of factors (for example, Scalia vs. the other justices in each case, predominant Fourth Amendment issues, statistical breakdowns of voting records, etc.). Working with both my qualitative case synopses and quantitative data has helped ensure accuracy.

Since Scalia joined the bench in 1986 there have been a number of important Fourth Amendment cases. In this current term alone the Fourth Amendment has undergone a shift in its meaning in *United States v. Jones*, a case heard on November 8, 2011 and decided on January 23, 2012, in a majority opinion written by Justice Scalia. During his time on the Court, he has not taken the most active role in Fourth

Amendment cases. However, he has made his own contributions, *Kyllo v. United States* (2000) and *Jones* being the most notable, and these decisions, as will be discussed below, question his own commitment to originalism and whether originalism is even viable as a method of constitutional interpretation. From the time of his appointment, until the end of the 2010 term, there were 96 Fourth Amendment cases decided. Of those 96, the Court held 22 times in favor of protecting an individual's right from an unreasonable search and seizure,²⁰ while Scalia voted 17 times in favor of individual's rights.²¹

These statistics show that the Rehnquist and Roberts Courts overwhelmingly support the ability of law enforcement to conduct questionable searches and seizures. It also shows that Scalia, even more so than the Court, supports law enforcement in this respect. For the cases where he supports the government, while the majority of the Court rules in favor of individual rights, there are diverse factors that go into Scalia's rationale. In many of these cases, what separated Scalia from the Court's focus on the primary issue at hand has purportedly been his textualist interpretation.

In *Ferguson v. City of Charleston*, the issue was drug-testing mothers directly after they have given birth to check if they had cocaine in their system. If cocaine were found, the hospital would then report it to the police who could charge the mother with possession of cocaine. The Court ruled that this type of drug testing was a violation of the Fourth Amendment since there was no consent from the mothers that were tested.²² Scalia dissented, writing in his opinion that the Court was not focusing on the

²⁰ Justice + Case chronological breakdown

²¹ 4th amend chronologic breakdown

²² *Ferguson v. Charlestown*, 532 U.S. 67 (2001) (Majority opinion by Justice Steven)

proper issue. He felt that what is really at issue is the hospitals' reporting their test results to the police and not the urine test itself. Scalia concludes that the reporting of test results is "obviously not a search."²³

Another case in which Scalia dissented from the majority to support law enforcement was *Groh v. Ramirez*. In this case Groh was an Alcohol Tobacco and Firearms (ATF) agent who applied for a search warrant for Ramirez's ranch. There were multiple flaws with his application, and the warrant the magistrate gave Groh did not specify what the agent was actually expecting to find on the ranch. The Court decided that since the warrant did not specify what law enforcement was looking for, it was invalid under the Fourth Amendment.²⁴ Justice Scalia joined Justice Thomas' dissent, stating that the relationship between the Fourth Amendment's warrant clause and unreasonableness clause was unclear and, according to their understanding, the majority has gone too far with their decision.²⁵

Cases like these display the conflicts that can arise in constitutional interpretation. In both instances one might ask whether it was prudent for Justice Scalia to rule in the manner he did, focusing on idiosyncrasies within the Constitution rather than the more straightforward approach that the Court utilized.²⁶

Since there is no unified manner with which the judiciary can interpret the Constitution, questions like this one will persist. The cases examined above were

²³ Ibid. (Dissent by Justice Scalia)

²⁴ *Groh v. Ramirez*, 540 U.S. 551 (2004) (Majority opinion by Justice Stevens)

²⁵ Ibid. (Dissent by Justice Thomas)

²⁶ This issue is not only found when trying to interpret the Constitution, it is something that can occur when trying to interpret any type of legislation.

instances where Scalia ruled in favor of law enforcement while the Court ruled for individual's rights. There is one case in which Scalia ruled in favor of promoting individual's rights against the Court's favoring of police action, *Riverside County v. McLaughlin*. The Riverside case presents the issue of detention of individuals without the police providing their probable cause within a certain time limit. This case may deal with Fourth Amendment issues like seizures and probable cause. However, what was really at issue here was a county's administrative process and a dispute about which case should be examined to provide the proper precedent. Overall the *Riverside* decision did not significantly affect the interpretation of the Fourth Amendment.²⁷

These cases are examples in which Justice Scalia either authored or joined a dissenting opinion, and from these cases it is fairly evident that Scalia finds little in the Fourth Amendment to restrain police action. This should be expected from a Justice who is regarded as being "conservative," despite his claims that he is not influenced by his ideology in interpreting the Constitution. This same conclusion can be reached if one examines the cases in which Scalia has written the majority opinion of the Court. Only 14% of the majority opinions he has written concerning the Fourth Amendment have favored the individual's protection from police action (from 1986 - 2010), which means that during these twenty-four years he has written only two majority opinions that do not favor law enforcement. These two cases are *Kyllo* and, which will be discussed later in this thesis, and *Arizona v. Hicks* (1987), in which an officer was found having only "reasonable suspicion" rather than "probable cause" to engage in a search that convicted a man of theft.²⁸

²⁷ County of Riverside v. McLaughlin, 500 U.S. 44 (1991)

²⁸ 4th amend chronologic breakdown

The other fourteen cases, in which Scalia wrote the majority opinion, all upheld the searches and seizures in question against claims of Fourth Amendment violations. This includes cases like *Murray v. United States*, where law enforcement applied for a warrant to search a warehouse, broke into the warehouse before they were given a warrant, and found evidence that they could use against Murray. They waited for the warrant and neglected to mention that they had already broken into the warehouse. Justice Scalia wrote that the Fourth Amendment did not require suppressing the evidence discovered prior to the obtained warrant, since it was going to be found during the later search with a proper warrant.²⁹ This is called invoking the “independent source doctrine” which allows for the evidence collected in an unlawful search to still be used against a suspect if it were going to be found through a lawful search anyway. Does this decision mean that police should be encouraged to apply for a warrant and then break in to the place the warrant covers to make sure that they will find evidence once the warrant is granted? What if the warrant was ultimately not issued?

One other example of an opinion that Justice Scalia authored with a questionable outcome was *Illinois v. Rodriguez*. In this case Rodriguez was charged with the possession of drugs that were found in “plain view” by police who had entered the property. The issue with this case was that Rodriguez did not let the police into the apartment and the police had no warrant to enter the apartment. Rodriguez’s ex-girlfriend, claimed that the apartment was “our[s]” and used a key that she had to unlock the door and then gave the police permission to enter, upon which they observed the drugs. The majority opinion held that evidence of drugs used against

²⁹ *Murray v. United States*, 487 U.S. 533 (1988)

Rodriguez did not have to be suppressed since the police at the time “reasonably believed” that the ex-girlfriend possessed the authority to consent to police entry of the apartment.³⁰ In his dissent Justice Thurgood Marshall states that, “If an individual has not so limited his expectation of privacy, the police may not dispense with the safeguards established in the Fourth Amendment.” The safeguard he is in particular referencing is acquiring a warrant since there were no exigent circumstances to enter the building.³¹

What is interesting about this case was that the traditionally more liberal set of Justices on the Court were utilizing a more textualist approach. The dissenting opinion written by Justice Marshall argued that due to the established understanding of the Fourth Amendment, combined with years of precedent, it is unreasonable to abandon the warrant requirement. The traditionally more conservative set of justices determined that the ex-girlfriend did not possess the “common authority” to allow the search of the apartment yet still ruled that the evidence found doesn’t have to be suppressed because the police had a *reasonable belief* that the ex-girlfriend did, in fact, possess the proper authority, which is an extremely subjective basis for the ruling.

Overall, Justice Scalia’s jurisprudence seems to be in line with what people would expect from a conservative justice. The protection of law enforcement in their fight against crime seems to take priority over the challenges that individuals posit against the police. Even though the Fourth Amendment is one of the more limited amendments in terms of the way it can be challenged, since it is solely based around a conflict between the state / law enforcement and the arrestee, it is still subject to many

³⁰ Illinois v. Rodriguez, 497 U.S. 177 (1990), (Majority opinion by Justice Scalia)

³¹ Ibid. (Dissent by Justice Marshall)

confusing factors. In particular, the role that advanced technologies have played in Fourth Amendment cases has proved to be a significant challenge for the Supreme Court—and especially Justice Scalia. He claims to adhere to a reasonable interpretation of the Fourth Amendment’s text. However, such a method is circular when asking what is a reasonable interpretation of a provision of the Constitution that forbids “unreasonable” searches and seizures. His jurisprudence, however, is to retreat to the original understanding of what was meant by this amendment when adopted in 1791. This is especially complicated when dealing with technology that the founding generation never could have anticipated.

Chapter 5

TECHNOLOGY AND THE FOURTH AMENDMENT

Throughout the 20th and 21st centuries there has been a back and forth in Supreme Court rulings on technologically based Fourth Amendment concerns. There have been dramatic shifts between protecting individuals and granting leeway to law enforcement. All the while these shifts are based around cases that are somewhat similar to one another. Largely, these cases deal with the perceived invasion of one's privacy through the use of newly developed investigative tools. The right to privacy is not a right that is overtly outlined in the Constitution like the right to free speech; however, it is one that has over the years been derived as a basic right and been developed through Court cases and constitutional interpretation.

Since the definition of constitutional "privacy" has been strung together in a series of cases over time in both Fourth Amendment cases and through the Court's rediscovery of "substantive due process," its boundaries are uncertain. Law enforcement officials have resorted to new technologies and have challenged the evolving definition of what is protected by the Fourth Amendment. New technologies are often used to try and gather evidence that test and ultimately redefine these boundaries. Some of the most important innovative investigative police tools challenging traditional Fourth Amendment decisions include wiretapping, keystroke recording, aerial reconnaissance, drug dogs, thermal imaging, and GPS tracking. Even the most gifted founding fathers or any of their contemporaries could never have

foreseen any of this. All this has resulted in interesting case law and lines of precedent.

The first significant instance in which the Fourth Amendment was challenged on technologically based grounds was *Olmstead v. United States* in 1928. Federal agents who had suspected that Olmstead was a bootlegger began investigating him. In order to obtain the necessary evidence to convict him, agents tapped the phone lines in Olmstead's basement office as well as other locations nearby without acquiring a warrant. Through the evidence collected from these wiretaps, Olmstead was convicted of conspiracy to violate national prohibition laws. He challenged his conviction arguing that the evidence used against him was a violation of his fourth and Fifth Amendment rights.

The Court ruled in favor of the federal agents in this case. Olmstead's Fifth Amendment rights were not violated since he was not being forced to say what he was saying in the conversations being used against him. His Fourth Amendment rights were also not infringed since, according to Chief Justice William Howard Taft who wrote the 5-4 opinion, wire tapping is not a search or seizure under the Fourth Amendment. There has to be a physical intrusion and seizure of tangible evidence, neither of which had occurred here. Like Justice Black in later cases like *Katz*, the majority saw no Fourth Amendment concern. This decision was much more focused on punishing criminal behavior rather than considering constitutional concerns.³² Ironically, wiretapping was itself illegal in the state of Washington; federal agents were themselves therefore violating the law, but this was of little concern to the five

³² *Olmstead v. United States* 277 U.S. 438 (1928).

members of the *Olmstead* majority. The precedent essentially eliminated any protection that individuals should expect when technology has been used to circumvent the Fourth Amendment's literal terms and invade their privacy. Almost forty years later *Olmstead* and its literal reading of the Fourth Amendment was overruled in the *Katz* decision that was discussed earlier which attempted to construct a reasonable degree of privacy that most individuals would expect. Protecting individual privacy rights against new technologies, as the *Katz* decision did, is something that legal scholars like Laurence Tribe support.³³

The mentality of the Supreme Court is drastically different in these two cases. The Taft Court sought to further what they believed was a protection of justice, allowing a suspect, who was clearly involved in criminal activity to be convicted of crimes due to a questionable constitutional conflict. Whereas when the Warren Court examined a very similar issue and came to a much different conclusion it was because their focus was on ensuring that people should be able to expect a degree of privacy against government snooping through electronic devices. The Warren Court sought to expand an individual's right to privacy; whether or not they are involved in misconduct is irrelevant since this is a right for all citizens.

After the Warren Court there were interesting developments during the Burger Court in the late 1970's. In *Smith v. Maryland*, police requested that a pen register (a device used to record the numbers dialed on a telephone) be installed on Smith's phone line without a warrant so they could record and see every number that Smith's

³³ The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution, Orin S. Kerr, Michigan Law Review, Vol. 102, No. 5 (Mar., 2004), pp. 801-888

phone dialed. Police used the evidence gathered from this pen register against Smith during his robbery trial. Smith sought to suppress this evidence claiming that the means of obtaining it violated his Fourth Amendment rights.

According to the precedent set in the *Katz* case, one might expect the Court to rule in favor of Smith, but the Court did not, making the *Katz* opinion “more a revolution on paper than in practice.”³⁴ In the opinion written by Justice Harry Blackmun, the Court found that this was not a search under their understanding of the Fourth Amendment since his expectation of privacy was not considered “legitimate.” Since the telephone companies record this information for regular business purposes already there is no need for a warrant to be required. Unlike the *Katz* opinion, which sought to protect privacy on a broader scale, the *Smith* opinion assumes that the public shouldn’t be expecting a right to privacy when dialing their phone. It is very likely that one would expect that the party one is contacting in a private phone call to remain exactly so, private. The *Smith* case assumes that people know that they are automatically assuming the risk that telephone companies could potentially reveal information about whom they are calling. It seems much less reasonable that the public assumes that telephone companies will reveal their call record to the police in comparison to the reasonable *Katz* assumption.³⁵ Even though the majority opinion in this case may not seem in line with the decision set out in *Katz*, it was the *Smith* case that affirmed the use of the *Katz* test that Justice John Marshall Harlan proclaimed in his concurrence.³⁶

³⁴ Ibid.

³⁵ *Smith v. Maryland*, 442 U.S. 735 (1979) (Majority opinion by Justice Blackmun)

³⁶ The idea of a “reasonable” expectation of privacy was outlined in the concurrence written by Justice Harlan in the *Katz* case. It was his opinion that founded the modern

Justice Marshall wrote a dissenting opinion that Justice William J. Brennan joined, arguing that the assumptions made by the majority do not seem reasonable and that they are misconstruing the precedent set in *Katz*. The telephone companies, for regular business purposes, are already recording much of the information in question, and therefore why not just require the police to obtain a warrant for these records? The police would still obtain the evidence they were looking for, Fourth Amendment requirements would be met, and the precedent set would help ensure that individual privacy would be protected in future cases. Instead, by making questionable assumption about the public's knowledge of the "esoteric functions" of pen registers and telephone company policy, precedent has been set that will protect warrantless searches involving technology.³⁷

The new technologies at issue cover a wide gamut and do not just include third party tapping into what the other two parties assume is a private conversation. Another interesting case is *Dow Chemical Co. v. United States* (1986). The Dow Company refused to allow the Environmental Protection Agency to conduct a follow-up inspection of one of its sites. In response the EPA conducted an aerial survey of the facility without announcing their intentions or procuring a warrant. Dow claimed that this was a violation of their Fourth Amendment expectation of privacy, and that the inspectors would need to obtain a warrant before conducting an investigation of this nature.

expectation of privacy for the Fourth Amendment and it was his opinion that established the test that is supposed to be used to determine if there is a "reasonable" expectation of privacy.

³⁷ *Smith v. Maryland*, 442 U.S. 735 (1979) (Dissent by Justice Marshall)

This case was narrowly decided by the Burger Court in a 5-4-vote ruling in favor of the United States. The majority opinion was that the Fourth Amendment only protects areas where “intimate activities occur” and that even though this was privately owned land that was being photographed the surveillance was undertaken legally. The airspace was public and the cameras being used were items that the general public could procure (albeit they cost \$22,000). This meant that there was no violation of the Fourth Amendment since the tools used were reasonable and there should be no expectation of privacy.³⁸

On the same day as *Dow* the Court decided *California v. Ciraolo*. The police had received a tip that Ciraolo was growing Marijuana openly on his property but due to a high fence police could not observe the plants and did not have enough evidence to obtain a warrant. Instead, they took a plane, flew it at 1000 feet, used cameras similar to those upheld in *Dow* and through their photographs gained enough evidence to obtain a warrant to search Ciraolo’s land. Upon executing the warrant, more than 70 marijuana plants were found growing in Ciraolo’s backyard. Ciraolo felt that the evidence used to obtain the warrant violated his Fourth Amendment rights.

The outcome was the same as in *Dow*. Chief Justice Burger’s majority opinion held that the Fourth Amendment protections of the home are not absolute and that when police officers are walking down a sidewalk or driving in the street, they are expected to act if they observe some sort of violation. He argued that the search was

³⁸ *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986) (Majority opinion by Chief Justice Burger)

conducted in public airspace and was non-intrusive making the police actions consistent with Fourth Amendment expectations of privacy.³⁹

The dissenters in these cases felt that *Katz* was again not being followed or considered appropriately. Whether or not the *Katz* test was appropriately applied, there are portions of the majority decision that would not seem reasonable expectations by the general public. For example, it doesn't seem totally "reasonable" to believe that any private individual has the ability to charter an aircraft to fly around someone's property. Equating an organized and very expensive air search to a police officer casually walking down the street and observing something out of the ordinary is also questionable. Orchestration of these fly-bys was instigated by some action (denial of access and police tip) that in turn set a goal for the government agencies flying over the property. Utilizing resources to investigate something with a specific goal in mind reasonably resembles a search.⁴⁰ The precedent set in these 1986 cases by the Burger Court went on to be applied in a case, in which Justice Scalia, appointed that year, would become a voting justice.

³⁹ *California v. Ciraolo*, 476 U.S. 207 (1986) (Majority opinion by Chief Justice Burger)

⁴⁰ *Ibid.* (Dissent by Justice Powell)

Chapter 6

SCALIA AND TECHNOLOGY

Justice Scalia has interestingly traversed the difficult terrain of technology and the Fourth Amendment. In every one of these cases⁴¹, Justice Scalia has been a part of the majority opinion, whether or not they were ruling in favor of the police or in favor of the individual rights. As in many other constitutional concerns, the Court has set conflicting precedent for these cases, making it difficult to resolve future questions. This could serve as an opportunity for the Court and Justice Scalia to define the confusing Fourth Amendment case law to establish protections to which most Americans would feel reasonably entitled and which jibe with the general purposes of the Fourth Amendment. He has done this with his decision in *Kyllo v. United States*, but he has not followed this route for the all of these cases. More commonly he joins the majority opinion protecting law enforcement, citing legislative regulations as their rationale rather than focusing on the crux of the Fourth Amendment. One of the other manners with which Scalia has ruled is based on his originalist philosophy, which is extremely questionable in these cases since he is trying to scrutinize 21st century technological intrusions by law enforcement using an 18th century rationale.

⁴¹ *Burns v. Reed* is a non-traditional case where Scalia joined an opinion that concurred in part and dissented in part rather than the majority opinion. However, this case dealt with hypnosis rather than more legitimate technological tools such as airplanes and GPS tracking.

AVIATION

The first time that Justice Scalia was faced with a case that combined the Fourth Amendment and technology was *Florida v. Riley*. This case was very similar to the *Dow* and *Ciraolo* cases, since it involved warrantless aerial reconnaissance and ultimately furthered the rights of law enforcement. In the *Riley* case, Florida police received a tip that Riley was growing marijuana on his property. However when they went to investigate the tip they found that they could not see into Riley's property or greenhouse. As a result they decided to fly a helicopter over his land to investigate the tip further. From 400 feet above Riley's greenhouse, the police officer concluded that he had seen through an open panel that Riley was growing marijuana in his greenhouse. Law enforcement used these observations to obtain a search warrant for Riley's property. Upon executing the warrant, police found marijuana and used it as evidence against Riley, which he tried to suppress claiming that his Fourth Amendment rights had been violated.

The decision rendered in this case was very divisive, splitting the Court 4-1-4. The plurality opinion was written by Justice Byron White and joined by Chief Justice William H. Rehnquist, Justice Anthony Kennedy, and Justice Scalia, ruling that there was no search involved according to their understanding of the Fourth Amendment. They relied heavily *Ciraolo* and *Dow* as well as Federal Aviation Administration (FAA) regulations regarding the elevation of the helicopter. As in *Ciraolo*, the Court concluded that anyone could have flown over Riley's property, looked in the open slot of his greenhouse and seen what they believed to be marijuana. This reasoning continued the completely unrealistic analogy that any regular person has the resources or motivation to charter an aircraft solely to survey someone else's property. This

perpetuates the idea that the Fourth Amendment does not require law enforcement to acquire a warrant before engaging in what is clearly a purposeful search. ⁴²

Justice Brennan filed a dissenting opinion that Justice Marshall and Justice John Paul Stevens joined.⁴³ In his opinion Justice Brennan states that “I cannot agree that the Fourth Amendment to the Constitution, which safeguards ‘the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,’ tolerates such an intrusion on privacy and personal security.”⁴⁴ The dissenters rely heavily on the Harlan concurrence in *Katz* which overall has a much more reasonable application in this case. Rather than looking just at the precedent set in the previous year, the dissenters in this case considered the privacy implications that the Fourth Amendment has been established to protect. Justice Brennan states that the plurality opinion finds “the expectation of privacy is defeated if a single member of the public could conceivably position herself to see in to the area in question.” He argues that the test developed in the *Katz* case was completely ignored by the plurality, since Riley did exhibit an expectation of privacy that the public would expect, by putting up fences and signs to prevent the prying eyes of others. ⁴⁵

Justice Sandra Day O’Connor wrote a concurring opinion that comes to a very similar conclusion as the plurality but does not utilize the FAA regulations since, as

⁴² Florida v. Riley, 488 U.S. 445 (1989) (Majority opinion by Justice White)

⁴³ Justice Blackmun filed a solo dissenting opinion as well.

⁴⁴ Florida v. Riley, 488 U.S. 445 (1989) (Concurrence by Justice O’Connor)

⁴⁵ Ibid. (Dissent by Justice Brennan)

she points out, they were not written to protect “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”⁴⁶ These regulations were put in place solely to promote safety in the air and are being misapplied by the plurality in their attempt to validate the police flying 400 feet over Riley’s curtilage. What Justice O’Connor posits instead, is that burden of proof would be on Riley to show that society would not find it “reasonable” to fly over a person’s property for investigative purposes. If Riley could prove that he had a “reasonable” expectation of privacy according to overall societal beliefs then these sorts of observations would not be allowed under the Fourth Amendment. By focusing on the reasonable aspect of the search, O’Connor nonetheless came to the same conclusion as the plurality: that the police can conduct searches like these. However, she was actually relying on the nature of the Fourth Amendment and past precedent rather than FAA regulations, which should have no bearing on what the Constitution means.⁴⁷ It seems strange that Justice Scalia would choose to join the plurality decision resting in large measure, as it did, on FAA regulations to promote safety in the air.

This case upholds the chain of reasoning set in *Dow* and *Ciraolo*, that there is no Fourth Amendment search when police use aircraft to peer into private property. Ultimately with this case, Scalia sat in the backseat and voted with the simplest conclusion: follow what the Court did last year. In joining the majority, he maintained the precedent and hence held true to one of the primary goals of the common law

⁴⁶ Fourth Amendment to the United States Constitution

⁴⁷ *Florida v. Riley*, 488 U.S. 445 (1989) (Concurrence by Justice O’Connor)

system. Ruling on precedent is something that Scalia defines as “an art or a game, rather than a science.”⁴⁸ It is something he admits all lawyers and judges must rely on within the common law system. The question arises: when does it become appropriate simply to follow precedent and when is it appropriate independently to discover the original meaning of the Fourth Amendment? In his attempt to maintain consistency, it becomes evident that there will always be conflict between maintaining the most recent precedent and following the tenets of his judicial philosophy. It is irrefutable that there was relevant precedent in this case to rule on; however, for Justice Scalia it could have been a great opportunity for him to apply his jurisprudence to discover the meaning of the Fourth Amendment.

By not writing an opinion for this case, and joining the opinion that followed the most direct line of precedent, Justice Scalia avoided having to utilize his originalist philosophy, which he has done even when precedent is clear—as in gender-based discrimination cases, which Scalia refuses to accept.⁴⁹ Since the Court had so recently decided both *Ciraolo* and *Dow*, to Scalia the line of precedent was clear. However, this also does lead to a conflict since the process of deciding whether or not to follow the most recent line of precedent or to apply originalism is subjective. The rationale of continuing the line of precedent rather than originalism or another method of constitutional interpretation does have a logical basis (to maintain consistency), but it

⁴⁸ *A Matter of Interpretation*

⁴⁹ During an interview for the legal magazine *California Lawyer*, Scalia stated that the 14th amendment’s equal protection clause does not protect women against sexual discrimination. He argues that it is something that lawmakers can work to remedy but that there is not a constitutional protection for discrimination against women.

conversely can also have a negative effect on the interpretation of the Fourth Amendment.

This is something that Justice Brennan discussed in his dissent: “The opinion for the plurality of the Court reads as if *Katz v United States*, had never been decided.” There are clear similarities among the *Riley*, *Dow*, and *Ciraolo* cases. However, by focusing on the precedent in these latter two cases, the Court is neglecting to properly consider what is thought of as the most important precedent relating the Fourth Amendment and technology, *Katz*. This depicts a clear confusion of precedent since the Court is having trouble coming to agreement as to which precedent should be applied and how. So why would it not be appropriate to apply originalism in this case? In his attempt to create an objective and scientific approach to textual analysis, Scalia could not escape the inevitability that there will always be a significant degree of subjectivity in deciding cases.

By joining this majority decision it seems that the reasonable textual interpretation of the word “search” is slowly being degraded. He is not writing an opinion here that defines who he is as a jurist, but this is one case that helps define his jurisprudence and conflicts with the decisions that he is to write in future. By joining an opinion that focuses on precedent rather than the nature of the Fourth Amendment, which is the core of originalism in constitutional cases like this one, it begs the question: when will he look independently at the Fourth Amendment? The expectations that the majority opinion assigns to the public are far-fetched and questionable. There was almost a Hobbesian bargain that Scalia had to make when deciding how to rule with this case, and he chose to follow the precedent and attempt to maintain consistency with the Court’s previous opinions instead of reanalyzing the

case as a reasonable textualist to find whether or not the police were engaging in a search.

THERMAL IMAGING

The issue of thermal imaging provides a very stark contrast to the use of helicopters in the *Riley* case. The case that is regarded as Scalia's most proactive soiree into Fourth Amendment law was *Kyllo v. United States*. This case and his opinion question why Scalia voted as he did in cases like *Florida v. Riley* and why he would vote the way he did in future cases like *Illinois v. Caballes*. The primary principles he develops in his *Kyllo* opinion seem to be incredibly relevant to these other cases.

Kyllo was suspected of growing marijuana in his home, but the federal agents could not get a warrant to search his house, and there was nothing in plain view that would give probable cause for a search. In an attempt to obtain evidence for a warrant, agents used thermal imaging technology and examined the exterior of Kyllo's home. From across the street of Kyllo's residence, with this device agent could demonstrate that the temperature inside his property was very significantly higher than the temperature inside his neighbor's homes. A federal magistrate felt that this was sufficient evidence to search Kyllo's home and granted law enforcement's request for a search warrant. Upon execution of the warrant, agents found the marijuana they had suspected was being grown and arrested Kyllo.

To Kyllo, this was a violation of his Fourth Amendment rights, so he sought to have this evidence suppressed. The legal battle ended up in the notoriously liberal 9th circuit court, where it was found that use of this thermal imaging was *not* a violation of the Fourth Amendment since Kyllo made no attempt to hide the increased heat

levels and since the technology was not exposing any intimate details of Kyllo's life. The 9th circuit court pointed out that there were a few panels that were open in Riley's greenhouse so Kyllo shouldn't fully expect a right to privacy. This part of the opinion relies on the definition of privacy in the decisions of the aviation cases. The 9th circuit felt that the thermal imaging technology was not an invasive tool that and would not expose anything more than the most basic facts the agents were looking for.⁵⁰

Justice Scalia wrote the majority opinion for this case and came to a conclusion that seems to contradict the position he had taken in *Florida v. Riley*. He wrote for a majority that overturned the 9th circuit's decision and ruled that the warrantless use of thermal imaging technology on a private home was an unreasonable search under the Fourth Amendment. This was a very interesting decision since Scalia has now completely broken away from the line of reasoning that he took in *Riley*. With this case Scalia investigated the nature and meaning of the Fourth Amendment, and his conclusion bolstered individuals' rights to privacy yet also resulted in certain conflicts with his originalist philosophy.

Justice Stevens wrote a dissent that Justice O'Connor and Justice Kennedy joined. They believe there is no need to create any new rules to decide this case since the heat exposed through the exterior of the house was effectively in plain view and, therefore, fair game for the police to observe. They cited a number of previous cases to support their position, including *Dow Chemical*, *Ciraolo* and *Riley*, which all seem to reinforce their argument. Ultimately they felt that the appropriate line of precedent clearly indicates that there had been no search according to the Fourth Amendment. The argument made by Justice Stevens falls in line with the decision that Scalia joined

⁵⁰ *Kyllo v. United States* 533 U.S. 27 (2001) (Majority opinion by Justice Scalia)

in *Riley* since it is just trying to continue the line of precedent that the Court had been developing in similar cases. ⁵¹

Justice Scalia focuses much less on precedent and instead examines the case with the purpose of the Fourth Amendment in mind. When Scalia does apply precedent he applies it very differently than the dissenters did, rather than looking at a number of cases, Scalia especially emphasizes the *Katz* decision. He acknowledges that trying to recognize what society would consider reasonable is very subjective and cyclical.⁵² Yet, he argues that this idea of “reasonable” guarantees that there is always a minimal expectation of privacy that the public should expect. Once he established that there was a level of privacy that should be expected, Scalia then argues that the use of a thermal imager is undoubtedly a search (which the dissenters claim it is not). Scalia tries to equate this “high tech” heat imaging surveillance to what the Fourth Amendment originally was understood to forbid: “This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted. On the basis of this criterion, the information obtained by the thermal imager in this case was the product of a search.” ⁵³

The argument that Scalia crafts in his opinion is strong and seems to be a reasonable examination of the effects that technology can have on Fourth Amendment searches. However, as stated above, it is the dissenters who are more concerned with continuing the line of precedent from the past aviation cases. Scalia only briefly

⁵¹ Ibid. (Dissent by Justice Stevens)

⁵² *Katz v. United States*, 389 U.S. 347 (1967) (Justice Harlan’s Concurrence)

⁵³ *Kyllo v. United States* 533 U.S. 27 (2001) (Majority opinion by Justice Scalia)

mentions these prior cases and bases the fact that this is a search on the idea that the minimal level of privacy that *existed at the time of the Fourth Amendment's drafting* has been violated. The textualist Justice Black, given his explanation in his *Katz* dissent, would have come precisely to the opposite conclusion in *Kyllo*. Had Scalia been consistent with his posture in *Riley*, which relied so heavily on the reasoning developed in *Dow* and *Ciraolo*, he, too, would have upheld the decision of the 9th circuit court in *Kyllo*.

Following Justice Scalia's claim that he relies on his jurisprudence when precedents are confusing, he evidently deemed it appropriate to apply his originalist philosophy. Scalia's claim to be protecting the degree of privacy that "existed when the Fourth Amendment was adopted" is an originalist sentiment. Through his analysis of the amendment as an originalist he declares that the use of technology in this case is in fact a search. To reach this conclusion, Justice Scalia relies on originalism and the opinion of *Silverman v. United States* (1961), which dealt with an "actual intrusion into a constitutionally protected area."⁵⁴ In his rationale for constituting the use of a thermal imager as a search, Scalia posits the argument that this is a technology that is not in general use being utilized without a warrant also to observe the interior of a constitutionally protected space.

He begins the second part of the Court's decision with this: "The Fourth Amendment provides that '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.' At the very core of the Fourth Amendment 'stands the right of a man to

⁵⁴ *Silverman v. United States*, 365 US 505 (1961) (Majority opinion by Justice Stewart)

retreat into his own home and there be free from unreasonable governmental intrusion.’⁵⁵ With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.”⁵⁶ Through this quote, Justice Scalia examines the nature of the Fourth Amendment and how it should reasonably be interpreted in this case. This is different from the majority decisions that he joined previously, since their focus was much more on the issue of precedent, while the manner of interpretation he is applying in *Kyllo* is related much more to the dissenting and concurring opinions in cases like *Florida v. Riley*.

This portion of his argument is in line with the originalism that he promotes and this kind of judicial construction continues throughout the second part of his argument. However, the first sentence in the third portion of his argument is where things start to get interesting: “It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology.”⁵⁷ This is a very reasonable argument and one that should have probably been stated decades ago, for example, in the *Olmstead* case. However, it also seems out of character that it is Justice Scalia who is making this claim. In his book on textual interpretation, Justice Scalia makes it very clear that he does not support the belief that the Constitution should be treated as a document whose meaning evolves with time. He has stated, “the reality of the matter is that, generally

⁵⁵ Ibid.

⁵⁶ *Kyllo v. United States* 533 U.S. 27 (2001) (Majority opinion by Justice Scalia)

⁵⁷ Ibid.

speaking, devotees of the living Constitution do not seek to facilitate change but to prevent it.”⁵⁸

A dilemma arises between these two quotes because in one he bashes the idea that the Constitution should evolve since to him that will hinder social change somehow, while in the other quote he is overtly expressing his belief that the Fourth Amendment needs to be reexamined under a modern set of circumstances due to technological developments. The later quote sounds as if it came from a proponent of an evolving Constitution rather than a textualist, like Justice Black, who openly and repeatedly condemned that idea as a distortion of a *written* Constitution with a fixed meaning. On the one hand Scalia has examined the Fourth Amendment as it was written, which he did not do in the previous cases, but is in accord with the reasonable textualism for which that he advocates. Then, on the other hand, in his argument that the meaning of the Fourth Amendment must evolve to be relevant and fair in contemporary society—a general idea that he has explicitly rejected nearly everywhere in his book *A Matter of Interpretation* and in virtually all his public addresses.

It is clear that Justice Scalia has attempted to apply his originalist philosophy in this case and there are legal pundits who applaud him for his execution of originalism. Ralph Rossum of the Claremont McKenna College felt that “his application of originalism in the Fourth Amendment context is clearly evident in his majority opinion for the court in a 2001 case, by the style of *Kyllo* against United

⁵⁸ *A Matter of Interpretation*

States.”⁵⁹ However, in his attempt to balance the minimum expectation of privacy that existed when the Fourth Amendment was adopted it became necessary to adapt the Fourth Amendment to account for modern technological advancements.

The ruling in this case has extended the rights of privacy that citizens can expect, but the manner in which Justice Scalia did so is inconsistent not only with his judicial philosophy of originalism but also his decision to join the majority opinion in *Riley*. He is now examining the nature of the Fourth Amendment in relation to the police search in order to conclude that there has actually been a search under the Fourth Amendment when the Court decided that there wasn't a search in *Riley*. He concludes that this is a case where the nature of the Fourth Amendment needs to be taken into consideration, whereas, in the *Riley* case it did not.⁶⁰

Scalia's opinion for *Kyllo* becomes even more interesting when he writes, “the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a ‘search’ and is presumptively unreasonable without a warrant.”⁶¹ According to this logic the previous ruling in the *Dow*, *Ciraolo* and *Riley* cases should probably be overturned. It was Justice Brennan in his *Riley* dissent, who pointed out

⁵⁹ "C-SPAN VIDEO LIBRARY Created by Cable. Offered as a Public Service." *C-SPAN Video Library*. Web. 21 Mar. 2012. <<http://www.c-spanvideo.org/program/191020-1>>. Ralph Rossum on Antonin Scalia's Jurisprudence: Text and Tradition. February 1, 2006.

⁶⁰ What Were They Smoking?: The Supreme Court's Latest Step in a Long, Strange Trip through the Fourth Amendment, Daniel McKenzie, *The Journal of Criminal Law and Criminology* (1973-), Vol. 93, No. 1 (Autumn, 2002), pp. 153-194

⁶¹ *Kyllo v. United States* 533 U.S. 27 (2001) (Majority opinion by Justice Scalia)

that the rationale of the majority was that “the expectation of privacy is defeated if a single member of the public could conceivably position herself to see in to the area in question.”⁶² The “not in general public use” rationale directly collides with the *Riley* presumption that it is technically possible, albeit very improbable for someone to acquire a private aircraft, fly it within FAA regulations over an individuals property and look in on that individuals activities, and that therefore this is not a search.

Citizens are not regularly chartering flights over other private individuals’ land to snoop on them. The whole argument of general use is one that makes sense on its face yet falls short when is placed into the context set by previous Supreme Court opinions. The populace does not expect that it’s homes are being observed with thermal imaging technology, since it is not an ordinary practice that the general public actively engages in. However, members of the public also doesn’t expect to have aircraft flying over their curtilage for investigative purposes.

It is interesting that this is the first time that Scalia has thought it prudent to address the issue of general public use in technology. This is a concern that Justice Brennan clearly felt was relevant when the Court was deciding *Florida v. Riley*. Yet why would Scalia not join or at least acknowledge Brennan’s argument? Maybe Justice Scalia decided to make this point with technology that is the least expensive in comparison to the others discussed. Thermal imaging technology currently costs about a minimum of \$1,500 while buying a helicopter costs millions and renting one costs thousands of dollars an hour. In crafting this argument, Scalia is effectively providing a completely alternative precedent that the Court can refer to instead of the decades

⁶² *Florida v. Riley*, 488 U.S. 445 (1989) (Dissent by Justice Brennan)

worth of precedent that they had previously been relying upon, which is what Stevens writes in his dissent as being the better option.

By creating this argument Scalia is not only confusing the role that decades of precedent should play; he is also evolving the meaning of the Constitution. Adhering to precedent is a principle that has been accepted as being paramount in deciding cases. This is why Scalia's joining the majority opinion in *Riley* makes some sense. The conflict arises when it becomes necessary to use this living Constitution philosophy in order to promote an originalist opinion.

One of the main disparities between Scalia's opinion and Stevens' dealt with what was actually being observed. Justice Stevens believes that the police are looking only at how hot the person's house probably is relative to his or her neighbors' homes and only by looking at emanations emerging from the dwellings through the use of a special detector. Scalia is examining what is causing the heat, which is also rather uncharacteristic of him. He argues that thermal imaging technology can invade the privacy that individuals expect *inside* their homes: "For example, at what hour each night the lady of the house takes her daily sauna and bath—a detail that many would consider 'intimate.'"⁶³ It is interesting that Justice Scalia is applying this sort of argument: does flying over someone's property and looking in on their activities not display potentially intimate details? When examined next to the reasoning in *Riley*, the line drawn by Justice Scalia in this case seems arbitrary and in collision with his frequent pontifications about the proper role of the Court.

⁶³ *Kyllo v. United States* 533 U.S. 27 (2001) (Majority opinion by Justice Scalia)

Scalia felt that the technology was indirectly observing the behaviors of an individual in their home, which without the use of technology would otherwise be completely unknown. Justice Stevens is taking a much more literal approach in his examination of thermal imaging technology. He is strictly focusing on what the technology is actually looking at, which in this case is heat radiating off of the walls and roof that is being observed from a public street. Stevens' interpretation of the technology is following the line of precedent that was created in *California v. Ciraolo* and *Florida v. Riley*. In writing the majority opinion the way that he did, Scalia sought to prevent future technologies that could view intimate details through the walls of one's home. Yet in order to do so he is departing from the precedent that has been set in the *Riley* case, because there was no attempt to cover up the heat emitted from the home.⁶⁴ Since there was no attempt at hiding the heat from his house, *Kyllo* should not be expecting a right to privacy according to the majority decision in *Riley* that Scalia joined.

Scalia's attempt to protect the home from invasive technologies in this decision creates a blatant inconsistency with his decision in the *Riley* case as well as with his originalist philosophy. The ruling in this case did much to protect the privacy rights of the individual; however, it is very odd that, from his conception of a Constitution with a fixed, not an evolving meaning, Scalia is the author of this opinion. He does finally attempt to examine the text of the Fourth Amendment as it was written in the 18th century, but he effectively also employed a living Constitution outlook to achieve the result he wanted. This is the core of Scalia's conflict: he so strongly dislikes the idea

⁶⁴ *Florida v. Riley*, 488 U.S. 445 (1989)

of a living Constitution, yet it seems necessary when attempting to interpret the Fourth Amendment in light of 21st century technology's capacity to intrude on people's rights.

DOGS

The police use of K-9 units is an interesting issue when it comes to personal privacy. Dogs have the ability to smell thousands of times better than any humans, which has resulted in their being useful tools for search and rescue, military service, anti-terrorism investigations and other police work. Using a dog in relation to military service or search and rescue scenarios is not something of which the public would generally question its legality. On the other hand, dogs are very often trained by police to sniff out various substances, in particular explosives and drugs, which can result in privacy concerns.

The most common legal conflict that arises is when a dog sniffs out illegal drugs. This is often an issue because these dogs have such an amazing capacity to smell and it is often seen that their use in some cases should require a warrant. In solely public settings, especially transportation settings (train stations and airports), it seems reasonable to allow these trained dogs. These settings are high traffic areas, open to the public and need to be protected from potential threats (train bombs and hijackings). However, dogs are not always used in these public environments and for general safety purposes. It is common practice to use dogs to sniff in private settings.

This was the concern in the case *Illinois v. Caballes* (2005). A police officer pulled Caballes over for a moving violation, when, as was protocol, the officer radioed in his current stop. A drug k-9 unit overheard his report and went to the location of the stop. When the drug unit arrived and began sniffing at the car, the original highway

trooper was writing a warning for Caballes. Once the k-9 got to the trunk it alerted for drugs, which gave the officers probable cause to search the trunk, in which they found a large amount of marijuana.

Caballes faced over a decade in jail and hundreds of thousands of dollars in fines for the marijuana found in his car. He challenged the validity of the dog sniff that provided the probable cause and in turn the drug evidence. The Supreme Court, along with all of the lower courts that heard this case, had many different issues to try and pick apart in order to come to a conclusion. Ultimately the Supreme Court ruled in favor of Illinois, stating that Caballes' Fourth Amendment rights were not violated. The initial traffic stop that instigated the issue was deemed a reasonable seizure since Caballes was breaking traffic laws. The Court then went on to conclude that there was no search according to the Fourth Amendment involved, since there should be no reasonable expectation of privacy to contraband. The possession of contraband is itself an illegal act and the public should not expect a greater right to privacy over its possession.⁶⁵

Justice Scalia joined this majority opinion, written by Justice Stevens, which further enhanced law enforcement. As in *Florida v. Riley*, the majority opinion does not try to analyze the substance of the Fourth Amendment to address whether or not Caballes right's were violated. Instead they look to the precedent set in *United States v. Place* and rely on the infallibility of drug detection dogs. A dog's sniff was classified as *sui generis* in the 1983 case *United States v. Place*, which means that it is unique since it only identifies the presence of contraband.⁶⁶ This precedent combined

⁶⁵ Illinois v. Caballes, 543 U.S. 405 (2005) (Majority opinion by Justice Stevens)

⁶⁶ United States v. Place, 462 U.S. 696 (1983) (Majority opinion by Justice O'Connor)

with the belief that there is no reasonable expectation to privacy of contraband items is what the Court used as its rationale to affirm that using a dog to sniff for drugs is not a search as understood in the Fourth Amendment.

Justices David Souter and Ruther Bader Ginsburg dissented from the majority opinion, deciding that the Illinois Supreme Court was correct. Souter felt that the precedent set in *United States v. Place* was not as concrete as the majority thought and the nature of the search was compromised once the police turned it from a traffic stop into a drug investigation.⁶⁷ There is ample evidence to support either the dissenting or majority opinions so the “art” of assigning precedent in common law cases, as Scalia calls it, is clearly subjective and leads to conflict within the Court. All the while, the true nature of the Fourth Amendment really hasn’t been considered to a great degree by either side, albeit the Illinois Supreme Court did so and the dissent preferred their ruling.

Caballes was stopped for a traffic violation, meaning that he was technically and reasonably “seized.” The nature of this stop was solely to address the traffic violation (speeding) that the officer had witnessed. However, it does not seem so reasonable to believe that the public expects every minor traffic violation to escalate into a drug investigation. The sole purpose of the drug dog used in this case was to sniff out narcotics, which is in no way related to initial offense.

This is an issue where Justice Scalia could have relied upon his philosophy to try and further the protections that the Fourth Amendment grants solely based on an originalist philosophy as he attempted to do in *Kyllo*. Yet, instead he joined an opinion that relies significantly upon *Place* where a dog’s sniff was declared *sui generis*. As

⁶⁷ Ibid. (Dissent by Justice Stevens)

Justice Souter said, “ if Fourth Amendment protections are to have meaning in the face of superhuman, yet fallible, techniques like the use of trained dogs, those techniques must be justified on the basis of their reasonableness, lest everything be deemed in plain view.”⁶⁸ By not focusing on the reasonableness of the use of technology the door is left open as to when dogs could potentially be used in questionable circumstances.

The majority opinion does try to address the apparent conflict between their opinion and the *Kyllo* precedent. As Stevens’ says in his opinion: “Critical to that decision was the fact that the device was capable of detecting lawful activity—in that case, intimate details in a home, such as ‘at what hour each night the lady of the house takes her daily sauna and bath.’” This may be an example of the police ascertaining intimate details from outside the home, but they also are not so intimate that one might be truly worried about whether police know what time you take a bath. It is a violation of the Fourth Amendment nonetheless since it is opening up these potentially intimate details for observation by law enforcement.

Justice Souter in his *Caballes* dissent discusses the fallibility of a dog’s sniff, citing multiple studies that place the false positive alert rate of a drug detection dog anywhere from 12.5 to 60% depending on the length of the search. Once this fact is considered, the unique nature of the dog sniff recognized in *Place* comes under fire. This fact potentially also means that 12.5 to 60% the intimate details of a container would be disclosed to the police without revealing contraband, just as a thermal-imaging device might do, as described in *Kyllo v. United States*. By ignoring the

⁶⁸ *Illinois v. Caballes*, 543 U.S. 405 (2005) (Dissent by Justice Souter)

salient evidence about the reliability of dogs, Justice Scalia is abandoning the precedent he himself set in *Kyllo*.⁶⁹

The position that Justice Scalia took in *Caballes* is quite similar to the one he took in deciding *Riley*. He looked to the opinion from *Place*, saw the unique nature of the dog sniff, and affirmed that there was no search according to the Fourth Amendment. This means that similar concerns from *Riley* also occur. The nature of having dog's sniff private property that has been deemed protected by the Fourth Amendment (cars) again seems very reasonable to be considered a search. The police have a goal in mind when they introduce a drug detection dog (an exotic resource not commonly found in public use) to a scenario and the police are clearly using them as a tool to investigate the contents of one's constitutionally protected property.⁷⁰

After his decision in *Kyllo*, it is very strange that Scalia would not consider the circumstances of this case and the nature of the Fourth Amendment as he had done in *Kyllo*. This recurring concern compromises the legitimacy of the scientific aspect that Scalia claims is inherent in his originalist philosophy. He may not be authoring an opinion in which he articulates his beliefs, but by voting in a similar fashion as he did in *Riley* after he had written the opinion for *Kyllo*, it does make his jurisprudence on these Fourth Amendment cases very interesting and also brings into question the consistency that one should expect from Justice Scalia in these Fourth Amendment cases.

⁶⁹ Ibid.

⁷⁰ Discretionless Policing: Technology and the Fourth Amendment, Elizabeth E. Joh, California Law Review, Vol. 95, No. 1 (Feb., 2007), pp. 199-234

GPS TRACKING

The most recent case that pitted new technologies against the Fourth Amendment was *United States v. Jones* (2012). Justice Scalia authored the majority opinion in this case addressing relevant 18th century precedent as well as confusing modern precedent (precedent that he helped make confusing). He ultimately followed his originalist philosophy much more closely than his ruling in *Kyllo*, which, as discussed, conflicted with his originalism due to the living Constitution concerns. In *Jones*, Scalia stuck closely to the ruling of the 18th century precedent and avoided the privacy concerns of the case for the most part. Justice Scalia learned from his *Kyllo* opinion that addressing privacy concerns thoroughly can conflict with his originalism.

In this case, respondent Antoine Jones was suspected of running a significant portion of the cocaine trade in Washington DC. In an attempt to gain evidence that could be used to convict Jones, DC police obtained a warrant that would allow them to attach a GPS tracker on his car for 10 days in DC. Instead of planting the tracking device on Jones' car within the 10-day period or within the DC limits, they attached it in a public parking lot in Maryland and 11 days after receiving the warrant. The tracking device was left on Jones' car for four weeks, over which time the police accumulated over two thousand pages worth of notes about Jones' transportation habits. These records led police to acquire some damning evidence against Jones, most significant being his "Stash house" with almost a hundred kilograms of cocaine and \$850,000 in cash. Jones sought to have this evidence suppressed since it was acquired without a functional warrant and therefore according to him a violation of his Fourth Amendment rights. Jones was originally convicted by the District Court, since Jones was driving on public streets and therefore he should have no expectation of privacy.

He appealed his case to the DC Circuit Court, which ruled in Jones' favor that the warrantless use of a GPS tracker did indeed violate the Fourth Amendment.⁷¹

The Court ruled unanimously in this case that the warrantless use of GPS devices did violate the Fourth Amendment. However, the Justices seemed to have a hard time agreeing how far they should go in terms of setting precedent. Justice Scalia wrote the majority opinion for the Court ruling that there was no need to examine what was Jones' expectation of privacy. The Court could more easily rule that attaching something without a warrant to someone's car is a violation of their Fourth Amendment rights rather than trying to address privacy concerns. This decision narrowed the scope of the case and left the issue of GPS tracking still open since they are not examining the issue of privacy but are only looking at physically attaching a tracking device. By not looking at the use of tracking devices versus privacy concerns of the Fourth Amendment the Court did not close the door on law enforcement using GPS tracking without a warrant.

For example many cars have GPS trackers in them already for navigation and very often people install things like "lo-jack" anti-theft devices and GPS navigation systems into their cars. It would be interesting to see how the Court would adapt this precedent if police used the GPS navigation service that came installed in the suspect's car to track their movement. This would not deal with the issue of installing anything on the suspect's vehicle, which is the "search" that Scalia deemed a violation of the Fourth Amendment, and would actually be more reminiscent of the pen-register technology in *Smith v. Maryland*, since the GPS navigation service could track the

⁷¹ United States v. Jones 389 U.S. 347 (2012) (Majority opinion by Justice Scalia)

movement of the suspect's vehicle for regular business purposes. According to the *Smith* precedent the investigating agents seemingly could do this, but Scalia chose not to answer the privacy concerns that come with GPS tracking.⁷²

The majority opinion of the Court ruled in favor of the individual by holding that the police can not physically attach anything to an individual's private property without a warrant. However, Scalia took a much more narrow approach to this opinion than he did in *Kyllo*. Justice Samuel Alito wrote the main concurring opinion that sought to address the privacy concerns associated with GPS tracking. Alito agrees that the Fourth Amendment was violated in this case; however, he argues that it is not only the installation of a GPS tracking device that constitutes an unconstitutional search, but the use of the device also should be considered an unconstitutional search. In order to come to this conclusion Alito examines whether the respondent's reasonable expectation of privacy was violated, which is something that Scalia decided to avoid altogether in his decision.⁷³ By choosing to examine the issue in this broader respect, Alito is seeking to preempt cases like the hypothetical discussed above, but it also would set stronger precedent that may conflict with previous cases like the aviation cases.

Justice Alito claims that Scalia has "chosen to decide this case based on 18th-century tort law." To Alito, this is not a very prudent choice considering the significant modern concerns that this case raises. On the other hand, it would seem that Scalia's rationale is finally starting to recognize an individual's right's while also

⁷² *Smith v. Maryland*, 442 U.S. 735 (1979), *United States v. Karo*, 468 U.S. 705 (1984)

⁷³ *United States v. Jones* 389 U.S. 347 (2012), Concurrence by Alito

utilizing an 18th century interpretation of the Fourth Amendment.⁷⁴ In a rebuke to Alito's claims Scalia added this to his opinion: "What we apply is an 18th-century guarantee against unreasonable searches, which we believe must provide *at a minimum* the degree of protection it afforded when it was adopted."⁷⁵ This is arguably one of the most originalist statements that Scalia has made in a Fourth Amendment technology case. In this decision he relied heavily on his reasonable textualist philosophy, however, the narrow scope that the opinion has to take in doing so is what leaves so many unanswered questions about how the Fourth Amendment could be applied in the contemporary world.

This highlights the struggle that will always occur when one tries to apply a centuries old text to modern issues that the framers of the Constitution could have never foreseen. Scalia talks about the *minimum* degree of privacy that the public should expect as the degree of privacy that was expected in 1791. The general public would probably more likely relate the minimum degree of privacy they expect to the opinion that was set in *Katz*. Scalia breaks the Fourth Amendment into 2 parts and isolates the section that says "in their persons, houses, paper and effects" to show that it is directly related to property rights. Once he has established this, Scalia goes on to argue that since the police had to physically attach the device to the suspect's property, they were then engaging in a search. This sounds more like *Olmstead* than *Katz* or *Kyllo*.

⁷⁴ Ibid.

⁷⁵ Ibid. (Majority opinion by Justice Scalia)

In focusing on the “tort” of attaching the tracker to Jones’ vehicle rather than the overarching privacy concern of tracking the vehicle itself, Scalia is only scratching the surface of the “unreasonable” search that occurred. Justice Alito’s and others in his concurring opinion in *Jones* did something similar to this in that they felt it was the precedent set in *Katz* that should be applied rather than “18th-century tort law.” According to the *Katz* precedent, not only the installation of the GPS tracking device, but also the use of the device, constitutes a search and would be unreasonable without acquiring a proper warrant. Alito begins his argument by isolating the core of the Fourth Amendment: “The Fourth Amendment prohibits unreasonable searches and seizures, and the Court makes very little effort to explain how the attachment or use of the GPS device fits within these terms.”⁷⁶ Alito is not advocating a strict textualist interpretation of the Fourth Amendment, but he clearly does believe that the Court should be examining the main privacy issue of this case in relation to the text of the Fourth Amendment.

Scalia’s opinion is fundamentally different from his opinion in *Kyllo* and more akin to Black’s dissent in *Katz*, where “trespass” was deemed essential to implicate any Fourth Amendment concerns. It will be interesting to see how the precedent set in this case will be applied to future cases due to the derisive nature of the opinions. Justice Sonia Sotomayor wrote her own concurring opinion, which ultimately joins Scalia’s ruling, but also considers the potential invasive properties that many technologies, like GPS tracking, have that could be used to undermine an individual’s right to privacy.⁷⁷ Not having all of the justices agree with one particular judgment

⁷⁶ Ibid. (Concurrence by Alito)

⁷⁷ Ibid. (Concurrence by Sotomayor)

means that there is the chance that the opinion of future cases similar to this one can easily reference a concurrence from *Jones* and not Scalia's majority opinion. Like *Katz* where Harlan's concurrence is frequently cited, it is conceivable that one of the concurrences written for *United States v. Jones*, not Scalia's majority opinion, could play a crucial role in defining the role of technology in police searches.

As is to be expected there is no silver bullet that can easily solve the problems that are posed in the *Jones* case. The more myopic approach that Scalia has adopted may be avoiding the overarching privacy concerns, but in doing so it also avoids the potentially negative ramifications that could come about if the Court addressed how technology shaped the expectation of privacy. New York University law professor Barry Friedman points out a less obvious conflict that occurs when applying Alito's opinion. "Focusing on public expectations of privacy means that our rights change when technology does." He draws this inference from a portion of Alito's concurrence that states: "New technology may provide increased convenience or security at the expense of privacy, and many find the tradeoff worthwhile."⁷⁸ This dilemma leads to concerns over the nature of an individual's right to privacy. The right to privacy is one that is not explicitly guaranteed in the Constitution, but it is derived and pieced together from multiple portions of the Constitution and its amendments. This fundamental right, however, if subject to change in meaning whenever new technology develops, could be dangerous.

It is this sort of concern that differentiates Scalia from the concurring opinion. The idea of reconfiguring a fundamental right in accordance with the emergence of

⁷⁸ Friedman, Barry. "Privacy, Technology and Law." *The New York Times*, 28 Jan. 2012. Web.

new technologies runs completely against the textual originalist philosophy that Scalia defends—even though he himself took quite the opposite approach in *Kyllo*. In *Jones* there was an 18th century precedent upon which he could rely this time narrowly to resolve case in the guise of an originalist. Precedents like the tort case upon which he relied in *Jones* may not always be available, and the Court will eventually have to tackle the expectation of privacy issue. This is the message that Justice Sonia Sotomayor sent in her concurrence.

Sotomayor joins the majority opinion since she feels that the physical trespass that occurred needs to be addressed first and foremost. She also notes that there are some significant risks to an individual's privacy that Alito has chosen to discuss. So she is agreeing with both the majority and main concurring opinion. However, at the end of her opinion she posits her own idea as to how privacy concerns could be imperiled but notes that deciding this narrowly because of the physical intrusion obviates the need to elaborate. "I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection."⁷⁹ Hopefully the adoption of this philosophy would limit the applicability of the precedent set in *Smith v. Maryland* and *United States v. Karo*.⁸⁰ Applied to the digital age, the precedent set in these cases

⁷⁹ *United States v. Jones* 389 U.S. 347 (2012) (Concurrence by Sotomayor)

⁸⁰ In *US v. Karo*, Karo sought to buy ether from a government informant to extract cocaine from items he and two others imported into the US. With the consent of the informant, government agents placed a tracking device in the ether, which they used to obtain evidence on Karo and his cohorts. Was planting a tracking device in a container without the buyer knowing a violation of the Fourth Amendment? The court said no, since the device was installed with the consent of the original owner and before it was the property of the buyer. This opinion was an extension of the *US v. Knotts* opinion.

could easily lead to serious infractions of what people would feel is a fundamental right to privacy.

The nature of GPS technology could be very intrusive on an individual's expectation of privacy, exponentially more so than the nature of thermal imagining technology. GPS tracking may not deal with "through the wall" or "off the wall" surveillance, but it does betray many more potentially intimate details that people would want protected. This is a point that Justice Sotomayor makes clear in her concurrence: "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious and sexual associations." All of this is undoubtedly more privacy matters than "what hour each night the lady of the house takes her daily sauna."⁸¹

What differentiated Scalia from the dissenters in *Kyllo* was his view on the nature of the technology in question. This makes his approach in *Jones* case all the more interesting since he could have easily agreed with the observations made by Justice Sotomayor in order to address the "use" rather than just the installation of GPS tracking devices. Scalia, instead, writes an entire section essentially as a rebuttal to the concurring opinion, stating why he will not address the use of GPS technology. Scalia did rule in favor of the individual but avoided the central issue. He himself had already set the precedent in *Kyllo* that could have been used to answer whether warrantless "use" of GPS monitoring conflicted with the Fourth Amendment

⁸¹ *Kyllo v. United States*, 533 U.S. 27 (2001) (Majority opinion by Justice Scalia)

Up until now Scalia's originalist philosophy really hasn't been effectively applied. In these past three cases he ruled along the lines of common law precedent (Riley and Caballes) and in *Kyllo* he himself seemed to take an anti-originalist approach in some ways. In *Jones* Justice Scalia could apply his originalist philosophy, thanks to the *Entick v. Carrington* precedent prohibiting tortious intrusion onto private property. These three cases paint a picture of Scalia going back and forth on these technology cases with not only whom he was favoring but also what rationale he was using, raising significant consistency concerns about Justice Scalia and his jurisprudence. What he wrote to resolve the issue in *Jones* provides a salient case to see what role originalism might play in modern technology cases.

Chapter 7

THE FUTURE

In this string of cases the Supreme Court has tried to address many different aspects of the Fourth Amendment and how it should be related to the new technologies that will always be coming into use. In some cases they relied strictly on the precedent set by the Court before them (*Riley* and *Caballes*), then in *Kyllo* Scalia attempted to examine the nature of the Fourth Amendment, and finally in *Jones* Scalia used his originalist philosophy by focusing on the physical trespass. All the while, there has been a constant debate about expectations of privacy, what precedent should be used and how the Fourth Amendment should be applied in modern times.

No matter what approach was adopted in each case there seem to be glaring inconsistencies that exist in the opinion, which should be expected when such difficult questions are being brought before the Court. Likewise, the different approaches that Scalia follows in his majority opinions in *Jones* and *Kyllo* reveal his own personal difficulties in implementing his judicial philosophy. The future cases that the Court will be hearing could serve as an opportunity for him reconcile his jurisprudence with his decisions.

Jardines v. Florida is the next pivotal Fourth Amendment technology case, in which the Court heard oral arguments in March 2012. Florida police received an anonymous tip that Jardines was growing marijuana in his home. Two detectives brought a drug detection dog to the front door of the house to investigate. The dog signaled for drugs as soon as they got to the front door, which served as the primary

justification to obtain a search warrant for Jardines' residence. Marijuana was found in the house, but Jardines moved to have the evidence suppressed on the grounds that his Fourth Amendment rights had been violated. The facts of the case implicate *Jones*, *Kyllo*, and *Caballes*, holdings based on different approaches reaching different conclusions. Physical intrusion (*Jones*) is involved since police brought drug detection dogs onto Jardines' private property that clearly falls under Fourth Amendment protection. Given *Kyllo* and *Jones*, this case could potentially issue a check on the *sui generis* nature of a dog's sniff, once physical intrusion combines with the expectation of privacy in the home or on private property.⁸²

Scalia will have trouble deciding how to rule on this case because of the conflicting precedents of *Caballes*, *Kyllo*, and *Jones*. Bringing a trained drug detection dog to the door of one's home certainly seems like a "substantial government intrusion into the sanctity of the home,"⁸³ but decades of meandering precedent provide multiple pathways to follow in addressing this concern.

Jardines will therefore not be an easy case for Scalia. There doesn't seem to be any relevant 18th century cases relating to the use of dogs, so the narrow, originalist-based *Jones* precedent should be of no avail. Scalia joined *Riley* and *Caballes*, and under these cases sniff dogs at Jardines' front door may or may not constitute a search according to the Fourth Amendment. However, since Scalia has reaffirmed that the greatest degree of privacy is found in one's home,⁸⁴ this case could allow the Court to

⁸² *Jardines v. Florida*, Fla. 3d. SC08-2101 (Opinion by Florida Supreme Court Justice Perry)

⁸³ Petition for a writ of certiorari, *Florida v. Jardines*

⁸⁴ *Kyllo v. United States*, 533 U.S. 27 (2001)

help define the future of the Fourth Amendment and expand the privacy rights that people should expect. With this Court it is much more likely that they will either rule in favor of the police action as a constitutional search (perhaps holding that the outside of the front door is not private, as mail carriers, solicitors, and any other person may approach it) or create an inordinately narrow holding that fails to address the privacy concerns.

This has been the case in the two most recent and significant Fourth Amendment cases decided by the Court. The *Jones* case was one of these as discussed above. In his 8-1 majority opinion, which Justice Scalia joined, in *Kentucky v. King* (2011), Justice Alito did not actually address the issue of warrantless entry. Instead, the Court held that the police, if they do not themselves create the exigent circumstances that excuse warrantless searches, may nonetheless engage in a warrantless entry of a home under the well established exigent circumstances doctrine. It would seem very likely that Justice Scalia, as well as the majority of the Court, would yet again rule narrowly in this fashion when deciding the *Jardines* case since there are other factors on which the Court could focus. Ruling broadly on technology-based Fourth Amendment cases is very difficult and something this Court and Justice Scalia, especially, are seemingly incapable of doing.

Chapter 8

SHOULD ORIGINALISM BE APPLIED

Is Justice Scalia's textualism/originalism jurisprudence interpreting an 18th century document sufficient, or even viable or realistic, in resolving cases involving 21st century privacy and security matters constantly threatened because of ever-changing technology? After examining how the Court has developed Fourth Amendment law throughout the 20th and 21st centuries, the answer, in my view, is no. After considering Justice Scalia's voting record and especially the opinion he wrote in *Kyllo*, it seems even more evident that an originalist philosophy is inappropriate, if not completely unrealistic, here.

The "originalism" that Justice Scalia applied in *Kyllo*, not only addressed whether or not the police were conducting a search when they used superhuman tools to observe the contents of a constitutionally protected area, but also furthered the privacy protections that the *Katz* opinion introduced. This was Justice Scalia's most significant contribution to the development of the Fourth Amendment in the 21st century, whether or not that was his goal. In doing so Scalia needed to account for the dramatic technological changes that are used by police, essentially evolving the Constitution, something that he ostensibly vehemently opposes. His most important contribution to the Fourth Amendment ironically has resulted from the application of a philosophy of interpretation that he himself has otherwise rejected as indefensible. In order to make a positive contribution to Fourth Amendment case law, Justice Scalia had to ultimately deviate from the textual originalism that he favors.

In *Kyllo*, it will be recalled, Scalia himself said: “It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology.”⁸⁵ With this recognition, Scalia moves away from his textual originalism and enters the realm of evolving the Constitution. Realistic statements like this challenge his established judicial philosophy, and this might provide an explanation as to why he decided to completely avoid the role of technology in *Jones*.

The *Jones* case was the first time that Justice Scalia could decide based on his originalism. In *Kyllo*, he explored the general privacy implications of the case, whereas in *Jones* he avoided them, stating that the case could be decided based solely on the physical trespass. In doing this, he sidestepped evolving the Fourth Amendment as he clearly did in *Kyllo*. But this is also what many of the other justices disagreed with and why they chose to write their own concurring opinions. Was this application of originalism something that will enlighten the meaning of the Fourth Amendment in the future? Alito felt that it was detrimental to rely so heavily on an originalist interpretation that was linked to the *Entick* case, because the way that the precedent was set would make it necessary to have an 18th century analogy that is relatable to the 21st century case. Since this will hardly ever be the case, Alito is concerned as to when it will be deemed appropriate to consider the *Jones* precedent in future Fourth amendment technology cases. The conclusion that Justice Scalia came to in his opinion for the *Jones* case is definitely a logical one when examining the content of the Fourth Amendment through a textual originalist perspective. However, in light of

⁸⁵ Ibid.

the originalist approach it does not address the Fourth Amendment's general protections. It is evident that attaching something to an individual's effects without a warrant is a violation of the Fourth Amendment; this is something that the entire Court agreed upon and felt could be supported on many grounds, particularly since there was a physical trespass. To properly apply his originalism, Scalia had to avoid the privacy issues in *Jones*, but in doing so he did not give the public an answer as to what level of privacy they are entitled to with respect to invasions that GPS technology can produce.

In the beginning of his essay in *A Manner of Interpretation* Justice Scalia talks about the neglect of the "science of construing legal texts," and posits more scientific alternatives for interpreting texts. It is a lofty ambition to try to create a scientific system that jurists can rely on when trying to interpret legal text. However, for these cases this system of originalism has fallen short. Through the years, the Court has taken many disparate positions, and consequently there is no direct line of precedent to follow. This means that there will always be a conflict within the available precedents that arises when trying to address these Fourth Amendment technology cases. There will always be a level of subjectivity when deciding which standard of interpretation should be applied. Where there was no previous case relating to the technology in question, Scalia tried to apply his originalist philosophy. If there were a case that had previously dealt with the current technology in question, Scalia would vote according to that case, even if there were a serious conflict of precedent involved with those opinions. According to Justice Scalia's voting record and opinions on these Fourth Amendment cases it is evident that there is a level of subjectivity involved when

deciding whether or not to apply originalism, which detracts from the legitimacy of the claim that Scalia is offering about textual originalism being more of a “science.”⁸⁶

Logically, textual originalism seems to be a questionable method of interpretation when trying to provide answers for questions that the framers of the Constitution could have never foreseen, but this has not deterred Justice Scalia from trying to utilize it when deciding Fourth Amendment technology cases. The application of originalism in these Fourth Amendment technology cases loses the level of objectivity that Justice Scalia set out to find when developing his judicial philosophy, making it just as subjective a standard of textual interpretation as all the others. When textual originalism has been applied, as in *Jones*, it does not actually help define the extent of privacy that individuals should expect from technologically based intrusions. By neglecting to provide these answers the Court will be leaving the door open for these invasive technologies to be used by law enforcement until there is another challenge when they can hopefully apply a more appropriate standard of interpretation.

⁸⁶ *A Matter of Interpretation*

REFERENCES

- Biskupic, Joan. *American Original: The Life and Constitution of Supreme Court Justice Antonin Scalia*. New York: Sarah Crichton/Farrar, Straus And Giroux, 2009. Print.
- Byrd, Scott. "Criminal procedure: searching high and low for a search in Kyllo: Justice Scalia reaffirms core protections of the Fourth Amendment." *Oklahoma Law Review* Spring 2003: 153-175. *LegalTrac*. Web. 8 Sep. 2011.
- "C-SPAN VIDEO LIBRARY Created by Cable. Offered as a Public Service." C-SPAN Video Library. Web. 21 Mar. 2012. <<http://www.c-spanvideo.org/program/191020-1>>. Ralph Rossum on Antonin Scalia's Jurisprudence: Text and Tradition. February 1, 2006.
- Cole, David. "Scalia's Kind of Privacy." *The National* 273.4 (2001). Print.
- Friedman, Barry. "Privacy, Technology and Law." *The New York Times*, 28 Jan. 2012. Web.
- Huskins, Michael L. ": Marijuana Hot Spots: Infrared Imaging and the Fourth Amendment." *The University of Chicago Law Review* 63.2 (1996): 655-92. Print.
- Joh, Elizabeth E.. Discretionless Policing: Technology and the Fourth Amendment, *California Law Review*, Vol. 95, No. 1 (Feb., 2007), pp. 199-234
- Kerr, Orin S..The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution, *Michigan Law Review*, Vol. 102, No. 5 (Mar., 2004), pp. 801-888
- Levinson, Tom, "Confrontation, Fidelity, Transformation: The 'Fundamentalist' Judicial Persona of Justice Antonin Scalia" (2006). *Pace Law Review*. Paper 535
- Maclin, Tracey, and Julia Mirabella. "The Fourth Amendment: Origins and Original Meaning." *Michigan Law Review* 109.6 (2011). Print.

McKenzie, Daniel. What Were They Smoking?: The Supreme Court's Latest Step in a Long, Strange Trip through the Fourth Amendment, *The Journal of Criminal Law and Criminology* (1973-), Vol. 93, No. 1 (Autumn, 2002), pp. 153-194

Petition for a writ of certiorari, Florida v. Jardines

Phibbs, Liam. 4th amend chronologic excel breakdown

Phibbs, Liam. Justice + Case chronological excel breakdown

Scalia, Antonin, and Amy Gutmann. *A Matter of Interpretation: Federal Courts and the Law* : An Essay. Princeton, NJ: Princeton UP, 1998. Print.

Schotter, Geoffrey. "Diachronic Constitutionalism: A Remedy for the Court's Originalist Fixation." *Case Western Reserve Law Review* 60.4 (2010). Print.

Seamon, Richard H. "Kyllo v. United States and the partial ascendance of Justice Scalia's Fourth Amendment." *Washington University Law Quarterly* Winter 2001: 1013-1033. *LegalTrac*. Web. 8 Sep. 2011.

Simmons, Ric. "Why 2007 Is Not like 1984: A Broader Perspective on Technology's Effect on Privacy and Fourth Amendment Jurisprudence." *The Journal of Criminal Law and Criminology* 97.2 (2007). Print.

Sklansky, David A. "The Fourth Amendment and Common Law." *Columbia Law Review* 100.7 (2000). Print.

Strauss, David. "The Living Constitution." University of Chicago Law School. Web. 23 Sept. 2011.
<<http://www.law.uchicago.edu/alumni/magazine/fall10/strauss>>.

United States Constitution Amendment IV

United States Constitution Amendment VIII

Whittington, Keith E. "Dworkin's "Originalism": The Role of Intentions in Constitutional Interpretation." *The Review of Politics* 62.2 (2000). Print.

LIST OF CASES

California v. Ciraolo, 476 U.S. 207 (1986)
County of Riverside v. McLaughlin, 500 U.S. 44 (1991)
District of Columbia v. Heller, 554 U.S. 570 (2008)
Dow Chemical Co. v. United States, 476 U.S. 227 (1986)
Ferguson v. Charlestown, 532 U.S. 67 (2001)
Florida v. Riley, 488 U.S. 445 (1989)
Groh v. Ramirez, 540 U.S. 551 (2004)
Illinois v. Rodriguez, 497 U.S. 177 (1990)
Jardines v. Florida, Fla. 3d. SC08-2101 (2011)
Katz v. United States, 389 U.S. 347 (1967)
Kyllo v. United States 533 U.S. 27 (2001)
McCulloch v. Maryland, 17 U.S. 316 (1819)
Murray v. United States, 487 U.S. 533 (1988)
Olmstead v. United States 277 U.S. 438 (1928)
Silverman v. United States, 365 US 505 (1961)
Smith v. Maryland, 442 U.S. 735 (1979)
Smith v. United States, 507 U.S. 197 (1993)
Trop v. Dulles, 356 U.S. 86 (1958)
United States v. Jones 389 U.S. 347 (2012)
United States v Karo, 468 U.S. 705 (1984)
United States v. Place, 462 U.S. 696 (1983)