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The Effects of Legislation on Fourth Amendment Protection

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THE EFFECT OF LEGISLATION ON FOURTH AMENDMENT PROTECTION

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Abstract

When judges interpret the Fourth Amendment, and privacy legislation regulates the government's conduct, should the legislation have an effect on the Fourth Amendment? Courts are split three ways. Some courts argue that legislation provides the informed judgment of a coequal branch that should influence the Fourth Amendment. Some courts contend that the presence of legislation should displace Fourth Amendment protection to prevent constitutional rules from interfering with the legislature's handiwork. Finally, some courts treat legislation and the Fourth Amendment as independent and contend that the legislation should have no effect.

This Article argues that courts should favor interpreting the Fourth Amendment independently of legislation. At first blush, linking the Fourth Amendment to legislation seems like a pragmatic way to harness the experience and skills of the legislature to help implement constitutional values. A closer look reveals a different picture. Investigative legislation offers a surprisingly weak indicator of constitutional values. Linking the Fourth Amendment and statutes raises novel and complex questions of what links to draw and how to draw them. Linkage also threatens to weaken statutory privacy laws by turning the legislative process into a proxy battle for Fourth Amendment protection. Interpreting the Fourth Amendment independently of legislation avoids these problems. Independence limits arbitrary decisionmaking, provides a clear standard, and helps to protect the benefits of legislation.

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Introduction

The law of search and seizure has two primary sources. The best-known source is the Fourth Amendment to the United States Constitution.[1] A massive body of case law interprets the Fourth Amendment's ban on "unreasonable searches and seizures."[2] That case law imposes a complex code of criminal procedure regulating detention, physical searches, and many kinds of surveillance.[3] Because Fourth Amendment doctrine often uses open-ended phrases and considers a range of policy interests, there is often uncertainty about how the Fourth Amendment applies to new facts.

The second source of search and seizure law is what I will call *investigative legislation*. Investigative legislation includes any statute that limits government investigations.[4] Examples include wiretapping laws;[5] laws governing

1. *See* U.S. Const. amend. IV.

2. The leading treatise in the field covers only a small percentage of the cases and spans six large bound volumes. Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment (5th ed. 2012).

3. *See generally id.*

4. This definition includes laws that regulate both private parties and the government when the latter has exceptions for government action pursuant to a court order or other special license. However, the definition excludes criminal laws that are believed to have been violated by a suspect. Because standards such as probable cause and reasonable suspicion hinge on the substantive crime under investigation, the statutory crime is in some sense always relevant to the Fourth Amendment. This Article focuses instead on laws that place limits on investigations.

5. *See, e.g.*, 18 U.S.C. §§ 2510–22 (2012) (codifying the federal Wiretap Act).

access to bank records;[6] hotel inspection ordinances;[7] laws on government use of automated license-plate readers;[8] laws regulating government use of drones;[9] statutes that regulate stops and frisks;[10] and legislation dictating when and how the police can make arrests.[11] Although investigative legislation receives far less scholarly attention than the Fourth Amendment, collectively it can amount to a parallel system of search and seizure law.[12]

This Article addresses a recurring question that has divided courts: Should investigative legislation influence judicial interpretations of the Fourth Amendment?[13] When courts apply the open-ended principles of the Fourth Amendment, and statutes regulate some aspect of the government's conduct, should the statutes help shape what the Fourth Amendment is interpreted to mean?

Existing cases offer three different answers to the question. I will label these answers *influence*, *displacement*, and *independence*. Courts applying the influence approach treat statutes as relevant benchmarks for constitutional

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6. *See, e.g.*, 12 U.S.C. §§ 3401–22 (2012) (codifying the Right to Financial Privacy Act).

7. *See, e.g.*, City of Los Angeles v. Patel, 135 S. Ct. 2443 (2015) (striking down L.A., CAL., MUN. CODE § 41.49(3)(a) (2008), a hotel inspection ordinance).

8. *See, e.g.*, CAL. CIV. CODE §§ 1798.90.5–.55 (West Supp. 2016).

9. For example, in 2015 the State of Florida enacted a law prohibiting anyone, including a state agency, from using a drone to observe another person's property without consent when it would violate a reasonable expectation of privacy. FLA. STAT. § 934.50 (2016).

10. *See* Hiibel v. Sixth Judicial Dist. Court, 542 U.S. 177, 183–84 (2004) (discussing the history and evolution of stop-and-identify statutes that regulate stop and frisk by statute).

11. *See, e.g.*, 18 U.S.C. § 3051 (2012) (authorizing agents of the Federal Bureau of Investigation to make arrests without warrants).

12. *See generally* Erin Murphy, *The Politics of Privacy in the Criminal Justice System: Information Disclosure, the Fourth Amendment, and Statutory Law Enforcement Exemptions*, 111 MICH. L. REV. 485 (2013) (examining the role of privacy statutes).

13. This question has mostly escaped prior scholarly commentary. A decade ago, Daniel Solove and I disagreed on whether courts should allow statutes to satisfy Fourth Amendment reasonableness holistically, a variant of what I now call the displacement approach. *Compare* Daniel J. Solove, *Fourth Amendment Codification and Professor Kerr's Misguided Call for Judicial Deference*, 74 FORDHAM L. REV. 747, 774 (2005) (suggesting "yes"), *with* Orin S. Kerr, *Congress, the Courts, and New Technologies: A Response to Professor Solove*, 74 FORDHAM L. REV. 779, 787–90 (2005) (arguing "no"). A recent student note predicts that what I call the influence approach will be applied to drone legislation and the Fourth Amendment–search test. *See* Taly Matiteyahu, Note, *Drone Regulations and Fourth Amendment Rights: The Interaction of State Drone Statutes and the Reasonable Expectation of Privacy*, 48 COLUM. J.L. & SOC. PROBS. 265, 289–307 (2015). The influence argument is also sometimes made in passing in Fourth Amendment scholarship. *See, e.g.*, Ryan A. Ray, *The Warrantless Interception of E-mail: Fourth Amendment Search or Free Rein for the Police?*, 36 RUTGERS COMPUTER & TECH. L.J. 178, 205–06 (2010). Finally, some scholars have recently suggested approaches that hint at but do not quite reflect the influence approach. *See, e.g.*, William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1825 (2016) (arguing that the government commits a search whenever it acts in a way that would violate any positive law if undertaken by a private actor); Michael J. Zydney Mannheimer, *The Contingent Fourth Amendment*, 64 EMORY L.J. 1229, 1287–91 (2015) (arguing as an originalist matter that federal officers should be required to follow state investigative law).

meaning.[14] These courts view statutes as signals from a coequal branch of government that should influence, although not control, the Fourth Amendment. Courts that endorse the displacement approach treat statutory coverage as a reason to reject constitutional protection.[15] For these courts, investigative legislation should occupy the regulatory field and discourage judicial intervention to preserve thoughtful legislative protections. Finally, some courts adopt an independent approach and simply ignore investigative legislation when construing the Fourth Amendment.[16] These courts treat statutory protection as so different from the Fourth Amendment that it should have no influence on constitutional meaning.

Much of the case law on the three approaches has developed in the last five years, a trend owing in part to the recent enactment of more and stronger statutory privacy laws. Consider investigative legislation passed just in 2015. In that year, twenty states passed statutes limiting the legal use of drones.[17] Four states enacted laws limiting government access to automated license plate reader data.[18] At the federal level, Congress passed the USA Freedom Act to limit surveillance of telephone records by the National Security Agency.[19] The most populous state, California, enacted the most strict and far-reaching legislative regulation of government access to digitally stored evidence ever seen.[20] This and other recent legislative activity has helped inspire litigation on the significance of legislation to the Fourth Amendment.

This Article has two goals. The first goal is descriptive: It identifies and explains the three positions courts have taken on the proper role of investigative legislation in Fourth Amendment interpretation. It shows that all three positions—influence, displacement, and independence—have been embraced in Supreme Court opinions and in decisions by prominent appellate judges. Each of the three positions stems from plausible premises about the role and purposes of the Fourth Amendment. Further, each shares roots

14. *See infra* Section I.B.

15. *See infra* Section I.C.

16. *See infra* Section I.D.

17. *State Unmanned Aircraft Systems (UAS): 2015 Legislation*, Nat'l Conf. St. Legislatures (Sept. 30, 2016), http://www.ncsl.org/research/transportation/state-unmanned-aircraft-systems-uas-2015-legislation.aspx [https://perma.cc/BAZ6-S622] (detailing 2015 legislative efforts).

18. *Automated License Plate Readers: State Legislation*, Nat'l Conf. St. Legislatures (Nov. 13, 2015), http://www.ncsl.org/research/telecommunications-and-information-technology/2014-state-legislation-related-to-automated-license-plate-recognition-information.aspx [https://perma.cc/D2PS-PJG6] (Arkansas, California, Minnesota, and North Carolina).

19. USA FREEDOM Act of 2015, Pub. L. No. 114-23, 129 Stat. 268.

20. The new law, the California Electronic Communications Privacy Act, went into effect on January 1, 2016. Cal. Penal Code §§ 1546–46.4 (West Supp. 2016). For an overview, see *In Landmark Victory for Digital Privacy, Gov. Brown Signs California Electronic Communications Privacy Act into Law*, ACLU Northern Cal. (Oct. 8, 2015), https://www.aclunc.org/news/landmark-victory-digital-privacy-gov-brown-signs-california-electronic-communications-privacy (on file with *Michigan Law Review*).

with established doctrines on the role of legislation in constitutional interpretation found outside the Fourth Amendment.

The Article's second goal is normative. It argues that courts should favor independence and should be wary of influence and displacement. The Fourth Amendment and investigative legislation create parallel systems of regulation. Influence and displacement try to link to the two systems by making the Fourth Amendment dependent (at least to some degree) on the state of investigative legislation. At first blush, this has considerable appeal. Under the influence approach, linkage can aid Fourth Amendment decisionmaking by learning from judgments of legislatures. And under the displacement approach, linkage can lead to more informed and nuanced privacy rules by deferring to legislatures that have institutional advantages over courts.

These arguments have surface appeal, but a closer look shows that they rest on dubious premises and ignore significant problems. The influence approach rests on the assumption that investigative legislation can shed light on societal values relevant to the Fourth Amendment. This assumption is quite weak, as determining the relevant societal message of investigative legislation turns out to be remarkably difficult if not impossible. Structural differences between the Fourth Amendment and investigative legislation make legislation a poor signal of constitutionally relevant judgments. And because investigative legislation is enacted in the shadow of the Fourth Amendment, its presence or absence tends to reflect the state of Fourth Amendment law rather than provide information about how it should be interpreted. What looks at first like a signal of societal values turns out to be mostly—if not entirely—noise.

Second, both influence and displacement would be surprisingly difficult to implement. Linking Fourth Amendment interpretation to the state of investigative legislation requires articulating standards for how this should be done. This proves very complicated because investigative legislation spans a series of interrelated regulatory choices by federal, state, and local legislatures. Courts would need to identify standards for what combinations of legislation trigger influence or displacement and what effect they should have once triggered. Developing such standards is not impossible. But nor is it easy, as it requires answering a series of novel questions that have no obvious answers. In contrast, implementing independence is simple. The difficult challenges of implementing influence and displacement provide a significant reason to favor independence.

The third argument for independence is that influence and displacement would undermine the benefits of a dual system of statutory and constitutional regulation. By linking constitutional standards to statutory law, influence and displacement would undermine the legislative process. Judicial linkage ex post would change the legislative incentives ex ante. The result would shrink legislative options, introduce considerable uncertainty, and give the executive significant incentive to object to investigative legislation because of its possible effect on Fourth Amendment interpretation. Having

independent systems of constitutional and statutory regulation allows each to best advance the goals of search and seizure law in their spheres.

Importantly, the Article does not argue that courts must always embrace independence. Search and seizure law is famously fact specific, and it regulates an extraordinarily diverse range of facts using many specific doctrines.[21] A one-size-fits-all answer may not be appropriate, especially given the unresolved questions about what version of influence or displacement courts might consider.[22] The arguments developed in this Article instead suggest a presumption: Courts should be inclined to adopt independence and should be wary of influence and displacement. Linking the Fourth Amendment and statutory privacy law is surprisingly difficult, threatens the legislative process, and does not provide helpful information about societal judgments that could otherwise aid Fourth Amendment decisionmaking. Courts should be reluctant to take that step.

The Article contains four Parts. Part I identifies and explores the three approaches. Part II explains the weakness of the basic premise of the influence approach. Part III explores the implementation problems of both the influence and displacement approaches. Finally, Part IV contends that influence and displacement can threaten the legislative process.

I. The Three Approaches: Influence, Displacement, and Independence

This Part reviews the different approaches courts have adopted when answering whether or how investigative legislation influences interpretations of the Fourth Amendment. It organizes the cases into three approaches: influence, displacement, and independence. In the influence cases, courts see legislation as a positive influence on Fourth Amendment meaning. In the displacement cases, courts treat investigative legislation as cause to reject constitutional protection. Finally, in the independence cases, courts interpret the Fourth Amendment independently of statutory protection.

The Part begins by framing the relationship between the Fourth Amendment and investigative legislation. The two bodies of law create parallel systems of regulation, each of which must grapple with the three questions of what to regulate, how to regulate it, and what remedies should apply to violations. The hard question is whether and how to connect the two systems. This Part explains the three answers to that question found in existing cases, and it then shows how those answers relate to precedents on the role of legislation in interpreting the Constitution outside the Fourth Amendment.

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21. *See* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 385 (1974). As Amsterdam notes, "[T]he police engage in a vast range of activities affecting a broad spectrum of citizens' interests in a complex variety of ways." *Id.* at 386.

22. *See infra* Sections III.A–B.

A. *Two Systems of Regulation*

The purpose of search and seizure law is to accommodate the competing public interests of privacy and security in government investigations.[23] To protect the public, the government must collect evidence of crimes and other wrongdoing. If the government has too little power to collect evidence, the public will suffer as harmful acts often go unpunished, undetected, and undeterred. On the other hand, if the government has too much power, the public can suffer if the government abuses its authority and violates civil liberties.[24] To avoid these dystopian extremes, lawmakers generally try to strike a balance that gives the government enough investigative power to deter wrongdoing while limiting government power enough to prevent abuses.[25]

These concerns imply three related questions that any system of search and seizure law must answer. The first question is, what government conduct does the law regulate? The second question is, when the law regulates a particular government act, what standard must the government satisfy to conduct it? The third question is the remedy. If the government breaks the law, what remedies follow?[26] Designing any legal regime governing search and seizure requires answering all three questions: the threshold at step one, the standard at step two, and the remedy at step three.

The Fourth Amendment and investigative legislation amount to two parallel sets of answers to these questions. In the constitutional context, the threshold at step one requires identifying a Fourth Amendment "search" or "seizure."[27] A search is either a government violation of a reasonable expectation of privacy or else a trespass onto a person, house, papers, or effects.[28] A seizure occurs when the government meaningfully interferes with a person's possessory interest in property or takes control of their persons.[29] The standard at step two is whether the search or seizure is "reasonable."[30] This usually requires a warrant based on probable cause or an exception to the warrant requirement such as exigent circumstances or consent, but it can

23. *See* United States v. U.S. Dist. Court, 407 U.S. 297, 314–15 (1972).

24. *See id.* at 316–21.

25. *See id.*

26. Professor Solove has contended that the Fourth Amendment raises two questions, labeling the first question "the Coverage Question" and the second "the Procedure Question." Daniel J. Solove, Essay, *Fourth Amendment Pragmatism*, 51 B.C. L. Rev. 1511, 1511 (2010). For reasons made clear in this Article, I think it's critical to add in the third question, the remedies available when violations occur, to understand the scope of any search and seizure regime.

27. U.S. Const. amend. IV.

28. *See generally* 1 LaFave, *supra* note 2, § 2.1.

29. *See* United States v. Jacobsen, 466 U.S. 109, 113 & n.5 (1984) ("A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property.").

30. *See* U.S. Const. amend. IV.

also be satisfied in particular circumstances by general balancing of interests.[31] The remedy at step three can include the exclusionary rule in criminal cases and money damages in civil cases.[32]

Investigative legislation must address the same three questions. At the same time, investigative legislation is both more complex and more diverse than Fourth Amendment law. Statutory privacy laws typically are narrow and specific.[33] The world of privacy legislation consists of many silos instead of one overarching doctrine.[34] For example, one statute might regulate government use of drones;[35] another might regulate government use of license-plate readers;[36] a third might address government access to cell-site information;[37] and a fourth might impose rules on government use of cell-site simulators.[38] Each statute might have its own unique answer to what conduct is regulated, what rules are imposed when the law applies, and what remedies are available for violations.

Investigative legislation is also more diverse than the Fourth Amendment because it has many sources. Regional variations in Fourth Amendment case law exist,[39] but they are a bug rather than a feature and Supreme Court review is designed to impose uniformity.[40] For the most part, there is only one Fourth Amendment. In contrast, statutory privacy laws represent a constellation of different laws from different levels of governments. Congress operates at the federal level. Fifty independent states can legislate at the state level. And hundreds or even thousands of local governments can enact ordinances at the local level. Investigative legislation is not so much an "it" as a "they," encompassing many different laws from different legislatures that often answer the three questions of search and seizure law differently. Despite these differences, investigative legislation must answer the same three basic questions as the Fourth Amendment answers: the threshold question of coverage at step one, the standard to satisfy at step two, and the remedies at step three.

This Article considers how best to relate the two systems of regulation. When courts must interpret the vague principles of the Fourth Amendment,

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31. *See generally* 3 LaFave, *supra* note 2, §§ 5.1–.5.

32. *See generally* 1 *id.* §§ 1.1–.13.

33. *See supra* notes 5–11 and accompanying text.

34. *See generally* Daniel J. Solove, Understanding Privacy (2008).

35. *See, e.g.*, Fla. Stat. § 934.50 (2016).

36. *See, e.g.*, Cal. Civ. Code §§ 1798.90.5–.55 (West Supp. 2016).

37. *See, e.g.*, Me. Rev. Stat. Ann. tit. 16, §§ 647–650-B (Supp. 2015).

38. *See, e.g.*, Cal. Gov't Code § 53166 (West Supp. 2016).

39. *See* Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 Vand. L. Rev. 1137 (2012).

40. *See* Sup. Ct. R. 10 (articulating the standards for granting a petition for a writ of certiorari, focusing largely on appellate decisions that conflict with other appellate decisions). The search and seizure provisions of state constitutions can also vary, *see* Stephen E. Henderson, *Learning from All Fifty States: How to Apply the Fourth Amendment and Its State Analogs to Protect Third Party Information from Unreasonable Search*, 55 Cath. U. L. Rev. 373 (2006), although not in a way relevant here.

they do so against the backdrop of existing legislation. Should interpretations of the Fourth Amendment consider that legislation? And if so, how? Courts have articulated three different answers to these questions: influence, displacement, and independence.

B. *The Influence Cases*

In the influence cases, investigative legislation is considered a possible standard for judicial incorporation. When a court is called on to interpret the Fourth Amendment in a novel context, it must apply Fourth Amendment principles that derive in part from value judgments about what invades privacy and what advances security. The influence cases rest on a pragmatic judgment: If courts must make these difficult judgment calls, and legislatures have done so already in enacting investigative legislation, courts can draw lessons from the thoughtful judgment of a coequal branch. Investigative legislation provides an important standard for courts to consider in interpreting the Fourth Amendment.[41]

The Supreme Court's decision in *United States v. Watson*[42] is a prominent example of the influence approach. *Watson* asked the step two question of whether it is constitutionally reasonable for a postal inspector to make a public arrest for a felony offense based on probable cause but without a warrant. A federal statute expressly authorized such warrantless arrests.[43] The Court ruled that the arrests were constitutional without a warrant and that the statute was constitutional.[44] Justice White's majority opinion relied heavily on deference to Congress's legislative judgment. According to Justice White, the statute authorizing the arrests "represents a judgment by Congress that it is not unreasonable under the Fourth Amendment for postal inspectors to arrest without a warrant provided they have probable cause to do so."[45] Congress's judgment was entitled to presumptive deference as the considered decision of a coequal branch.[46]

Watson bolstered its case for following Congress by pointing to the consistency of Congress's judgment. The statute in *Watson* "was not an isolated or quixotic judgment of the legislative branch."[47] To the contrary: "Other federal law enforcement officers have been expressly authorized by statute for many years to make felony arrests on probable cause but without a warrant."[48] Congress's consistency was significant, the Court explained in a later case, because a "longstanding, widespread practice" should not "be lightly brushed aside . . . when custom and contemporary norms necessarily play

41. *See* Henderson, *supra* note 40.

42. 423 U.S. 411 (1976).

43. *Watson*, 423 U.S. at 415 (citing 18 U.S.C. § 3061(a)(3) (2012)).

44. *See id.* at 424.

45. *Id.* at 415.

46. *See id.*

47. *Id.* at 415–16.

48. *Id.* at 416.

such a large role in the constitutional analysis."[49] Finally, *Watson* justified deference to the statutory standard based on principles of judicial restraint. Because there is a "strong presumption of constitutionality due to an Act of Congress," and that presumption should apply "especially when [the statute] turns on what is 'reasonable,'" then "[o]bviously the Court should be reluctant to decide that a search thus authorized by Congress was unreasonable and that the Act was therefore unconstitutional."[50]

The Second Circuit's recent decision rejecting the National Security Agency's telephony metadata program provides another example of the influence approach.[51] A lawsuit challenged the program as illegal both because it was not authorized by a federal statute and because it violated the Fourth Amendment.[52] After ruling that the statute did not authorize the program and then declining to reach the Fourth Amendment question,[53] the court offered extensive dicta on why future congressional approval of a telephony metadata program would influence a future Fourth Amendment ruling. According to the opinion, authored by Judge Gerard Lynch, legislation would implicitly render "[a] congressional judgment as to what is 'reasonable'" that "would carry weight—at least with us, and, we assume, with the Supreme Court."[54] This was so, Lynch reasoned, because Congress has a significant institutional advantage over courts in creating sound rules in the face of new technologies.[55] Congress can hold hearings and consult with experts about what invades privacy and what protects security.[56] Because Congress is better suited than courts to balance privacy and security, courts can learn from the measured judgment of reasonableness implicit in legislation.[57]

Judge Richard Posner's opinion in *United States v. Torres*[58] strikes a similar note. *Torres* confronted an anomaly in the federal Wiretap Act. Although the Wiretap Act mandates a complex procedure to authorize government

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49. Payton v. New York, 445 U.S. 573, 600 (1980) (holding that the Fourth Amendment requires a warrant to enter a home to make an arrest). *Payton* is somewhat puzzling because it based its sense of "contemporary norms" on not just statutes but also then-recent lower court cases striking down similar statutes under both state and the federal constitutions. *See id.* For an additional discussion of *Payton*, see *infra* text accompanying notes 202–203.

50. *Watson*, 423 U.S. at 416 (second alteration in original) (quoting United States v. Di Re, 332 U.S. 581, 585 (1948)).

51. *See* ACLU v. Clapper, 785 F.3d 787 (2d Cir. 2015).

52. *See id.* at 792.

53. *See id.* at 825–26.

54. *Id.* at 824.

55. *See id.* ("Congress is better positioned than the courts to understand and balance the intricacies and competing concerns involved in protecting our national security, and to pass judgment on the value of the telephone metadata program as a counterterrorism tool.")

56. *See id.* at 824–25.

57. Judge Lynch also suggested a second Fourth Amendment use for legislation: because a court applying the Fourth Amendment might have to assess what is technologically possible, legislation could guide that assessment because Congress would likely be technologically informed. *See id.*

58. 751 F.2d 875 (7th Cir. 1984).

audio recording of a private conversation, the statue does not apply at all to mere video surveillance without audio.[59] In analyzing how the Fourth Amendment might apply to video-only surveillance, Judge Posner "borrow[ed] the warrant procedure" of the Wiretap Act, which he described as "a careful legislative attempt to solve a very similar problem," and held that the statutory procedure "provides the measure of the government's constitutional obligation" to establish particularized warrants for video-only surveillance.[60] Judge Posner declined to constitutionalize other aspects of the Wiretap Act, such as the remedies imposed for violations, on the ground that the Fourth Amendment requires warrant particularity but that importing other statutory requirements would exceed the proper judicial role.[61]

The influence approach has also been used to inform judgments at the threshold stage to identify what qualifies as a "search." Under the *Katz* test, a Fourth Amendment search occurs when government action violates an expectation of privacy that "society is prepared to recognize as 'reasonable.'"[62] Some courts have reasoned that investigative legislation can reflect society's reasonable expectations. Because society can speak through the elected branches, the state of investigative legislation can show whether society is prepared to recognize an expectation of privacy as constitutionally reasonable.

In *United States v. Maynard*, for example, the D.C. Circuit held that a search occurred when agents tracked a car's location for thirty days using a GPS device installed underneath the car.[63] This was so, Judge Douglas Ginsburg argued, because "[s]ociety recognizes" that a person's "expectation of privacy in his movements over the course of a month as reasonable."[64] For support, Judge Ginsburg noted that seven states had enacted statutes requiring the police to obtain warrant before installing a GPS device. "Although perhaps not conclusive evidence of nationwide 'societal understandings,'" Judge Ginsburg reasoned, "these state laws are indicative that prolonged GPS monitoring defeats an expectation of privacy that our society recognizes as reasonable."[65]

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59. *Torres*, 751 F.2d at 880 (citing 18 U.S.C. §§ 2516(1), 2518(1)).

60. *Id.* at 885.

61. *Id.* at 885–86.

62. Smith v. Maryland, 442 U.S. 735, 740 (1979) (quoting Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)). Although originally it was articulated only in Justice Harlan's concurring opinion, Harlan's formulation was later adopted by the full Court and has become known as the *Katz* test. *See id.*

63. 615 F.3d 544, 555–56 (D.C. Cir. 2010), *aff'd on other grounds sub nom.* United States v. Jones, 132 S. Ct. 945 (2012).

64. *Maynard*, 615 F.3d at 563.

65. *Id.* at 564. For similar reasoning, see *United States v. Velasquez*, No. CR 08-0730 WHA, 2010 WL 4286276, at *5 (N.D. Cal. Oct. 22, 2010) ("[T]he recognition of a privacy right by numerous states may provide insight into broad societal expectations of privacy."); and *Custodian of Records for the Legislative Tech. Servs. Bureau v. State* (*In re John Doe Proceeding*), 680 N.W.2d 792, 806 (Wis. 2004) (reasoning that the enactment of the Electronic Communications Privacy Act was "a strong expression of society's expectation of privacy in electronic communications" that justified Fourth Amendment protection for email).

Judge Lucy Koh recently made a similar argument in the course of holding that phone users have a reasonable expectation of privacy in their historical cell-site location information (CSLI).[66] CSLI is location information generated by cellular phone providers that indicates which cell tower a particular phone was communicating with when a communication was made.[67] Under the federal Stored Communications Act (SCA), Congress requires the the government to obtain a court order based on specific and articulable facts—less than probable cause—before it can compel cellular providers to disclose historical CSLI.[68] In her opinion, Judge Koh ruled that the federal statutory standard was unconstitutional in part because six states had enacted legislation that required a warrant for historical CSLI. According to Judge Koh, the six statutes, together with a handful of state statutes that require warrants for real-time location tracking as well as several state constitution decisions, provided evidence of "broad societal expectations of privacy" in historical CSLI.[69]

Although legislation can help establish a reasonable expectation of privacy under the influence approach, it can also have the opposite effect. Consider *United States v. Carpenter*,[70] in which the opinion by Judge Raymond Kethledge addressed the same CSLI question resolved by Judge Koh but reached the opposite result. Whereas Judge Koh looked to the six state statutes that required a warrant,[71] Judge Kethledge focused on the fact that Congress rejected the warrant standard for CSLI in enacting the SCA. According to Judge Kethledge, the fact that "Congress has specifically legislated on the question before us today" and yet rejected the Fourth Amendment warrant standard was an indication that "society itself—in the form of its elected representatives in Congress—has already struck a balance that it thinks reasonable."[72] Because the search doctrine "itself turns on society's views, and society has in a meaningful way already expressed them" by rejecting the warrant standard, judges "should bring a certain humility" and be cautious about rejecting that standard.[73]

Judges Koh and Kethledge applied the same influence approach but diverged on which statutes represent society's view. Judge Kethledge looked to Congress and concluded that its rejection of the Fourth Amendment standard signaled a rejection of Fourth Amendment privacy. In contrast, Judge Koh looked to a handful of state statutes and concluded that their acceptance of the Fourth Amendment standard is more telling. Both decisions looked to

66. *In re* Application for Tel. Info. Needed for a Criminal Investigation, 119 F. Supp. 3d 1011 (N.D. Cal. 2015), *appeal dismissed*, No. 15-16760 (9th Cir. Feb. 5, 2016).

67. *See id.* at 1013–14.

68. *See* 18 U.S.C. § 2703(c) (2012).

69. *In re Application for Tel. Info.*, 119 F. Supp. 3d at 1025–26 (quoting United States v. Cooper, No. 13-cr-00693-SI-1, 2015 WL 881578, at *8 (N.D. Cal. Mar. 2, 2015)).

70. 819 F.3d 880 (6th Cir. 2016).

71. *In re Application for Tel. Info.*, 119 F. Supp. 3d at 1025–26.

72. *Carpenter*, 819 F.3d at 889–90.

73. *Id.* at 890.

legislatures for society's view. They simply diverged on which statutes represent society's true expectations.

C. *The Displacement Cases*

A second set of cases adopts what I call the displacement approach. The displacement cases instruct that the existence of investigative legislation counsels against Fourth Amendment protection that might interrupt the statutory scheme. Echoing Judge Lynch in *Clapper*,[74] these courts focus on the comparative advantage of allowing legislatures to protect privacy in areas of emerging technologies.[75] Legislatures can regulate comprehensively and with expert input. They can try different approaches over time as technology changes, and they can craft new strategies free from the limits of precedent. Because legislatures can do a better job at balancing privacy and security in new technologies as compared to courts, courts should reject Fourth Amendment protection as long as legislatures are protecting privacy adequately to avoid interfering with the careful work of the legislative branch. The existence of investigative legislation effectively preempts the field and displaces Fourth Amendment protection that may otherwise exist.

Justice Samuel Alito endorsed the displacement approach in *Riley v. California*.[76] *Riley* held that the government must obtain a search warrant before searching a cell phone incident to a suspect's lawful arrest.[77] Justice Alito concurred, agreeing with the majority only in the absence of adequate legislation regulating cell phone searches. "I would reconsider the question presented here," he wrote, "if either Congress or state legislatures, after assessing the legitimate needs of law enforcement and the privacy interests of cell phone owners, enact legislation that draws reasonable distinctions based on categories of information or perhaps other variables."[78]

The enactment of investigative legislation should discourage judicial intervention, Justice Alito reasoned, because "[l]egislatures, elected by the people, are in a better position than we are to assess and respond to the changes that have already occurred and those that almost certainly will take place in the future."[79] Although Fourth Amendment protection was necessary in the absence of legislation, the enactment of legislation might be reason to withdraw Fourth Amendment protection to avoid the "very unfortunate" result of "federal courts using the blunt instrument of the Fourth Amendment" to try to protect privacy in emerging technologies.[80]

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74. *See supra* text accompanying notes 53–57.

75. *See infra* text accompanying notes 89–97.

76. 134 S. Ct. 2473 (2014).

77. *Riley*, 134 S. Ct. at 2494–95.

78. *Id.* at 2497 (Alito, J., concurring in part and concurring in the judgment).

79. *Id.* at 2497–98.

80. *Id.* at 2497; *see also* United States v. Jones, 132 S. Ct. 945, 962–64 (2012) (Alito, J., concurring in the judgment).

The Sixth Circuit's decision in *Adams v. City of Battle Creek*[81] provides another example of the displacement principle. A city police officer claimed that the city had illegally wiretapped him in violation of both the Fourth Amendment and the federal Wiretap Act.[82] The Sixth Circuit held that the Wiretap Act provided a statutory remedy but that its "detailed legislative scheme" should "provide the exclusive remedies in the field" of wiretapping law.[83] The availability of statutory remedies under the Wiretap Act foreclosed consideration of a Fourth Amendment remedy. According to the court, the Wiretap Act was a careful and comprehensive statutory effort "to balance privacy rights and law enforcement needs" that were "the primary vehicle by which to address violations of privacy interests in the communication field."[84] The statute effectively displaced any constitutional remedies that would otherwise exist.

Judge Harvie Wilkinson's opinion for the Fourth Circuit in *United States v. McNulty* is an additional example of the displacement approach.[85] The government intercepted the defendant's phone calls that were made using a cordless telephone that broadcast an unencrypted signal to the handset that could be readily intercepted from a radio receiver nearby.[86] Judge Wilkinson ruled that the government's surveillance did not violate the defendant's reasonable expectation of privacy.[87] Wilkinson relied heavily on Congress's active consideration of cordless phone privacy under the Wiretap Act. During the time the criminal case was pending, Congress had amended the Wiretap Act to change the statutory rule: The old statute had excluded the radio portions of cordless calls from the protections of the Wiretap Act but the new statute included them.[88]

According to Judge Wilkinson, Congress's activity provided a sound reason to reject Fourth Amendment protection. In his view, "courts should be cautious not to wield the amorphous 'reasonable expectation of privacy' standard in a manner that nullifies the balance between privacy rights and law enforcement needs struck by Congress."[89] The "primary job" of protecting privacy in new technology should "remain with the branch of government designed to make such policy choices, the legislature."[90] Congress was doing careful work on wiretapping that courts should not upset: "Congress undertook in [the Wiretap Act] to legislate comprehensively in this field and

81. 250 F.3d 980 (6th Cir. 2001).

82. *Adams*, 250 F.3d at 982–86.

83. *Id.* at 986.

84. *Id.*

85. United States v. McNulty (*In re* Askin), 47 F.3d 100, 104–06 (4th Cir. 1995).

86. *Id.* at 101.

87. *Id.* at 105–06.

88. *Id.* at 104.

89. *Id.* at 105–06 (citation omitted) (quoting Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)).

90. *Id.* at 106.

has shown no reluctance to revisit it."[91] Because Congress was in charge with "a comprehensive effort . . . to strike a careful balance between rights of personal privacy and the needs of law enforcement,"[92] it was inappropriate for the courts to step in.

Judge Wilkinson recently reaffirmed his approach in *United States v. Graham*,[93] yet another case on whether the Fourth Amendment protects CSLI. Concurring with the en banc court's decision that acquiring CLSI is not a search, Judge Wilkinson emphasized that "developing constitutional meaning has always been a collaborative enterprise among the three departments of government."[94] When Congress enacted the intermediate court-order standard for CSLI in the SCA, he reasoned, Congress had "weighed in on the Fourth Amendment's requirement of 'reasonableness.'"[95] "Faced with a term literally crying out for balance between the competing interests of individual privacy and societal security," he added, "it is appropriate to accord some degree of deference to legislation weighing the utility of a particular investigative method against the degree of intrusion on individuals' privacy interests."[96] Specifically, deference to Congress meant rejecting Fourth Amendment protection that would "displace altogether the legislative role."[97]

Although influence and displacement may seem very different at first, they share important similarities. Both assume that investigative legislation implicitly answers the same questions that courts must consider when interpreting the Fourth Amendment. Both embrace some kind of deference to the legislative judgment. The two differ largely on what kind of deference to adopt. In the influence cases, courts defer to legislative judgments about how to balance privacy and security by considering statutory standards for constitutional adoption. In the displacement cases, by contrast, courts defer to the legislative judgment by rejecting constitutional protection to ensure that the Fourth Amendment will not interfere with the legislature's handiwork. The influence approach respects legislatures by treating statutes as a potential benchmark for the Fourth Amendment; the displacement approach respects legislatures by getting out of the way.[98]

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91. *Id.*

92. *Id.* at 101.

93. 824 F.3d 421, 438–41 (4th Cir. 2016) (en banc) (Wilkinson, J., concurring).

94. *Graham*, 824 F.3d at 438.

95. *Id.* at 439.

96. *Id.*

97. *See id.* at 441.

98. The similarity between influence and displacement is highlighted by the way that displacement arguments can be expressed using influence-like language. For example, Daniel Solove has suggested that investigative legislation might "satisfy" Fourth Amendment standards. *See* Solove, *supra* note 13, at 775–76. The apparent idea is that the Fourth Amendment might regulate government conduct absent legislation, but then the enactment of sufficiently protective legislation might itself satisfy the Fourth Amendment and no longer require independent judicial checks. *See id.* This is identical to the displacement approach in practice, even though the idea of legislation "satisfying" Fourth Amendment standards may initially sound

D. *The Independence Cases*

The third approach courts have taken is constitutional independence. In the independence cases, courts treat investigative legislation as irrelevant to the Fourth Amendment. Legislatures are free to supplement privacy protections by enacting statutes, of course. But from the independence perspective, legislation sheds no light on what the Fourth Amendment requires. The leading case is the Supreme Court's unanimous decision in *Virginia v. Moore*.[99] Because *Moore* contains the most detailed argument for any of the three approaches, it deserves especially close attention.

Virginia state officers arrested Moore for driving on a suspended license. Officers searched him incident to that arrest and found drugs.[100] The question before the Supreme Court was whether the search incident to arrest violated the Fourth Amendment because a Virginia statute directed that driving on a suspended license was not an arrestable offense.[101] Blackletter law required searches to be incident to a "lawful arrest."[102] The issue was, did "lawful" mean in compliance with state law or did it merely mean based on probable cause?

In an opinion by Justice Antonin Scalia, the Court ruled that a lawful arrest simply required probable cause and that the arrest statute was irrelevant to the Fourth Amendment.[103] "[W]hile States are free to regulate such arrests however they desire," the Court held, "state restrictions do not alter the Fourth Amendment's protections."[104] The Fourth Amendment was not "a redundant guarantee of whatever limits on search and seizure legislatures might have enacted."[105]

Justice Scalia's opinion offered a defense of constitutional independence based on four arguments. As you might expect from Justice Scalia, the first argument was originalist. History revealed no sign that the Fourth Amendment was originally intended to incorporate statutory standards.[106] The Fourth Amendment was instead understood to adopt the common law of search and seizure, which at the time was understood as a source of law quite distinct from statutory commands.[107]

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like the influence approach. It is also noteworthy that the recent proposal from Barry Friedman and Maria Ponomarenko that courts should encourage democratic rulemaking in criminal procedure suggests various ways to achieve that goal that include both displacement and influence strategies. *See* Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. Rev. 1827, 1898–1901 (2015).

99. 553 U.S. 164 (2008).

100. *Moore*, 553 U.S. at 166–67.

101. *Id.* at 166.

102. *Id.* at 176–77.

103. *See id.* at 178.

104. *Id.* at 176.

105. *Id.* at 168.

106. *Id.* at 168–69.

107. *Id.* at 169.

Justice Scalia next rejected reliance on state arrest law because it answered a question different from what Fourth Amendment doctrine raised.[108] In deciding the standard for when an arrest was reasonable, the Court had to balance the state's interest in making the arrest against the individual's interest in his freedom.[109] The state arrest law could be based on different considerations, however, such as the costs of arrests and whether the legislature valued privacy more than the Fourth Amendment required.[110] Constitutionalizing the state standard would only frustrate the state's efforts to achieve those goals, as it would mean "los[ing] control" of the regulatory scheme and might lead the state to "abandon restrictions on arrest altogether."[111]

Justice Scalia's third reason for refusing to adopt state law was that it would add confusion and improper variation to Fourth Amendment standards.[112] State law might be vague, making it difficult for officers to rely on it. And because state law varied from state to state, and generally bound only state officials, the meaning of the Fourth Amendment would vary from place to place and even from officer to officer.[113] By ignoring state law, the Fourth Amendment could follow the simple rule that probable cause allowed an arrest.[114]

Justice Scalia's fourth argument for independence was the weight of precedent, of which *California v. Greenwood*[115] is perhaps the most significant.[116] *Greenwood* held that a person has no reasonable expectation of privacy in trash left by the side of the road.[117] The defendant in that case had relied on a California Supreme Court ruling that had recognized a right to privacy in garbage under the state constitution.[118] *Greenwood* dismissed the relevance of the state court ruling as "no less than a suggestion that concepts of privacy under the laws of each State are to determine the reach of the Fourth Amendment."[119] Not so, *Greenwood* explained. Because the Fourth Amendment was about the expectations of society "as a whole," variation in state law could not alter them.[120]

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108. *See id.* at 174.

109. *See id.* at 173–74.

110. *See id.* at 174.

111. *Id.*

112. *See id.* at 174–75.

113. *See id.* at 176.

114. *See id.* at 175–76.

115. 486 U.S. 35 (1988).

116. I have rearranged the order in which the four *Moore* arguments appear.

117. *Greenwood*, 486 U.S. at 41.

118. *See id.* at 43. The case was *People v. Krivda*, 486 P.2d 1262 (Cal. 1971), decided under the California state constitution.

119. *Greenwood*, 486 U.S. at 44.

120. *Id.* at 43–44.

Although *Moore* and *Greenwood* involved state privacy protections, the Court appears to have applied an independent approach to federal investigative legislation in *City of Ontario v. Quon*.[121] *Quon* involved a lawsuit over the disclosure of personal text messages sent and received by a city police officer using a city-provided text pager.[122] The Ninth Circuit had held that the disclosure violated the SCA's statutory ban on disclosing the contents of customer communications.[123] Before the Supreme Court, the officer argued that the SCA's existence revealed a reasonable expectation of privacy in text messages and that the search was unreasonable in significant part because it violated the SCA.[124]

The Court disagreed in an opinion by Justice Anthony Kennedy. To avoid a broad ruling, Justice Kennedy assumed without deciding that the government had conducted a search.[125] He then ruled that the search was reasonable and that the SCA violation was irrelevant.[126] He noted that "Respondents point to no authority for the proposition that the existence of statutory protection renders a search *per se* unreasonable under the Fourth Amendment."[127] Justice Kennedy then rejected the role of the SCA with a short sentence—"And the precedents counsel otherwise"—followed by citations to *Moore* and *Greenwood*.[128] Although *Quon* is not definitive, it appears consistent with an independent approach to federal privacy legislation.

The Supreme Court's cases expressly rejecting the influence approach are supplemented by the many cases implicitly applying independence. The usual practice is for courts to ignore investigative legislation when considering what the Fourth Amendment requires. Courts may note the existence of legislation, and in appropriate cases they might frame the Fourth Amendment question as being whether the statute is constitutional.[129] But courts ordinarily don't suggest that legislation has any bearing on the proper interpretation of the Fourth Amendment. For example, in the course of striking down New York's wiretapping statute as violating the Fourth Amendment, the Supreme Court noted the existence of state wiretapping laws but rested its reasoning on the Court's independent analysis of constitutional reasonableness.[130] In deciding whether two *Terry* stops undertaken pursuant to a

121. 560 U.S. 746 (2010).

122. *Quon*, 560 U.S. at 750–53.

123. Quon v. Arch Wireless Operating Co., 529 F.3d 892 (9th Cir. 2008), *rev'd sub nom.* City of Ontario v. Quon, 560 U.S. 746 (2010).

124. Brief of Respondents at 46–48, 53, 57, City of Ontario v. Quon, 560 U.S. 746 (2010) (No. 08-1332), 2010 WL 989696, at *46–49.

125. *Quon*, 560 U.S. at 760.

126. *See id.* at 764–65 (assuming the SCA was violated, "it does not follow that petitioners' actions were unreasonable").

127. *Id.* at 764.

128. *Id.*

129. *See, e.g.*, City of Los Angeles v. Patel, 135 S. Ct. 2443, 2451 (2015).

130. *See* Berger v. New York, 388 U.S. 41, 47–49 (1967) (noting state wiretapping laws); *id.* at 54–60 (analyzing the reasonableness of wiretapping requirements).

New York statute violated the Fourth Amendment, the Court recognized the statute but analyzed the constitutional question independently of it.[131]

E. *The Three Approaches Outside Fourth Amendment Law*

The coexistence of the three approaches is particularly intriguing because they reflect broader themes outside Fourth Amendment law. The effect of legislation on constitutional protection is a recurring question that arises in a wide range of contexts.[132] When we look outside the Fourth Amendment, we find cases and scholarship embracing variants of all three approaches. Each approach can therefore draw from and tap into precedents and traditions outside Fourth Amendment law.

1. The Influence Approach

There are several examples of constitutional doctrines that resemble the influence approach. Consider the Eighth Amendment's ban on cruel and unusual punishment.[133] The Supreme Court has instructed that courts should look to legislation to help identify what the Eighth Amendment prohibits. If the "consensus" among legislatures is that a punishment should be prohibited, the argument runs, the legislative consensus helps show that a practice violates societal standards of decency.[134] Society expresses its views through the legislature, and the courts can then review the state of legislation to understand society's values.

Case law interpreting the Fourteenth Amendment also sometimes echoes the influence approach. In construing the scope of substantive due process rights, courts may survey legislation, both past and present, to help identify whether a legal right is "deeply rooted in this Nation's history and tradition" so as to be recognized as "fundamental."[135] And in deciding

131. Sibron v. New York, 392 U.S. 40, 60–68 (1968). As *Sibron* explained:

> The question in this Court upon review of a state-approved search or seizure "is not whether the search [or seizure] was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment. Just as a search authorized by state law may be an unreasonable one under that amendment, so may a search not expressly authorized by state law be justified as a constitutionally reasonable one."

Id. at 61 (alteration in original) (quoting Cooper v. California, 386 U.S. 58, 61 (1967)).

132. *See generally* Ira C. Lupu, *Statutes Revolving in Constitutional Law Orbits*, 79 VA. L. REV. 1 (1993); Anthony O'Rourke, *Statutory Constraints and Constitutional Decisionmaking*, 2015 WIS. L. REV. 87.

133. U.S. CONST. amend VIII.

134. *See, e.g.*, Penry v. Lynaugh, 492 U.S. 302, 331 (1989), *abrogated by* Atkins v. Virginia, 536 U.S. 304 (2002). The same awareness of "legislative consensus" informed the Court's decision in *Atkins*. Atkins v. Virginia, 536 U.S. 304, 307 (2002).

135. Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion)); *see also* Mapp v. Ohio, 367 U.S. 643, 650–53 (1961) (posing a similar question in the context of incorporation of the Fourth Amendment).

whether a law violates equal protection, courts considering whether heightened scrutiny is appropriate can look to whether legislation discriminates against or protects members of that class.[136] These doctrines all share the premise of the influence approach that legislation can provide objective evidence of prevailing societal values relevant to constitutional interpretation.

William Eskridge has argued that this tradition reflects a commendable form of democratic constitutionalism.[137] In his view, statutes can lead the way in articulating constitutional values that courts can later adopt.[138] "Where Congress or most state legislatures have spoken clearly on a normative issue," he writes, "and agencies have elaborated those norms successfully, reflecting broad popular support, that ought to have bite" in constitutional interpretation.[139] "It is not only evidence about what a norm ought to mean, but also evidence of popular acceptance of such a reading, which has independent value in a democratic constitution such as ours."[140]

2. The Displacement Approach

The displacement approach also taps into themes and doctrines elsewhere in constitutional law. For example, the Supreme Court has held that the availability of statutory remedies can block constitutional remedies that could otherwise exist under the Due Process Clause. If a state takes a person's property, the availability of a state law tort action can satisfy procedural due process and block a constitutional claim for the taking.[141] If a state has a procedure giving convicted defendants access to DNA evidence, that state law, if adequate, obviates any federal due process right to the evidence.[142] It is possible to read these cases narrowly as solely about the Due Process Clause: If the government provides sufficient process, there is no denial of constitutional due process. But as a practical matter, the cases operate like displacement. Adequate statutory law cancels the constitutional remedy that would exist had the statute not been in place.[143]

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136. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 443–45 (1985) (detailing federal and state legislative protections for the mentally disabled, and concluding that the legislation "belies a continuing antipathy or prejudice and a corresponding need for more intrusive oversight by the judiciary.").

137. *See* William N. Eskridge, Jr., *America's Statutory "Constitution"*, 41 U.C. DAVIS L. REV. 1, 40 (2007).

138. *See id.* at 41; *see also* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216–17 (2001) (arguing that some statutes resolve a significant question of policy and become sufficiently significant to public culture that they become a "kind of law [that] might be considered 'quasi-constitutional' ").

139. Eskridge, *supra* note 137, at 40.

140. *Id.*

141. *See* Parratt v. Taylor, 451 U.S. 527 (1981), *overruled in part by* Daniels v. Williams, 474 U.S. 327 (1986).

142. *See* Dist. Attorney's Office v. Osborne, 557 U.S. 52 (2009).

143. *Cf.* Albright v. Oliver, 510 U.S. 266, 281–86 (1994) (Kennedy, J., concurring) (developing this argument).

Another example of displacement can be found, albeit tentatively, in *Miranda v. Arizona*.[144] The Constitution doesn't "*necessarily* require[ ] adherence" to *Miranda*'s rules, Chief Justice Warren's opinion explained.[145] If Congress and the states can develop "other procedures which are at least as effective" as *Miranda*'s rules, those statutory procedures could displace *Miranda*'s judge-made regime.[146] There is some reason to be skeptical of this passage in *Miranda*, as it may only be a judicial feint.[147] Taking the opinion at face value, however, *Miranda* appears to contemplate a version of the displacement approach. If the legislature can provide adequate regulation that is "at least as effective" as judge-made law, legislation might substitute for direct constitutional regulation.

These examples can reflect what John Rappaport has called "second-order regulation of law enforcement," a constitutional method that encourages legislative action to implement a constitutional value.[148] In Professor Rappaport's view, this delegation of rulemaking power to the legislature can lead to superior rules in some cases because legislatures can make more informed rules than courts, can update those rules more quickly, and can enact structural reforms more readily than can courts.[149] Because legislatures may have comparative advantages over courts, second-order regulation can at least sometimes lead to better legal regulations than would occur if courts tried to craft regulatory rules themselves.[150]

3. The Independence Approach

Independence also follows a well-established path. Courts ordinarily do not give weight to the existence of legislation in deciding the meaning of the Constitution. For example, in rejecting the doctrine of "separate but equal" in *Brown v. Board of Education*, the Supreme Court did not treat the state of legislation on school segregation as relevant to the meaning of equal protection.[151] In announcing the "one person, one vote" standard in *Reynolds v. Sims*, the Court did not look to state statutory apportionment law as a signal

144. 384 U.S. 436 (1966).

145. *Miranda*, 384 U.S. at 467 (emphasis added).

146. *Id.*

147. We know from the justices' papers that Chief Justice Warren added it at the request of Justice Brennan, who wrote to Warren that it would mollify critics of *Miranda*, "mak[ing] it very difficult to criticize our action as outside the scope of judicial responsibility and authority." Letter from William J. Brennan, Assoc. Justice, U.S. Supreme Court, to Earl Warren, Chief Justice, U.S. Supreme Court 5 (May 11, 1966) (on file with Library of Congress). This letter, the Chief Justice's reaction, and Justice Brennan's reply are detailed in Charles D. Weisselberg, *Saving* Miranda, 84 CORNELL L. REV. 109, 123–25 (1998).

148. *See* John Rappaport, *Second-Order Regulation of Law Enforcement*, 103 CALIF. L. REV. 205 (2015).

149. *See id.* at 231–45 (detailing potential advantages of second-order regulation).

150. *See id.*

151. *See* 347 U.S. 483 (1954).

for what the Fourteenth Amendment requires.[152] In deciding whether the District of Columbia's ban on the possession of handguns in the home violated the Second Amendment, the Court did not treat the District's enactment of the law as itself relevant to the answer.[153] In all of these cases, the Court announced its best sense of the Constitution's meaning without reference to the scope of statutory law.

The Supreme Court's case law on deference to legislative findings, which are statements by the legislature about the justification for legislative action that themselves lack the force of law, provides another interesting benchmark.[154] In some contexts, courts give weight to legislative findings in reviewing whether the statutes were justified—at least indirectly echoing the influence approach.[155] In the First Amendment context, however, the Supreme Court has stressed that legislative findings about the need for laws infringing on speech should not interfere with independent judicial assessments of whether the legislature is correct.[156] "Were it otherwise," the Court has stated, "the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified."[157] Like influence and displacement, independence has its own roots in the constitutional tradition.

* * *

The upshot of this survey is that judges have some discretion to choose which approach to take. Judges who favor the influence approach can cite the Supreme Court's decision in *Watson* and point to cases from the Eighth Amendment. Those who favor displacement can follow Justice Alito's recent opinion in *Riley* and cases on procedural Due Process. Finally, those who favor independence can invoke *Virginia v. Moore* and the broad tradition of constitutional independence. The question is, which approach should courts take?

The remainder of this article tries to answer that question by focusing on the structure of search and seizure decisionmaking. It accepts that influence, displacement, and independence can each have a legitimate role in constitutional interpretation generally. It then argues that within Fourth Amendment law specifically, the arguments for influence and displacement largely fail on their own terms.

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152. *See* 377 U.S. 533 (1964).

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

154. *See generally* Daniel A. Crane, *Enacted Legislative Findings and the Deference Problem*, 102 Geo. L.J. 637 (2014).

155. *See id.* at 643–44. I say only "indirectly" because legislative findings are conclusions outside the legally operative rule that are expressly about constitutionality. The influence approach, as I have defined it, is different: It seeks to draw implicit lessons about constitutional questions from the scope of the enacted rule.

156. Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 843 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.").

157. *Id.* at 844.

II. Against Influence: The Weak Signal of Investigative Legislation

This Part examines the core assumption of the influence approach in Fourth Amendment law. Influence rests on the intuitive idea that investigative legislation reflects society's values. Because Fourth Amendment law often relies on such values, the argument runs, investigative legislation is naturally relevant to the Fourth Amendment. If a Fourth Amendment "search" hinges on whether society is prepared to recognize an expectation of privacy as reasonable, which is widely understood to hinge on social practices and societal values, why not look to the collective products of society's elected branches to understand those values? And if "The People," acting through their legislatures, have said that a particular police practice should be regulated in a particular way, doesn't the imprimatur of the democratically accountable branches suggest that the legislative standard is more likely than otherwise to be reasonable? The state of legislation can't control the constitution, but surely it can at least provide some objective evidence of societal values. At first blush, the argument has considerable appeal.

This Part argues that the influence approach is dubious because its intuitive premise falls apart on close inspection. I agree with the initial step that objective indicia of societal values and practices are relevant to the Fourth Amendment. And it is true that, in general, statutes can provide objective signals of societal values. But for the reasons developed in this Part, the mechanics of Fourth Amendment decisionmaking make investigative legislation a deeply flawed way to measure the societal values relevant to the Fourth Amendment. The signal-to-noise ratio of investigative legislation is remarkably low. What looks at first like a clear signal of Fourth Amendment values turns out to be anything but, making reliance on the influence approach highly prone to error. Courts should be very reluctant to rely on it.

This is true for three reasons. The first reason is what I call the distortion problem. Differences between constitutional and statutory systems mean that answers at one step in one system shed little light on answers at that same step in the other system. Looking to legislation for societal values ends up relying on a distortion: It presents legislation as answers to Fourth Amendment questions when they actually answer different questions based on assumptions of different remedies and different contexts. The structural differences between the two regulatory systems ensure that the lessons of investigative legislation are surprisingly difficult to draw.

The second reason is what I call the federalism problem. Even if the two systems offer the same answers, the Fourth Amendment and investigative legislation apply to different levels of government. The Fourth Amendment applies to all levels of government—federal, state, and local. In contrast, investigative legislation usually applies only to one or maybe two levels. Because the two regimes regulate different levels of government, and there are good reasons to regulate different levels differently, it is difficult to translate the signal from one regime to the other.

The third problem with identifying the signal of investigative legislation is what I call the necessity problem. Investigative legislation is always enacted in the shadow of Fourth Amendment law. Legislatures usually pass privacy laws when it seems necessary because legislators expect the courts to stay out. As a result, legislation and Fourth Amendment protection are more like opposites than parallels. The enactment of legislation might reflect societal values or it might just reflect the expected absence of constitutional protection. Conversely, the absence of legislation might reflect societal values or it might reflect expectations that the Fourth Amendment would apply.

Because of these three problems, the true "signal" of investigative legislation tends to be remarkably opaque. What looks like a signal is mostly noise, making it easy to create a narrative about how the state of legislation justifies any desired Fourth Amendment outcome. The influence approach does not so much resemble learning from the wisdom of the legislature as it resembles misusing legislative history by "looking over a crowd and picking out your friends."[158]

A. *The Distortion Problem*

Let's begin with the distortion problem. The influence approach asks courts to pick one aspect of legislation and to treat it as an informed judgment on a related constitutional question. But because Fourth Amendment protection and investigative legislation are typically premised on a series of different judgments, such borrowing is actually a distortion. The influence approach requires misrepresenting a legislative decision on one issue so that it looks instead like a different judgment relevant to the court. The premise of the influence approach, that a court should learn from legislative judgment, is undermined because the court is not so much borrowing as it is taking legislative judgments out of context.

To see this dynamic, we need to recall the three questions of search and seizure law: the threshold question of what is regulated at step one, the standards question of when regulated steps are permitted at step two, and the remedies question at step three.[159] When courts interpret the Fourth Amendment, they typically decide how the Fourth Amendment applies at just one of these three steps. Litigation is interstitial. Courts usually answer only one question at a time. But this creates a major problem for the influence approach. Because the answers at one step hinge on the answers at the other two steps, the answer found in investigative legislation often will not translate to the different context of the Fourth Amendment. Influence inevitably cherry-picks some aspects of legislation and ignores others.

158. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195, 214 (1983) (quoting Judge Harold Leventhal).

159. *See supra* Section I.A.

The interdependence of answers at the three steps is the root of the problem.[160] If a method of government evidence collection imposes substantial privacy harms, it generally will be permitted only based on a substantial showing of government need and will tend to justify the strongest remedies.[161] On the other hand, if an investigative method imposes only modest privacy harms, only a modest showing of offsetting government interest will be needed and weaker remedies can be used.[162] Translating this into the three-step framework, the breadth of regulation at step one should often be inversely related to the degree of burden at step two and the severity of the remedy at step three. A law that focuses only on the most serious threats to privacy will tend to have a narrow scope at step one with a heavy burden at step two and strong remedies at step three. On the other hand, a law that regulates less intrusive government practices will tend to have a broad scope at step one with a light standard at step two and relatively weak remedies.

This dynamic imposes a critical limit on what lessons can be drawn from investigative legislation. The answer at any one step, taken in isolation, does not indicate the lawmakers' attitudes about that step. Instead, it only tells us what the lawmakers thought about that one step under the constraints of the statute's approach to the other two steps. Because each step is contingent on the other steps, we can't draw ready lessons from one legal regime for another that has different answers at different steps. An attempt to borrow the answer from a different regime ends up distorting the answer rather than borrowing it.[163]

An example can help make the distortion problem concrete. Imagine a court must decide if monitoring internet protocol (IP) addresses used to connect to the internet is a Fourth Amendment search.[164] Let's assume that however the court resolves this step-one question, Fourth Amendment law at steps two and three is quite strict. Every search will requires a warrant to be reasonable at step two, and every violation will lead to suppression of the

160. *Cf.* John C. Jeffries, Jr., *In Praise of the Eleventh Amendment and Section 1983*, 84 VA. L. REV. 47, 78–81 (1998) (describing the tradeoffs between rights and remedies in constitutional design).

161. *See* United States v. U.S. District Court, 407 U.S. 297, 314–15 (1972).

162. *See id.*

163. The distortion is enhanced by the common practice of including assistance and immunity provisions in investigative legislation. Assistance provisions require third parties to assist the government when it has obtained a court order. *See, e.g.*, 18 U.S.C. § 2518(4) (2012) (assistance provision for the Wiretap Act); *id.* § 3124 (assistance provision for the Pen Register statute). Immunity provisions can limit or foreclose legal liability for conduct that implicates investigative legislation. *See, e.g.*, *id.* § 2703(e) ("No cause of action shall lie in any court against any provider of wire or electronic communication service, its officers, employees, agents, or other specified persons for providing information, facilities, or assistance in accordance with the terms of a court order, warrant, subpoena, statutory authorization, or certification under this chapter."). Both kinds of provisions can sweeten the deal for law enforcement, giving the government new powers that can help to offset the new regulation. Thanks to these provisions, a focus on one step of the statute in isolation can be remarkably myopic.

164. *See, e.g.*, United States v. Forrester, 512 F.3d 500, 504 (9th Cir. 2008) (answering the question "no").

evidence at step three. The court only faces the step one question: Does monitoring IP addresses violate a reasonable expectation of privacy and therefore amount to a Fourth Amendment search?

A court applying the influence approach might look to the federal statute known as the Pen Register statute.[165] The Act was passed in the wake of *Smith v. Maryland*, in which the Supreme Court ruled that recording the numbers dialed from a telephone is not a search.[166] The Pen Register statute provides statutory protection to fill in the gap that the Court left in *Smith*. It adds statutory protection against monitoring of communications metadata, both in the context of numbers dialed for telephone calls and IP addresses for internet communications.[167] In applying the influence approach, a court might use the existence of the Pen Register statute to help say that society is prepared to recognize privacy in IP addresses. After all, Congress essentially overruled the Supreme Court's analysis in *Smith*.[168] After the Court ruled that there should be no protection, the thinking would run, Congress disagreed. Congress's statutory protection shows that the Court was wrong and that society has an expectation of privacy.

But there's a big problem with this analysis: Congress's approach to steps two and three show that the Pen Register statute is not in tension with *Smith*. Although the Pen Register statute has broad application at step one, the statute is extremely weak at steps two and three. The statute is a mile wide but inches deep. At step two, the statute authorizes prosecutors to obtain a court order requiring the collection of metadata surveillance based only on a certification that the information to be collected is relevant to an ongoing investigation.[169] The Act doesn't require a warrant. The government doesn't even need to prove any facts to the judge.[170] And at step three, the only remedy for violations is an almost purely theoretical possibility of criminal charges against an officer who conducts the monitoring without a proper order. There is no exclusionary rule, and no civil remedies against the officers are permitted.[171]

Further, the weak privacy protections of the Pen Register statute are combined with an assistance provision that grants the government substantial powers.[172] Because metadata surveillance is generally conducted on a private network, the government often requires the help of the network

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165. *See* 18 U.S.C. §§ 3121–27.

166. 442 U.S. 735, 745–46 (1979).

167. *See generally* Orin S. Kerr, *Internet Surveillance After the USA Patriot Act: The Big Brother That Isn't*, 97 Nw. U. L. Rev. 607, 632–42 (2003) (describing the history of the Pen Register statute and its application to the internet).

168. *See* State v. Stevens, 734 N.W.2d 344, 351 (S.D. 2007) (Sabers, J., dissenting).

169. 18 U.S.C. § 3123(a).

170. *See In re* Application for an Order Authorizing the Installation & Use of a Pen Register & Trap & Trace Device, 846 F. Supp. 1555, 1559, 1563 (M.D. Fla. 1994).

171. *Id.* at 1561 ("The pen register statute contains no provision for recovery of civil damages.").

172. *See* 18 U.S.C. § 3124.

operator to carry out court orders. Before the Pen Register statute, the government had to seek a search warrant based on probable cause to get a court order commanding the phone company to conduct the surveillance.[173] The Pen Register statute changed that. Thanks to its assistance provision, the government only needs to ask the service provider for help implementing a pen register order.[174] The provider must then furnish "all information, facilities, and technical assistance necessary to accomplish the installation" of the surveillance tool.[175] This makes the statute a decidedly mixed bag for privacy. Does it increase privacy by banning metadata surveillance and requiring a court order? Or does it expand government power by dropping the standard for assistance orders from probable cause to mere certification? It does a bit of both.

We can now appreciate how the influence approach rests on a distorted picture of the legislature's judgment. Congress did want *some* protection against the monitoring of communications metadata when it enacted the Pen Register statute. But the amount of protection was very low—vastly lower, certainly, than would be in place if the Fourth Amendment applied. And the law also gave the government new powers. Viewed as a whole, the Pen Register statute was consistent with a Fourth Amendment rule protecting IP addresses only in a very narrow way. Congress agreed with the threshold question but rejected the Fourth Amendment rule for the standards and remedies. The influence approach therefore relies on the arbitrary choice to focus on one aspect of the statute while ignoring the rest.[176]

The path-dependent nature of the three steps creates a high risk that the influence approach will falsely suggest that the legislature answered a Fourth Amendment question that it actually didn't answer. In the example above, the wide-but-shallow protection of the Pen Register statute doesn't tell us anything obvious about the proper width of the traditionally narrow-but-

173. *See generally* United States v. N.Y. Tel. Co., 434 U.S. 159 (1977) (approving this practice). The theory approved by the Supreme Court in *New York Telephone* was that a warrant could be used to conduct surveillance that might or might not be a search, and that the All Writs Act could be used to mandate the phone company's assistance with the execution of the warrant. *See id.*

174. 18 U.S.C. § 3124(a).

175. *Id.*

176. This problem touches on one of many difficulties with a recent proposal that the test for Fourth Amendment searches should be whether a private person could lawfully do the act. *See* Baude & Stern, *supra* note 13, at 1825. Professors Baude and Stern's proposal is like an extreme version of the influence approach: It applies the influence approach to any law, not just statutes and not just investigative legislation. The most obvious problem with this proposal is that most laws have nothing to do with regulating government power, making them poor proxies for the regulatory challenge of Fourth Amendment doctrine. *See* Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 532–34 (2007) (explaining why the Supreme Court sometimes looks to positive law but why it cannot be a universal guide to the search test). The Baude and Stern argument therefore leads to quite bizarre results. For example, a police officer who sees a speeding car and must himself speed to catch it would commit a Fourth Amendment search and presumptively need a warrant if he exceeds the speed limit to chase after the speeder.

deep Fourth Amendment. If we want to see statutes as the work of a coequal branch, the fact that Congress adopted broad-but-weak protection doesn't inform us about societal judgments relevant to the narrow-but-strong Fourth Amendment.

B. *The Federalism Problem*

One response to the distortion problem might be to rely on extrajurisdictional statutes that adopt Fourth Amendment–style protections.[177] Imagine many states have enacted investigative legislation regulating a particular practice with Fourth Amendment–like protections at all three steps, including a warrant requirement and an exclusionary rule. Now imagine a defendant in a state where no such legislation exists tries to invoke the influence approach to adopt standards of the state laws from other states. In that case, it might seem like there is no distortion. The defendant would simply be relying on statutes that adopt a constitutional-equivalent rule from other jurisdictions.

The distortion remains, however. The reason is what I will call the federalism problem: The Fourth Amendment and extrajurisdictional legislation apply to different levels of government. Since 1961, the Fourth Amendment has applied equally to all levels of government—federal, state, and local.[178] That assumption does not hold with investigative legislation, however, and that results in distortion even if the answers at the three steps look the same. Because there are often reasons to regulate different levels of government differently, we can't assume that the investigative legislation should inform a constitutional rule even if the answers at all three steps are the same.

The key problem is that the power of governments to regulate up and down the federalism ladder is limited. Congress operates at the federal level, state legislatures at the state level, and county, municipal, and city governments at the local level. But legislative powers over other governments are limited. The federal government has at least some limits on regulating state law enforcement.[179] Under the Supremacy Clause, state and local legislatures lack the constitutional authority to regulate federal officials in the course of their official duties.[180] And at the local level, state legislatures can bind local police but local governments ordinarily cannot bind the state police.[181] The

177. By "extrajurisdictional statutes," I mean statutes that do not apply to that particular case because they do not apply in that jurisdiction. For example, for purposes of litigation in Minnesota state court, investigative legislation from California would be an extrajurisdictional statute.

178. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (applying the entirety of the Fourth Amendment to state officials).

179. *See, e.g.*, New York v. United States, 505 U.S. 144 (1992) (establishing the anticommandeering principle).

180. *See, e.g.*, United States v. Supreme Court of N.M., 839 F.3d 888 (10th Cir. 2016); *see also* Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195, 2201 (2003).

181. *See* David M. Jaros, *Preempting the Police*, 55 B.C. L. REV. 1149, 1165–69 (2014).

basic rule is that each legislative body lacks the power to regulate above it and has some limits on its authority to regulate below it.

This dynamic is particularly clear when state or local governments purport to legislate the investigative powers of federal officials. These efforts are purely symbolic. They have no effect. For example, following the passage of the Patriot Act, several city councils passed resolutions purporting to block the operation of the Patriot Act within their jurisdictions.[182] These resolutions were merely for show, as the cities had no power to change how federal law enforcement enforces federal law. Similarly, some states have laws imposing strong privacy protections for government surveillance practices that go beyond the federal statutory floor.[183] Federal authorities are not bound by these rules.[184] Federal officials can simply ignore them.

The fact that courts and legislatures regulate different levels of government makes it hard to draw Fourth Amendment lessons from investigative legislation. The Fourth Amendment is one-size-fits-all. A rule that applies to the Grainfield, Kansas, police department also applies at FBI Headquarters in Washington, D.C. But there are significant reasons why lawmakers might want to regulate different levels of law enforcement differently. Federal agents tend to be better educated, be more professional, have access to greater resources, and be more subject to oversight than state agents.[185] Federal agents more often investigate broader scale and more serious offenses, such as large-scale financial frauds, while state police tend to investigate street crimes and only less serious financial offenses.[186] Federal agents also have significant advantages in collecting evidence across state lines; federal court orders are binding nationwide, while state orders are not normally binding outside of the state borders.[187] For these reasons, a lawmaker might

182. *See e.g.*, *Santa Cruz City Council Says Patriot Act Violates Civil Rights*, BERKELEY DAILY PLANET (Nov. 15, 2002), http://www.berkeleydailyplanet.com/issue/2002-11-15/article/16123?headline=Santa-Cruz-City-Council-says-Patriot-Act-violates-civil-rights&status=301 [https://perma.cc/B88V-VYGV].

183. *See* ORIN S. KERR, COMPUTER CRIME LAW 711 (3d ed. 2013).

184. *See id.*

185. For example, the FBI provides considerable resources to state and local law enforcement because the FBI has resources to give. *See generally Law Enforcement*, FBI, https://www.fbi.gov/resources/law-enforcement [https://perma.cc/Y2TD-H2AZ] (providing an overview of resources the FBI offers federal, state, municipal, and international agencies). On education, in one study 48% of local police officers had a four-year college degree while every FBI agent must have a four-year college degree as a condition of applying to work for the FBI. *Compare* Susan Hilal & James Densley, *Higher Education and Local Law Enforcement*, FBI L. ENFORCEMENT BULL. (May 7, 2013), https://leb.fbi.gov/2013/may/higher-education-and-local-law-enforcement [https://perma.cc/74SA-YVYA] (surveying higher education levels among local law enforcement in Minnesota and Arizona), *with Facts and Figures 2003*, FBI, https://www2.fbi.gov/libref/factsfigure/employ.htm [https://perma.cc/5J9D-YMMN] (noting the FBI's requirement).

186. *See generally What We Investigate*, FBI, https://www.fbi.gov/investigate [https://perma.cc/4454-YN36] (describing FBI investigations into areas such as organized crime, white-collar crime, weapons of mass destruction, and terrorism).

187. *Compare* KERR, *supra* note 183, at 694–96 (explaining the nationwide scope of federal investigative authorities), *with Ex parte* Dillon, 29 S.W.2d 236, 238 (Mo. Ct. App. 1930)

rationally want to give different powers to federal, state, and local authorities.

The federalism problem complicates the influence approach even when the standards at all three steps are the same. Influence requires identifying the societal lessons or values behind legislation. But the federalism problem renders that lesson often impossible to identify. We can't readily translate the judgment implied by extrajurisdictional investigative legislation because that legislation generally regulates different levels of government than does the Fourth Amendment. If a state law bans a particular practice at the state level, what's the lesson for a Fourth Amendment that must regulate the federal government as well?[188]

Consider a state law that prohibits metadata surveillance of internet communications. That law bans acts by state officials but has no effect on federal officials. What's the lesson? Is the lesson that the legislature weighed the privacy and security interests and imposed a thoughtful rule, albeit one that could only be applied as far as the Supremacy Clause would allow? Alternatively, is the lesson that the legislature was concerned with abuses by rogue state officials and it wished to stop them while not touching federal powers? Or is the lesson that the legislature affirmatively sought to ensure that metadata surveillance of internet communications occurred only at the federal level where the resources and extraterritorial reach are greater? There's no obvious way to know what judgment the state law encapsulates. The influence approach presupposes that the legislature must have made the first kind of judgment, but the federalism problem means that there is no obvious way to know which of the three judgments it was making.

Defenders of the influence approach might argue that the legislative judgment can be determined based on signals of intent such as statutory preambles, floor statements, and committee reports. There are two good reasons to be skeptical of relying on these signals. First, the challenges of relying on legislative history to identify legislative intent are well understood in the context of statutory interpretation.[189] The notion of a single legislative intent is a fiction,[190] and it is easy for staffers to manipulate signals that (not being

(holding that Full Faith and Credit Clause does not require states to recognize court orders from other states).

188. It is possible that federal legislation could ban a practice for federal, state, and local law enforcement and impose a standard and remedy that is as good as or exceeds what the Fourth Amendment would impose. In that case, however, the Fourth Amendment becomes irrelevant. Courts would ordinarily rely on the statutory right and not reach the question of whether the Fourth Amendment also applies. *See, e.g.*, Adams v. City of Battle Creek, 250 F.3d 980, 986 (6th Cir. 2001).

189. *See generally* Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law (1997); Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 Harv. L. Rev. 1005, 1012–23 (1992).

190. As Judge Easterbrook has written:

> Legislative intent is a fiction, a back-formation from other and often undisclosed sources. Every legislat*or* has an intent, which usually cannot be discovered, since most say nothing before voting on most bills; and the legislat*ure* is a collective body that does not have a

legally operative) mislead rather than reveal.[191] Those same challenges apply here.

Second, relying on signals of legislative intent to overcome the federalism problem raises a substantial conceptual difficulty. The relevant judgment of a state legislature involves a hypothetical question: If the legislature could enact a statute regulating federal officials—a power that the Supremacy Clause denies—what regulation would it adopt? It is unclear how signals of intent could reliably answer that question. Indeed, it is uncertain how many state legislators could even fully grasp this hypothetical question and answer it meaningfully for themselves. For all of these reasons, it seems unlikely that signals of intent could be used to overcome the federalism problem.

C. *The Necessity Problem*

A third difficulty with interpreting the signal of investigative legislation is what I call the necessity problem. A legislature's decision about whether to enact investigative legislation is usually made in the shadow of Fourth Amendment law. Legislatures usually act when there is a perceived necessity to act because the courts have stayed out. This means that the Fourth Amendment and investigative legislation end up more like opposites than cousins. The difference between when courts act and when legislatures act again greatly complicates the message of legislation. The influence approach treats legislation as a signal of societal values. Because of the necessity problem, however, the presence of investigative legislation often says more about the prior state of Fourth Amendment law than about society.

This point is easiest to make with an example. Forced government entry into a private citizen's home, and ransacking private property inside, would make anyone's list of egregious privacy violations that call for strong legal regulation. But if you look for investigative legislation requiring a warrant to search a home, you will come up empty. As far as I can tell, no legislature in the United States has passed a law establishing that the government ordinarily needs a warrant to search a home.[192] Some statutes may exist that I have missed, but they are not common.

> mind; it "intends" only that the text be adopted, and statutory texts usually are compromises that match no one's first preference.

Frank H. Easterbrook, *Foreword* to Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts, at xxi–xxii (2012).

191. The Supreme Court has cautioned:

> [J]udicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.

Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005).

192. The closest I have found is a vestigial statute that requires that officers have an arrest warrant before they enter a home to execute that warrant. S.C. Code Ann. § 23-15-60 (2007)

What lesson should we draw from this absence? Surely it doesn't mean that the home is not worthy of legal protection. "The People" haven't made a judgment that homes are unimportant. Instead, the absence of legislation reflects the necessity principle. Legislatures don't enact laws protecting the privacy of the home because it would be redundant. The Fourth Amendment already has the problem covered with a constitutional warrant requirement.[193] Legislatures normally don't bother to enact redundant laws that add nothing to what the Fourth Amendment already protects.

On the other hand, investigative legislation is usually passed to regulate the police when legislators have reason to believe that the Fourth Amendment won't apply. In some cases, Supreme Court decisions definitively rejecting Fourth Amendment protection often lead to a new privacy statute.[194] For example, after the Supreme Court ruled that the Fourth Amendment did not regulate government use of pen registers, Congress passed the Pen Register statute requiring a court order.[195] After the Supreme Court ruled that the Fourth Amendment does not protect government access to bank records, Congress enacted the Right to Financial Privacy Act limiting government access to bank records.[196] The courts stepped out, and the legislature stepped in.

In other cases, legislatures act when then-existing Fourth Amendment law points to the likelihood of no protection even if courts have not directly contemplated the question. In the last few years, many states have regulated government use of drones and automated license-plate readers.[197] They have done so because the traditional understanding of the Fourth Amendment is that it does not apply in public.[198] Fourth Amendment cases are sparse because the technology is so new. But legislatures have stepped in when they

("It shall be lawful for the sheriff or his deputy to break and enter any house, after request and refusal, to arrest the person or to seize the goods of anyone in such house; provided, such sheriff or his deputy have process requiring him to arrest such person or seize such goods."). Notably, however, this statute was enacted before *Payton v. New York* established a Fourth Amendment warrant requirement for such entries. 445 U.S. 573 (1980). Legislatures also have enacted statutes such as CAL. PENAL CODE § 1531 (West 2011) that govern how warrants are executed. Section 1531 states: "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute the warrant, if, after notice of his authority and purpose, he is refused admittance." *Id.* The statute does not state when a warrant is required; it only covers how a warrant to search a home must be executed.

193. *See Payton*, 445 U.S. at 586 ("It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." (quoting Coolidge v. New Hampshire, 403 U.S. 443, 477 (1971))).

194. *See* Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 855–56 (2004) (listing examples).

195. *See id.* at 855.

196. *See id.* at 856.

197. *See supra* text accompanying notes 17–18.

198. Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) ("[C]onversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable").

expected courts to stay on the sidelines. The absence of Fourth Amendment protection created a sense of necessity that prompted legislative action.

The necessity problem greatly complicates the search for the message implicit in investigative legislation that is at the heart of the influence approach. Because of the yin-and-yang relationship between the Fourth Amendment and legislation, the message of investigative legislation is impossible to discern in the abstract. The presence of legislation might suggest that the elected branches demanded privacy, or it might just show that the legislature expected the courts to stay out. The absence of legislation might suggest that the legislature concluded that no regulation should be imposed, or it might just reflect expectations that the Fourth Amendment would offer constitutional protections. The state of legislation is too closely linked to the expected state of Fourth Amendment law for it to be a reliable signal of societal values.[199]

All of these problems should give courts pause before adopting the influence approach. Legislation is not the clear signal of societal values that it might seem at first. Because the signal-to-noise ratio of investigative legislation is surprisingly low, courts can craft any influence narrative to reach any result they want. Influence has superficial appeal, but it is based mostly on noise.

III. For Independence: The Implementation Challenges of Influence and Displacement

Having explained why the influence approach does not yield significant benefits, we now turn to a consideration of costs. This Part explains how both influence and displacement are surprisingly difficult to implement. Influence and displacement try to forge a connection between complex systems of statutory law and a notoriously complex body of constitutional law. Drawing that link is remarkably difficult. It raises a series of novel questions that courts have not yet appreciated.

Questions include, what combination of investigative legislation is sufficient to trigger influence or displacement? When influence is triggered, what standard should courts adopt for how much to consider it? When courts apply displacement, how do courts know that legislation is sufficiently protective to substitute for the Fourth Amendment? So far, courts have not

199. Sometimes, clues about legislative intent, such as committee reports or statutory preambles, are unreliable for the reasons explained earlier. *See supra* notes 190–191 and accompanying text. In extreme cases, the necessity problem may even lead the influence approach to become circular. If the courts are looking to the legislature for direction, but the legislature is looking to the courts, the interaction between the two branches may begin to resemble a dog trying to chase its own tail. The absence of Fourth Amendment protection could invite legislative action, which could then be interpreted as a signal to courts to turn on the Fourth Amendment spigot. On the other hand, Fourth Amendment protection would indicate that no statutory protection was needed, which would then mean no Fourth Amendment protection was needed. If courts treat legislation as an important signal of societal values, the risk exists of cycling between protection and no protection.

dwelled on these questions. Decisions applying influence and displacement have done so rather haphazardly without identifying the standards. If courts are to adopt these approaches in a consistent way, however, these novel and complicated questions must be addressed.

If courts and scholars have the commitment and shared mindset to implement influence or displacement, these challenges are not insurmountable. And if courts are merely looking for arguments to justify results, rather than a coherent legal framework, then implementation concerns may be beside the point. But if courts are seeking a coherent way to implement influence or displacement, the complexity and difficulty of the questions that must be answered should give courts considerable pause.

This Part begins by exploring the complex questions that must be answered to implement the influence approach, and it then turns to the equivalent problems raised by implementing the displacement approach. It concludes by showing how the independence approach avoids these questions, and how the concerns that animate the displacement approach can be addressed within independence.

A. *The Challenges of Implementing Influence*

The first question that must be answered to implement the influence approach is what body of investigative legislation must exist to trigger it. As noted earlier, investigative legislation is a "they" not an "it," as it spans statutes at federal, state, and local levels.[200] To implement the influence approach, courts would need a theory of which combinations of legislation are needed to trigger it. No such theory currently exists. The influence cases are all over the map. They tend to announce results without explaining what standard applies.

For example, in *United States v. Maynard*, the D.C. Circuit invoked the influence argument because seven state legislatures required a warrant to install a GPS device.[201] Forty-three states had *not* passed such legislation. Nor had Congress. Nor had the District of Columbia, where the D.C. Circuit sits. Why were those seven state laws enough to influence the interpretation of the Fourth Amendment? The opinion doesn't say.

By contrast, in *Payton v. New York*, the Supreme Court suggested that the existence of twenty-three state statutes allowing warrantless home entries to make an arrest (compared to only four state statutes forbidding such entries) was not a compelling body of investigative legislation.[202] Although the statutes should not be "lightly brushed aside," the Court suggested, they lacked the "virtual unanimity" that allowed warrantless arrests in public in *Watson*.[203] Why was a ratio of twenty-three to four insufficient but "virtual unanimity" enough? Again, the opinion doesn't say.

200. *See supra* text accompanying notes 178–181.

201. 615 F.3d 544, 564–65 (D.C. Cir. 2010).

202. *See* 445 U.S. 573, 598–99 nn.46–47 (1980).

203. *Payton*, 445 U.S. at 600.

The disagreement between Judge Koh and Judge Kethledge on the constitutional protection in CSLI also highlights the problem. Recall that Judge Koh and Judge Kethledge handed down decisions on the same question just a few months apart applying the influence approach but reaching opposite conclusions on the role of legislation.[204] To Judge Koh, the existence of six state statutes adopting a warrant requirement for CSLI tended to show that society expected privacy in CSLI and the Fourth Amendment applied.[205] At the same time, to Judge Kethledge, the federal statute's rejection of a warrant requirement for CSLI tended to show that society did not expect privacy and the Fourth Amendment did not apply.[206] Adopting the influence approach requires identifying which of these approaches (if either) is correct.

This is possible, but it is hardly easy. For example, are all legislatures created equal? Does Congress matter more than a state legislature? Does a statute enacted by California (population 39 million)[207] matter more than a statute enacted in Wyoming (population 586,000)[208]? How much do local ordinances weigh in the calculus? Does the strength of different kinds of legislation matter? For example, does a strict law that greatly limits law enforcement with severe remedies have outsize influence, or does it just count as a single law? Does it matter when the legislation was enacted, or whether there is a recent trend in the direction of legislation? Identifying the standard to trigger the influence approach presumably requires answering such questions.

Another puzzle is how to treat the absence of legislation. Does the absence of legislation amount to a judgment about the lack of need for privacy rights, or does it just mean the legislature hasn't yet expressed its view? This came up in *State v. Stevens*, a case on whether a person has a reasonable expectation of privacy in trash.[209] The government emphasized that the state legislature had not enacted privacy legislation to protect trash, which it took to signal that there was no Fourth Amendment expectation of privacy.[210] But to Justice Sabers in dissent, while the *presence* of legislation would prove a reasonable expectation of privacy, the *absence* of legislation showed nothing because "[o]ne day" the legislature might act.[211] Perhaps there's a principled

204. *See supra* text accompanying notes 66–73.

205. *See supra* text accompanying note 69.

206. *See supra* text accompanying notes 72–73.

207. *Quick Facts—California*, U.S. Census Bureau, https://www.census.gov/quickfacts/table/PST045215/06,00 [https://perma.cc/WVP2-PACN].

208. *Quick Facts—Wyoming*, U.S. Census Bureau, http://www.census.gov/quickfacts/table/PST045215/56,00 [https://perma.cc/2BQP-J6DA].

209. 734 N.W.2d 344 (S.D. 2007).

210. *See Stevens*, 734 N.W.2d at 351 (Sabers, J., dissenting) (noting that "[d]uring oral argument, much was made about the fact that no legislation had been enacted" to protect trash).

211. *Id.* at 351–52 ("One day, the Legislature may decide that the details of our private lives contained in our garbage should remain private and there is a societal expectation of privacy in our garbage. . . . [T]hat the Legislature has not yet acted does not mean society does not recognize the expectation of privacy as reasonable.").

lesson courts can draw from legislative inaction under the influence approach, but it's not obvious what that lesson is.[212]

A related problem is whether legislation needs to have meaningfully addressed the specific question to count. This issue came up in yet another case on Fourth Amendment protection for CSLI. Magistrate Judge James Orenstein concluded that the SCA's rejection of a warrant requirement for CSLI did not count as a *real* legislative rejection because Congress had not expressly considered it in 1986 when it enacted the SCA.[213] Although "legislation is plainly a vehicle for society" to recognize or deny expectations of privacy, Orenstein stated, it was not enough to show that the plain language of the statute covered the case.[214] Rather, the legislative record needed to show that the legislature had actually considered the question and intended to take a position.[215] Because Congress had not specifically considered location tracking, it did not "definitively accept or reject the reasonableness of any particular expectation of privacy with respect to location tracking" and was irrelevant under the influence approach.[216] On the other hand, how can courts tell when the legislature has truly considered a constitutional question and taken a position other than through the statutes it actually enacted?

One response might be that courts have dealt with similar problems elsewhere and can surely work these problems out somehow. In the Eighth Amendment context, for example, courts look to legislation for "objective indicia" of "contemporary values" relating to "evolving standards of decency."[217] If courts can use such amorphous legislation-counting tests elsewhere, it's fair to ask, why not here? I have two responses. First, experience with legislation-counting doctrines is cause for concern rather than relief. In the Eighth Amendment context, the Supreme Court has announced a standard of legislative "consensus" but applied it inconsistently. It has found a "consensus" by counting in creative ways and then announcing that the Court's own "independent judgment" was paramount.[218] This is hardly a jurisprudential beacon.

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212. *See* Richard M. Re, *The Positive Law Floor*, 129 HARV. L. REV. F. 313, 327 (2016) ("[A] lack of regulation directed toward a new technology is not reliable evidence that lawmakers or the public have condoned the technology's use.").

213. *In re* Application for an Order Authorizing the Release of Historical Cell-Site Info., 736 F. Supp. 2d 578, 581 n.6 (E.D.N.Y. 2010), *rev'd*, No. 10-mc-00550 (E.D.N.Y. Nov. 29, 2010).

214. *Id.*

215. *Id.*

216. *See id.*

217. Atkins v. Virginia, 536 U.S. 304, 340 (2002) (Scalia, J., dissenting); *id.* at 312 (majority opinion) (citing Penry v. Lynaugh, 492 U.S. 302, 331 (1989), *abrogated by Atkins*, 536 U.S. 304); *id.* at 312 (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958)).

218. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 564 (2005) (after the data provide "essential instruction," the Court must rule "in the exercise of [its] own independent judgment"); *id.* at 609 (Scalia, J., dissenting) ("Words have no meaning if the views of less than 50% of death penalty States can constitute a national consensus."); *id.* at 587–88 (O'Connor, J., dissenting) (noting that despite counting cases, "the rule decreed by the Court rests, ultimately, on its independent moral judgment").

Second, even if statute-counting exercises elsewhere have proved sufficiently workable in other areas, search and seizure law is far more complex. Eighth Amendment law is binary and specific. Either the criminal law allows a punishment or it doesn't, and that question is up to each jurisdiction independently. By contrast, in search and seizure law the question is when the government can act, not whether it can act. The answer implicates the three interrelated questions of what the law regulates at step one, the standard at step two, and the remedy at step three. This creates the puzzle of what exactly do you count: The presence of any statute? A law with particular features—and if so, which features? Given the poor signal of investigative legislation explained in Part II, it is hard to know what should be counted and how to count it even if a clear standard is identified.

The next set of puzzles is how to apply the influence approach once it is triggered. If legislation should receive *some* weight, how much weight should it receive? Presumably the passage of investigative legislation is never binding on courts. But if it is not binding, courts have to figure out how much weight it should receive. Should courts adopt a rebuttable presumption that they should adopt the standards of investigative legislation, at least unless there is a reason not to follow it? Should investigative legislation merely be an extra factor in a vague multifactor test, so that no one can ever articulate just how much if at all it has influence on outcomes? Or is the influence approach merely an adornment to add to an opinion, sort of a "shout out" to legislators, that likely has no impact on results but shows respect for legislators when announcing that the Constitution trumps some legislative judgments?[219]

Another possibility is that influence should act as a sliding scale. Perhaps different bodies of investigative legislation should trigger different versions. In *Payton*, for example, the Court suggested that "virtual unanimity" in investigative legislation was entitled to more deference than a more mixed set of statutes.[220] *Payton* also suggested that lower court rulings striking down some state statutes under the Fourth Amendment removed state laws from the list, and that state court invalidation of state statutes under state constitutions was a particularly strong signal that the investigative legislation should not be followed.[221] Whether or not these suggestions make sense, they point to the diversity of approaches courts could take under the influence approach. Implementing influence in a consistent way requires developing some kinds of answers to these questions.

A related problem is how to account for legislative diversity. As noted earlier, investigative legislation always answers three interrelated questions:

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219. *Cf.* Tim Wu, *Foreign Exchange: Should the Supreme Court Care What Other Countries Think?*, SLATE (Apr. 9, 2004, 5:03 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2004/04/foreign_exchange.html [https://www.perma.cc/VH5R-ZPCV] (suggesting that citations to foreign law in Supreme Court decisions interpreting the U.S. Constitution is merely a "judicial shout-out" to foreign judges).

220. *See supra* text accompanying notes 202–203.

221. *See supra* note 49.

what government conduct is regulated (step one), what standard the government must satisfy (step two), and what remedy applies for violations (step three).[222] The messy process of enacting legislation means that variations in answers in each jurisdiction are common if not inevitable. No two statutes may be the same, creating the puzzle of which statutes should be followed. If five states adopt a strong version of the legislation and two adopt a weaker version, should courts look to the weak version or the strong version when looking to incorporate statutory lessons? Or should the Fourth Amendment law vary by jurisdiction, and perhaps by the government that has hired that particular officer, in order to try to solve these problems (while creating others)?[223]

A final implementation problem is which stages of the Fourth Amendment should be subject to the influence approach. If courts apply the influence approach, should that influence interpretations at step one, step two, step three, or some combination of them? Each approach has its difficulties. If influence applies to every stage, then courts may simply constitutionalize the entire legislative scheme wholesale. But if courts pick and choose, they presumably need a reason for why they pick as they do.

B. *The Challenges of Implementing Displacement*

Some of the challenges of implementing displacement are shared with those of influence, such as identifying which combinations of investigative legislation trigger the approach. But implementing the displacement approach raises its own set of problems. The chief problem is identifying when investigative legislation is sufficiently protective to displace Fourth Amendment protection. Recall Justice Alito's language from his concurrence in *Riley*: "I would reconsider the question presented here," he wrote, "if either Congress or state legislatures, after assessing the legitimate needs of law enforcement and the privacy interests of cell phone owners, enact legislation that draws reasonable distinctions based on categories of information or perhaps other variables."[224] Central to this idea is that the legislative acts must be reasonable. An entirely toothless or symbolic law won't do. Courts therefore would need to answer, how reasonable is reasonable enough?

This is quite different from the traditional questions of Fourth Amendment law. Fourth Amendment litigation is famously fact specific.[225] Courts ask whether a particular set of facts fits the specific requirements of Fourth Amendment law. Under the recent decision in *City of Los Angeles v. Patel*, courts can conduct facial review of statutes for compliance with the Fourth

222. *See supra* Section I.A.

223. *See supra* text accompanying notes 112–113.

224. Riley v. California, 134 S. Ct. 2473, 2497 (2014) (Alito, J., concurring in part and concurring in the judgment).

225. *See generally* Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311, 315–16 (2012) (noting that the building block of Fourth Amendment law is sequential analysis of specific factual scenarios).

Amendment.[226] But that facial review is apparently limited to determining whether any set of facts within the statute is constitutional.[227] Even in the context of a facial challenge, courts do not ask if the statute as a whole is "good enough" to satisfy the Fourth Amendment.[228]

Answering when legislation is "good enough" to displace Fourth Amendment protection raises difficult questions. Investigative legislation addresses the three steps of search and seizure law—what is regulated, how, and with what remedy. When assessing whether legislation is sufficient, it is not clear whether courts are supposed to focus on any one of the three steps or any particular combination of them. If a law seems strict on paper but has weak remedies, is that enough? If the law is narrow but has strong remedies, is that better? What if the statute regulates many nonsearches but affords only weak protection? There are no obvious answers to these questions.[229]

The challenge is particularly difficult because the adequacy of legislation might change as technology advances.[230] To see this, imagine Congress passes legislation that generally prohibits the interception of unencrypted wireless signals but then allows the government to intercept those signals with an order based only on the lower standard of reasonable suspicion and not probable cause. A court applying the displacement approach would want to know if this legislation is sufficiently privacy protective to discourage judicial intervention. But identifying how well that statute protects privacy would require knowing social uses of technology, and in particular how rare or common it is for people to rely on the privacy of unencrypted wireless signals. That can change quickly. In the last decade, for example, social norms have changed from wide reliance on open wireless networks to the default of encryption.[231] If the question is whether the statute is sufficiently reasonable, the answer might change from year to year.

More broadly, the basic nature of a sufficiency inquiry seems odd. It's not clear what it means to say that a law is "good enough" to substitute for the Fourth Amendment. Imagine Congress passes a statute requiring the government to get a court order, based only on reasonable suspicion instead of probable cause, to search a home for evidence.[232] The traditional Fourth

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226. 135 S. Ct. 2443, 2447 (2015).

227. *Patel*, 135 S. Ct. at 2451 ("Under the most exacting standard the Court has prescribed for facial challenges, a plaintiff must establish that a 'law is unconstitutional in all of its applications.'" (quoting Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 (2008))).

228. *See id.* at 2450–51.

229. *See* Rappaport, *supra* note 148, at 248–49 (noting that second-order regulation raises difficult questions of measuring the adequacy of legislation).

230. I explored this problem in depth in my response to Daniel Solove. *See* Kerr, *supra* note 13, at 787–90.

231. *See Tips for Using Public Wi-Fi Networks*, FED. TRADE COMMISSION, https://www.consumer.ftc.gov/articles/0014-tips-using-public-wi-fi-networks [https://perma.cc/ELF7-CQD4].

232. For a discussion of the "reasonable suspicion" standard, see 2 LAFAVE, *supra* note 2, § 4.9(d).

Amendment conclusion would be that the statute is unconstitutional because a warrant is required.[233] Would a statute that lowers the protection from probable cause to reasonable suspicion be reasonable? How about a statute that requires just shy of probable cause? If legislative action can lower Fourth Amendment protection at all—an idea that itself seems strange—courts must answer how much. There is no obvious answer to how much watering down of the Fourth Amendment courts should countenance.

Of course, the idea of one branch delegating implementation of authority to another branch is not novel. Congress delegates regulatory authority to executive branch agencies.[234] Under *Chevron*, courts patrol that delegation by identifying whether a particular agency legal interpretation is a reasonable construction of the guiding statute.[235] If courts can tell when an executive interpretation is a reasonable interpretation of a statute, perhaps courts can determine when legislation is a reasonable implementation of a constitutional provision, such as the Fourth Amendment, which itself calls for reasonableness.[236]

This may be possible, but there are two reasons to be skeptical. First, the Fourth Amendment says that "searches" and "seizures" must be reasonable, not that statutes must be reasonable. The constitutional history and case law focus on specific cases with specific facts.[237] They provide no guidance to answer what it means for a statute to be a reasonable substitute for a regime of constitutional rules.

Second, there is a significant conceptual difference between judicial review of agency interpretations of statutes and the assessment of Fourth Amendment reasonableness required by the displacement approach. A court reviewing agency action begins with the text of Congress's enacting statute. It then asks whether the executive legal interpretation offers a reasonable interpretation of that text.[238] The statute provides the baseline for the court to measure reasonableness. No such baseline exists to determine if a statute is constitutionally reasonable. For a court to say that a statute is a reasonable implementation, it has to have some idea of *what* the statute is implementing. But the displacement approach offers no answer, as the underlying constitutional standard would remain unidentified if a statute serves as a substitute. The court will rule that the statute is a reasonable alternative to an unknown regime it doesn't have to articulate because the statute exists. This is a different animal from judicial review of agency action.

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233. *See* Payton v. New York, 445 U.S. 573, 586 (1980) ("It is a 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." (quoting Coolidge v. New Hampshire, 403 U.S. 443, 477 (1971))).

234. *See, e.g.*, Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2153–54 (2004).

235. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

236. For a suggestion along these lines, see Daphna Renan, *The Fourth Amendment as Administrative Governance*, 68 STAN. L. REV. 1039 (2016).

237. *See generally* Kerr, *supra* note 225, at 315–16 (noting that the building block of Fourth Amendment law is sequential analysis of specific factual scenarios).

238. *Chevron*, 467 U.S. at 840.

C. *The Relative Ease of Implementing Independence*

Independence avoids these implementation challenges. When courts don't link the system of Fourth Amendment law to the system of investigative legislation, they don't need to ponder exactly how such a linkage might work. Courts can answer the three steps of Fourth Amendment law independently without considering how investigative legislation might change the answers. Of course, answering those questions may not be easy. The Fourth Amendment is not mathematics. Judges cannot simply turn a crank and wait for the Fourth Amendment machine to answer how invasive a police tactic is or how much suppression will deter wrongdoing. But independence simplifies Fourth Amendment analysis by eliminating the need to develop and apply consistent answers for how legislation alters Fourth Amendment meaning.

Simplicity and ease of application aren't everything, of course. But the Supreme Court has repeatedly expressed a "general preference to provide clear guidance to law enforcement through categorical rules" in Fourth Amendment law.[239] The Court has rejected proposed Fourth Amendment approaches that would "keep defendants and judges guessing for years to come" about how they would apply.[240] The unanswered implementation challenges of influence and displacement raise the troubling prospect that they would do just that.

Further, the motivating premise of displacement, that legislatures have significant institutional advantages in regulating law enforcement when technology is in flux, is entirely consistent with the independence approach.[241] That is true because the institutional advantage of legislatures does not depend on whether legislatures have acted. The institutional advantage of legislatures includes deciding when to pass legislation or whether to pass any legislation at all. Legislatures should not be forced to pass *something* for courts to stay away, and courts should not stay away when technology has stabilized just because legislatures have acted. After the technology and its social implications have reached a stable point, courts are well suited to consider how the traditional principles of the Fourth Amendment should apply.[242] Deference should hinge on technological flux rather than legislative action. As long as the technology and its social implications are still in flux, courts should be reluctant to intervene. After the technology and its social implications stabilize, the period for caution should end. Either way, that caution should not hinge on the state of legislation.

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239. Riley v. California, 134 S. Ct. 2473, 2491 (2014).

240. *Id.* at 2493 (quoting Sykes v. United States, 564 U.S. 1, 34 (2011) (Scalia, J., dissenting)).

241. *See generally* Kerr, *supra* note 194. I have argued at length that courts should be cautious when technology is in flux for these reasons. *See id.*

242. *See generally* Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 541–42 (2011) (recommending judicial delay to produce better Fourth Amendment rulemaking when technology is in flux).

IV. Independence Protects the Two Systems of Search and Seizure Law

Independence can also help to preserve the advantages of having a dual system of search and seizure law that includes both constitutional and statutory protections. Courts that have endorsed influence and displacement have tended to ignore the effect of constitutional interpretation on investigative legislation. If courts look to legislation to interpret the Fourth Amendment, however, legislation will take on constitutional importance. The prospect that courts will interpret the Constitution differently ex post will tend to influence the legislation that the elected branches enact ex ante. The resulting feedback loop provides a significant argument for independence.

Displacement and independence risk losing the benefits of a dual system of search and seizure in two ways that the independence approach preserves. First, the prospect that legislation will influence Fourth Amendment rulings under influence or displacement can limit the legislature's ability to enact helpful statutory protections beyond the Fourth Amendment. Influence and displacement take away control from the legislature, either forcing it to enact constitutional-style rules or else making the effect of its statutory design uncertain. Independence frees the legislature to impose whatever rules appear best.

Second, the prospect that legislation will influence the Fourth Amendment creates an incentive to manipulate investigative legislation. Because the executive branch both has veto power over investigative legislation and also litigates Fourth Amendment cases, it would likely coordinate the two roles. Legislative debates could become a proxy for Fourth Amendment litigation, with legislative attention turned away from enacting the best statutory rule and towards what state of statutory law might set up the most advantageous constitutional case. Independence cuts the feedback loop and allows the legislative process to proceed without constitutional interference.

A. *The Benefits of a Dual System*

A dual system of search and seizure law, with both constitutional and statutory forms of regulation, has substantial advantages over an exclusively constitutional system. Fourth Amendment doctrine plays a bedrock role in regulating search and seizure. It limits when the government can invade private spaces and take control of property, and it does so backed by the usual rule of a warrant requirement and the possibility of suppression of evidence when the rules are violated. But despite its obvious importance, the Fourth Amendment has its limits. Traditional sources of legal authority such as text, history, and precedent cabin the range of Fourth Amendment options.[243] The Fourth Amendment evolves over time in response to new technologies

243. *See id.*

and social practices.[244] But these changes typically happen slowly and interstitially.

The possibility of statutory privacy offers several substantial advantages over the Fourth Amendment alone. Legislatures are not bound by text, history, or precedent. They can enact whatever privacy answers seem best suited to the privacy threats the public faces. Legislatures can identify new ways that the government invades privacy and can enact rules specifically designed to counter them. They can use whatever combination of the three steps of search and seizure law seems best suited to any particular problem. While the Fourth Amendment addresses timeless concerns of search and seizure law and remains fairly stable over time, investigative legislation can respond in creative ways to new problems.

The challenge of long-term surveillance offers a useful example. Tools such as GPS devices and location tracking devices allow the government to collect records over time of where a person goes and what a person does. The existing Fourth Amendment rule is that tracking devices do not trigger the Fourth Amendment unless they reveal that the person is inside a Fourth Amendment–protected space such as a home.[245] The Fourth Amendment rule could change, of course. Courts could say that all location tracking triggers the Fourth Amendment, or that none does. But the range of feasible rule options within traditional Fourth Amendment doctrine is limited. Without undoing major changes that themselves raise a long list of puzzling problems, Fourth Amendment doctrine is not well suited to offer creative solutions to the problem of long-term surveillance.[246]

Legislatures have many more options. For example, one plausible solution would be to enact a time-bound rule: Monitoring can be allowed at different thresholds based on how long the monitoring occurs.[247] Just as a reference point, perhaps surveillance up to a week should require reasonable suspicion while monitoring up to thirty days should require a warrant, with each additional thirty days requiring an additional warrant. This approach would sensibly require a sliding scale of investigative cause to justify the scope of the privacy invasion.

It is difficult for courts to develop such a regime using the Fourth Amendment but very simple for legislatures to do so using statutes.[248] Regulating long-term surveillance requires arbitrary line drawing about what

244. *See generally* Kerr, *supra* note 242.

245. United States v. Karo, 468 U.S. 705, 715–16 (1984) (holding that although public surveillance using a location tracking device is not a search, a search occurs when "the Government surreptitiously employs an electronic device to obtain information that it could not have obtained by observation from outside the curtilage of the house").

246. *See generally* Kerr, *supra* note 225.

247. *Cf.* United States v. Jones, 132 S. Ct. 945, 964 (2012) (Alito, J., concurring in the judgment) (distinguishing between short-term and long-term monitoring).

248. *Compare* Kerr, *supra* note 225, at 333–34 (explaining the difficulties of interpreting the Fourth Amendment to impose a time limit), *with* Christopher Slobogin, *Making the Most of* United States v. Jones *in a Surveillance Society: A Statutory Implementation of Mosaic Theory*, 8 Duke J. Const. L. & Pub. Pol'y, 2012, at 1, 1–5 (implementing a statutory solution).

methods can be used, for exactly how long, and by whom. For legislatures, arbitrary line drawing is routine and unobjectionable. They can, as the old Nike commercial says, "Just do it." Not so for courts. For judges, announcing arbitrary lines seems uncomfortably legislative.[249] The lines don't naturally fit either the text or doctrine of what is a search and what makes a search "reasonable."[250] It is also difficult to do on a case-by-case basis: The need to draw lines calls for a comprehensive answer that only legislatures can adequately provide.[251]

B. *Influence and Displacement Limit Legislative Options*

The benefits of this dual system could be threatened under influence or displacement. The problem is the feedback loop created by linking the two systems. If the Fourth Amendment depends at least in part on legislation, then legislators cannot simply enact the rules they think best. Instead, they need to enact rules with an eye to what the courts would do in response to the legislation they pass. They would need to consider the legislation combined with its effect on the Fourth Amendment to know the privacy rule that would result. If courts adopt a weak version of influence or displacement, this would create considerable uncertainty. If courts instead adopt a strong version of influence or displacement, legislative awareness would limit the set of choices of rules available to the legislature. In either case, influence or displacement can interfere with legislative independence and can interfere with the legislature's ability to deliver helpful privacy legislation.

To see this, imagine that Congress is considering a proposed law regulating long-term location surveillance. The proposed legislation requires the government to obtain a reasonable-suspicion court order for up to seven days of tracking and then obtain a warrant for the next thirty days. If the government violates this law, it must pay victims of monitoring $10,000 for every day of illegal surveillance but does not impose a statutory suppression remedy. Under the independent approach, the legislature can enact its rule with relatively low uncertainty as to its effect. The legislative remedy would apply the same way regardless of what the courts do, and what the courts do would be independent of legislative activity.

Under the influence approach, however, the picture becomes much more cloudy. Assume that courts adopt a strong view of the influence approach, where the presence of legislation regulating a government practice makes that practice a search. By requiring a reasonable-suspicion order for any location monitoring, the proposed legislation would make location monitoring a search at step one. This would presumably trigger the usual Fourth Amendment rules at steps two and three of a warrant requirement

249. *Cf.* Maryland v. Shatzer, 559 U.S. 98, 110 (2010) ("[I]t is certainly unusual for this Court to set forth precise time limits governing police action . . . .").

250. *See* Kerr, *supra* note 225, at 350.

251. *See* Slobogin, *supra* note 248, at 5.

and the exclusionary rule. But that result would eliminate the creative legislative design and give the legislature only two options. It could enact no legislation and have no privacy protection at all, or it could pass legislation and be stuck with a Fourth Amendment rule of a warrant and the exclusionary rule for all location monitoring. No middle ground could exist.

The Supreme Court recognized this problem in *Virginia v. Moore*.[252] Recall that *Moore* held that a warrantless public arrest based on probable cause satisfies the Fourth Amendment even when a state statute established that the crime was not an arrestable offense.[253] Among the Court's reasons for not incorporating the legislative standard into the Fourth Amendment test was that it "would often frustrate rather than further state policy."[254] Virginia's legislative scheme did not share the strong remedies of the Fourth Amendment; in particular, the exclusionary rule was not available.[255] Adopting legislation as the Fourth Amendment standard therefore would force the state to "lose control over the remedy," which might lead the state "to abandon restrictions on arrest altogether."[256] Under the influence approach, the Fourth Amendment consequences of investigative legislation can discourage legislatures from passing any limiting legislation at all.

Granted, the picture would look different if we assumed a different version of the influence approach. Imagine courts adopt a soft version of influence that only lightly considers legislation as a factor rather than always follows it. In that case, the problem is uncertainty. Legislators considering a new privacy statute would not know its ultimate effect. Statutory rule *A* might turn into constitutional rule *B*, or maybe not. At the margins, this kind of uncertainty is likely to discourage the passage of investigative legislation among legislators who prefer the statutory standard to a constitutionalized one. At the very least, the uncertainty would complicate the process of securing broad agreement about the desirability of different rules.

Analogous problems exist with the displacement approach. If courts adopt displacement, legislators cannot simply enact what they see as the best set of rules. Instead, they need to consider what effect their work might have on Fourth Amendment protection. A legislator who wants to maximize privacy might want to do nothing at all. Legislative inaction might invite courts to step in. No statutory privacy protection right now might mean strong Fourth Amendment protection tomorrow. Conversely, a legislator who wants to minimize privacy might want to enact the weakest statutory privacy rules that will pass constitutional muster to trigger displacement. It's impossible to predict how these incentives might play out without knowing which version of displacement courts would adopt. But like the influence approach, displacement would limit or at least complicate the legislative options because of any legislation's expected impact on the Fourth Amendment.

252. 553 U.S. 164 (2008).

253. *Moore*, 553 U.S. at 176.

254. *Id.* at 174.

255. *Id.*

256. *Id.*

C. *Independence Prevents Executive Manipulation of Legislation*

The prospect that feedback from influence or displacement can interfere with legislation is enhanced by the special role of the executive branch. Both investigative legislation and the Fourth Amendment provide legal checks on executive power. And yet the executive plays a critical role both in enacting legislation and in Fourth Amendment litigation. This combination increases the likelihood that the executive would coordinate roles and treat the legislative process as a battleground for the Fourth Amendment under a system of influence or displacement.

First consider the executive's influence on legislation. Every state constitution, as well as the U.S. Constitution, grants the executive veto power over legislation.[257] Strong majorities can override the executive veto, but that is difficult and uncommon. For the most part, the executive branch plays a major role in shaping legislation.[258] And that is particularly true with legislation that regulates the executive: The politics of criminal justice makes the executive's position on investigative legislation particularly important to legislators.[259] For all of these reasons, the position of the executive for or against investigative legislation often plays an outsized role in whether it will pass.

The executive plays a critical role in Fourth Amendment litigation. Most Fourth Amendment questions are litigated in motions to suppress in criminal cases.[260] The government will bring a prosecution; the defendant will move to suppress the evidence on Fourth Amendment grounds; and the government will defend the state action as constitutional. The executive acts as a litigant to every case. Even in civil cases, where the victim of police action sues the officers in their private capacity, the government is often represented because it has indemnified the officers and provided counsel.[261] In other cases the government can weigh in as a very important amicus curiae. At the Supreme Court, for example, the United States files an amicus brief in every Fourth Amendment case to which it is not a party. Even when the case is a civil case and no state is represented, the United States ordinarily seeks and is given oral argument time.

The dual role of the executive branch means that the interaction between legislation and the Fourth Amendment is not only, or even primarily,

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257. *See* U.S. CONST. art. I, § 7; *Separation of Powers—Executive Veto Powers*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/research/about-state-legislatures/separation-of-powers-executive-veto-powers.aspx [https://perma.cc/2TWK-XWAK] ("Every state constitution empowers the governor to veto an entire bill passed by the legislature.").

258. *See* Murphy, *supra* note 12.

259. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 510 (2001).

260. *See* Orin S. Kerr, *Fourth Amendment Remedies and Development of the Law: A Comment on* Camreta v. Greene *and* Davis v. United States, 2011 CATO SUP. CT. REV. 237, 239–40 (2011) ("The exclusionary rule has traditionally been the driving force of Fourth Amendment development.").

261. *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 885, 890 (2014).

a matter of interest to the courts. It is also a matter of intense interest to the executive. If courts decide that legislation shapes the Fourth Amendment, executive officials are well placed to use their influence on legislation to influence Fourth Amendment rules. This is admittedly more the case at the federal level than at the state level. Under the unitary executive of Article II, the attorney general of the United States serves at the pleasure of the president.[262] In contrast, most state attorneys general are elected independently of the governor.[263] Nonetheless, the dual role of the executive provides a significant incentive to coordinate roles, rendering the legislative debate a proxy fight for Fourth Amendment litigation.[264]

Let's entertain a hypothetical to make this more concrete. Assume the Supreme Court were to adopt a strong version of the influence approach and hold that an expectation of privacy is "reasonable" when investigative legislation bans that action absent a court order. A court order based on a certification of relevance is sufficient; no warrant is necessary.[265] The president and federal law enforcement agencies want to maintain the broadest powers they can to investigate criminal activity. As a matter of policy, the executive has no objections to a legislation requiring a court order based on relevance. That court order is very easy to obtain, so it will pose no barriers in any good-faith investigation. The remedies are modest: only modest civil remedies with no attorney's fees or punitive damages. Under the prevailing independence doctrine of *Virginia v. Moore*,[266] the president would support that legislation. It would easily pass.

If the Supreme Court were to adopt the influence approach, however, the incentives would change. The executive would be fine with the legislation on its face. But the legislation's effect on the Fourth Amendment would cause heartburn. Allowing any investigative legislation might trigger the adoption of much stronger Fourth Amendment rights. To ensure that the legislation doesn't establish strong Fourth Amendment protection that would limit officers down the road, the executive would have an incentive to make sure no Fourth Amendment legislation passed. The executive would fight even legislation it approved of to avoid Fourth Amendment rules it opposed.

Similar problems arise under the displacement approach. The executive's incentives are different but no less harmful. The executive branch now

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262. *See, e.g.*, *Gonzales: 'I Serve at the Pleasure of the President'*, ABC NEWS (Mar. 14, 2007) http://abcnews.go.com/GMA/story?id=2949749&page=1 (on file with *Michigan Law Review*) (commenting on the role of the attorney general).

263. Forty-three of the fifty state attorneys general are elected. *Attorney General (State Executive Office)*, BALLOTPEDIA, https://ballotpedia.org/Attorney_General [https://perma.cc/D3SJ-BD2B]j.

264. *See* Re, *supra* note 212, at 330–31 (noting that resting Fourth Amendment law on positive law creates incentives for manipulation of positive law to influence Fourth Amendment rules).

265. This is the standard used in the Pen Register statute. *See* 18 U.S.C. 3123(a) (2012) (explaining how a lawyer for the government can obtain a pen-register order).

266. 553 U.S. 164 (2008).

would want to support legislation *just strong enough* to trigger judicial displacement. When the executive expected that courts would step in the absence of legislation, the executive would propose legislation to lower privacy protections by triggering judicial displacement. If the threshold for displacement-triggering legislation is clear, the result would be the elimination of Fourth Amendment protection in favor of lower statutory protections.

As with the incentives on legislators,[267] the particular incentives for the executive will depend on what version of influence or displacement courts adopt. The weaker the version, the weaker the incentives. But as long as courts adopt some version of influence or displacement, some incentive to manipulate the legislative process will remain. The independence approach avoids these problems entirely. Independence ensures that the tail of the Fourth Amendment doesn't wag the legislative dog. It allows the legislative process to proceed without fears that whatever passes will turn out to have far greater effects—either bolstering or cutting back Fourth Amendment protection—at the Supreme Court.

Conclusion

This Article has offered reasons why courts should favor independence over influence and displacement when interpreting the Fourth Amendment. The core premise of influence, that investigative legislation signals societal values relevant to the Fourth Amendment, turns out to be weak. Implementing influence or displacement raises a series of novel and difficult questions that neither courts nor scholars have begun to answer. Finally, influence and displacement threaten to undercut the advantages of a dual system of independent constitutional and statutory search and seizure rules. For all of these reasons, courts should presume independence and be very wary adopting influence or displacement.

This does not mean that courts must categorically reject all reliance on statutes in every area of Fourth Amendment law. Although the arguments raised in this Article provide reasons to be skeptical of influence and displacement generally, Fourth Amendment law is famously diverse and fact specific. There are many specific doctrines which raise special dynamics. It is possible that statutes may play a role in specific situations without substantially implicating the concerns raised in this article. Courts should be wary of influence and displacement, but the general concerns raised in this Article may or may not apply to uses of statutes within specific Fourth Amendment doctrines.

The closely regulated industries exception to the warrant requirement offers a possible example. The exception allows warrantless searches as part of an inspection scheme in commercial industries that have been closely regulated.[268] In looking at whether an industry is "closely regulated," courts have looked to whether there is a history, often found in statutory law, of

267. *See supra* Section IV.B.

268. *See* City of Los Angeles v. Patel, 135 S. Ct. 2443, 2455–56 (2015).

allowing government inspections of that particular industry.[269] This appears to be a form of the influence approach, as the statutory allowance of government inspections helps to establish a Fourth Amendment rule allowing those inspections. With that said, the doctrine on the exception appears to limit the concerns raised in this Article by making the influence-based inquiry only one of four requirements that must be satisfied for the exception to apply. After a court finds that the industry is closely regulated, the exception applies only if a court rules that the inspection scheme serves a substantial government interest, that warrantless inspections are necessary to further that interest, and that the inspection scheme provides an adequate substitute for a warrant.[270] Although the influence-based element of the exception would be troubling if it stood on its own, its potential mischief is minimized by the remaining independence-based requirements of the exception.

Despite this example, the broad theories of influence and displacement should be approached with great caution. Viewed in isolation, looking to the elected branches for help with the Fourth Amendment can seem sensible. But when you step back and see the Fourth Amendment and investigative legislation as two complex systems of regulation, the picture changes. Influence and displacement try to link two systems that are not easily linked, based on assumptions that are not true, in ways that threaten the benefits of having two independent systems of search and seizure law.

269. *Id.* at 2454–56; New York v. Burger, 482 U.S. 691, 703–07 (1987).

270. *Burger*, 482 U.S. at 702–03.