

**THE BENEFITS OF USING INVESTIGATIVE LEGISLATION TO INTERPRET  
THE FOURTH AMENDMENT: A RESPONSE TO ORIN KERR**

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## INTRODUCTION

In a recent article, Orin Kerr examines the use of investigative legislation in Fourth Amendment decision-making.<sup>1</sup> Professor Kerr identifies and evaluates three models courts have used, which he labels “influence,” “displacement, and “independence.”<sup>2</sup> Under the influence approach, courts look to statutory standards for possible constitutional adoption.<sup>3</sup> Under the displacement approach, courts view statutory regulation as cause to decline Fourth Amendment protection in the same realm, thus preserving the institutional advantages of regulating searches and seizures through thoughtful statutory directives over the blunt instrument of the Fourth Amendment.<sup>4</sup> Under the independence approach, courts treat legislation as irrelevant to Fourth Amendment analysis.<sup>5</sup> Professor Kerr concludes that the influence model offers little insight into societal values that should arguably inform Fourth Amendment decision-making and that the influence and displacement approaches have significant costs, including difficulty of implementation and distortion of the legislative process.<sup>6</sup> In contrast, according to Professor Kerr, the independence model promotes a dual system of regulation that is easy to implement and preserves the respective institutional advantages of courts and legislatures.<sup>7</sup> Professor Kerr raises important, insightful concerns about using investigative legislation as a guide to Fourth Amendment protection. Nonetheless, I believe that Professor Kerr understates the value of such legislation as a marker of societal values that can inform constitutional decision-making and overstates the extent to which an approach that takes such legislation into account will undermine the integrity of the legislative process, particularly under the model I propose.

In this article, I argue that courts should implement a soft influence approach, relying on investigative legislation only when the legislative

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1. Orin S. Kerr, *The Effect of Legislation on Fourth Amendment Protection*, 115 MICH. L. REV. 1117 (2017). Professor Kerr defines “investigative legislation” as “any statute that limits government investigations,” including statutes that regulate private conduct when those statutes include exceptions for government conduct under prescribed conditions. *Id.* at 1118.

2. *Id.* at 1119–20.

3. *Id.*

4. *Id.* at 1120.

5. *Id.*

6. *Id.* at 1121–22.

7. *Id.*

landscape shows broad national consensus. Additionally, courts should rely on such legislation only with regard to the question of whether government conduct constitutes a Fourth Amendment search, not with regard to the standards the government must meet to make its searches reasonable or the remedies that should follow from Fourth Amendment violations. This model can be used effectively to assess societal values relevant to Fourth Amendment interpretation. It would also be consistent with Fourth Amendment precedent and with the Supreme Court's approach in other areas of constitutional interpretation. Finally, a model that draws on legislative wisdom only as evidence of national consensus would be unlikely to lead to the kind of legislative or executive gamesmanship that Professor Kerr believes would undermine the benefits of a dual constitutional and statutory system of regulation of government searches and seizures. Ultimately, courts can draw on such a model as a means of forging a more principled, predictable Fourth Amendment jurisprudence.

#### I. LEGISLATION AS A SIGNAL OF SOCIETAL VALUES

The crux of Professor Kerr's skepticism of the benefits of using legislation as a lodestar for Fourth Amendment decision-making is that investigative legislation tells us little about the legislative perspective (and, by proxy, the societal perspective) on whether and how the Constitution should regulate government conduct. Professor Kerr identifies several ways in which apparent legislative signals of constitutionally relevant values are actually largely noise. First, Professor Kerr argues that legislation is a poor proxy for societal values relevant to the Fourth Amendment because of what he refers to as "the distortion problem."<sup>8</sup> In short, Fourth Amendment analysis requires a court to answer three questions: 1) does the government's conduct implicate the Amendment?; 2) if so, what does the Fourth Amendment require in order to make such conduct reasonable?; and 3) what remedy should be available to an individual whose Fourth Amendment rights the government has violated?<sup>9</sup> Courts often answer only one of these questions in a given case, but to do so in reliance on legislation risks ignoring the signals conveyed by the full context in which the legislature acted.<sup>10</sup> For example, a court might view Congress's choice to regulate the use of pen

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8. *Id.* at 1140.

9. *Id.*

10. *Id.*

registers to monitor internet protocol (IP) addresses used to connect to the internet as a sign that Congress believed individuals have a reasonable expectation of privacy in such information.<sup>11</sup> The court might conclude, therefore, that government collection of the information constitutes a Fourth Amendment search.<sup>12</sup> Yet, as Professor Kerr observes, Congress believed such information merits only weak protection against government observation.<sup>13</sup> Under the Pen Register Act, a court order based on a prosecutor's certification that the information is relevant to an ongoing investigation is sufficient to authorize the use of a pen register,<sup>14</sup> and violations of the Act carry only a remote possibility of criminal prosecution of the violator and do not require exclusion of any evidence in a criminal trial of the individual whose rights the violation impinged.<sup>15</sup>

On the other hand, Professor Kerr notes, when the Fourth Amendment applies, it often imposes more severe restrictions on government conduct, in the form of the warrant requirement, and requires the use of the exclusionary rule as a remedy for violations.<sup>16</sup> Therefore, a court's reference to the Pen Register Act to conclude that society is prepared to recognize the expectation of privacy in IP addresses as reasonable (and to determine, as a result, that monitoring IP addresses constitutes a Fourth Amendment search), would distort the overall signal of societal values if it ignored the fact that Congress chose a relatively permissive approach to authorizing the use of pen registers and to impose only weak sanctions for violations.<sup>17</sup> Professor Kerr posits a scenario in which the traditional warrant requirement and exclusionary rule would apply anytime a court concludes that government conduct implicates the Fourth Amendment.<sup>18</sup> This, of course, might not be

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11. *Id.* at 1142.

12. *Id.*; see *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (asserting that a Fourth Amendment search occurs when the government intrudes on a subjective expectation of privacy that society is prepared to recognize as reasonable).

13. *Id.*

14. 18 U.S.C. § 3123(a)(2001).

15. Kerr, *supra* note 1, at 1142 (citing *In re Application for an Order Authorizing the Installation & Use of a Pen Register & Trap & Trace Device*, 846 F. Supp. 1555, 1561 (M.D. Fla. 1994)).

16. *Id.* at 1123–24.

17. See *id.* at 1142–43.

18. See *id.* at 1141–42.

the case,<sup>19</sup> but his broader point has considerable force: any time a court uses legislation to shed light on only one of the three Fourth Amendment questions, it risks distorting the societal values it claims to be interpreting through reference to the legislation.<sup>20</sup>

The second problem Professor Kerr identifies with using legislation to identify societal values of constitutional significance is what he refers to as “the federalism problem.”<sup>21</sup> The essence of the problem is the lack of state authority to regulate the conduct of federal officers enforcing federal law and of local authorities to regulate the conduct of state officers enforcing state law.<sup>22</sup> While a state’s privacy law cannot apply at the federal level, and a local law generally will not apply at the state level, a Fourth Amendment rule applies at every level of government.<sup>23</sup> Thus, for example, state privacy legislation regulating some species of government conduct might reflect a legislative judgment that individuals should have some protection against any government actor engaging in such conduct, subject only to the limitations of the Supremacy Clause, but it might not.<sup>24</sup> Instead, the legislation might suggest the state legislature had no perspective whatsoever

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19. By the middle of the twentieth century, the notion that warrants are virtually always required to justify Fourth Amendment searches, subject only to a few well-delineated exceptions, had won out rhetorically on the Court. *See Katz*, 389 U.S. at 357. Nonetheless, much of the Court’s Fourth Amendment jurisprudence has been dedicated to carving out exceptions to that ostensible presumption, and it is clear today that searches conducted without a warrant or probable cause vastly outnumber those conducted subject to the restrictions of the Fourth Amendment’s Warrant Clause. *See, e.g., California v. Acevedo*, 500 U.S. 565, 582–83 (1991) (Scalia, J., concurring); *see also* Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473–75 (1985). The Court also articulated a seemingly categorical standard of excluding evidence obtained in violation of a defendant’s Fourth Amendment rights from that defendant’s criminal trial when it incorporated the exclusionary rule against the States in 1961. *Mapp v. Ohio*, 367 U.S. 643, 657 (1961). Nonetheless, in recent decades, the Court has retreated from that position, suggesting the exclusionary remedy will apply only when the benefits of deterring government misconduct outweigh the costs of keeping reliable evidence from the fact finder. *See, e.g., Herring v. United States*, 555 U.S. 135, 141 (2009); *Hudson v. Michigan*, 547 U.S. 586, 591 (2006).

20. Kerr, *supra* note 1, at 1121–22, 1139.

21. *Id.* at 1144.

22. *See id.* at 1144–45.

23. *Id.*

24. *Id.* at 1146.

on how such conduct should be regulated outside the state.<sup>25</sup> Alternatively, it might reflect the legislature's belief that the federal government has institutional advantages that suggest its officers should have exclusive authority to engage in the conduct at issue.<sup>26</sup> Like the distortion problem, in Kerr's judgment, the federalism problem makes investigative legislation a poor proxy for societal judgments about values relevant to the Fourth Amendment.<sup>27</sup>

Finally, Professor Kerr discusses what he calls "the necessity problem."<sup>28</sup> The problem, according to Kerr, is that legislative enactment of privacy legislation often reflects an expectation that the Fourth Amendment will not apply to a given category of conduct, not a judgment that it should.<sup>29</sup> Professor Kerr again uses the Pen Register Act as an example.<sup>30</sup> Congress passed the Act in the wake of the Supreme Court's determination that the Fourth Amendment does not regulate the use of pen registers.<sup>31</sup> According to Kerr, such legislation "might suggest that the elected branches demanded privacy, or it might just show that the legislature expected the courts to stay out."<sup>32</sup> On the other hand, the absence of legislation might reflect a legislative judgment that government activity implicates no significant privacy interest, but legislatures might also choose inaction because statutory protection is unnecessary in light of existing, robust Fourth Amendment protection.<sup>33</sup> By way of example, Professor Kerr notes that there seem to be no statutes in the United States requiring police to have a warrant to enter a home.<sup>34</sup> This fact, of course, is a product of legislative awareness that well-established Fourth Amendment doctrine already provides such a safeguard,<sup>35</sup> not a

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25. *Id.*

26. *Id.*

27. *Id.* at 1144–47.

28. *Id.* at 1147.

29. *Id.*

30. *See id.* at 1147–49.

31. *See Smith v. Maryland*, 442 U.S. 735, 745–46 (1979); Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 855 (2004).

32. Kerr, *supra* note 1, at 1149.

33. *Id.* at 1147.

34. *Id.*

35. *See, e.g., Kentucky v. King*, 563 U.S. 452, 459 (2011) ("It is a 'basic principle of Fourth Amendment law' . . . 'that searches and seizures inside a home without a warrant are presumptively unreasonable.'") (internal citations omitted).

determination that the home is unworthy of protection against government intrusion.

Professor Kerr's analysis includes important insights about the limits of looking to legislation as a guide to societal values of significance to Fourth Amendment decision-making. Nonetheless, he understates the usefulness of reliance on such legislation by setting too high a bar for its inclusion in the process of constitutional interpretation. Professor Kerr's critique suggests that he believes legislation must reveal specific societal judgments about the optimal scope of constitutional protection in order to have any relevance to a court's constitutional decision-making. Although Professor Kerr is correct that legislation often offers little specific insight into legislative attitudes about how the Constitution should define and limit the government's investigative authority, his standard demands more than is necessary for such legislation to be useful to a court's Fourth Amendment analysis. In other areas of constitutional law in which the Supreme Court has looked to positive law as a source of societal values, the Court has not imposed such exacting requirements. Rather than insisting that positive law must reflect precise legislative contemplation of the contours of constitutional protection, the Court has looked more generally to positive law as reflective of broad societal attitudes about the importance of contested interests. This more generalized sort of evaluation of societal norms can be useful in the Fourth Amendment context as well.

Professor Kerr's apparent belief that legislation must provide insight into a legislature's precise view of how the Constitution should regulate conduct in order to have any relevance to constitutional analysis is perhaps revealed most clearly in his discussion of the necessity problem. Recall the quoted language above: "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."<sup>36</sup> The dichotomy Professor Kerr presents makes sense only if what he means by "demanded privacy" is that a legislature's action demonstrates a belief that the Fourth Amendment should protect the regulated conduct. Otherwise, it would be perfectly reasonable to conclude that investigative legislation evinces a legislature's belief both that individuals should have some protection against a particular kind of government conduct and that courts will stay out. Legislators might have no specific attitude toward whether the Constitution should regulate such conduct, and they might understand and accept that under current doctrine it

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36. See Kerr, *supra* note 1, at 1149.

does not. They may believe only in a general way that the conduct implicates privacy interests worthy of protection, and a statute represents the legislature's regulation of that conduct in the only way it has authority to regulate it.<sup>37</sup>

Even if legislators feel the need to intervene because they understand the Constitution does not apply rather than because they believe it should, however, their intervention reveals something important about the interests society believes worthy of protection. A court's investigation of societal values in assessing the requirements of the Constitution need not amount to a survey of the public's position on the precise constitutional question before the court. Rather, the Supreme Court has regularly informed its constitutional analysis by evaluating trends in American positive law for signs of broadly accepted moral standards, whether or not those who adopted such laws specifically thought the relevant principles should be constitutionally enshrined.

In its substantive due process jurisprudence, for example, the Court has, in determining whether a right qualifies as fundamental, examined positive law to assess whether the right is deeply rooted in the nation's history and tradition.<sup>38</sup> Thus, in accepting the existence of a constitutional liberty interest in refusing medical treatment, the Court relied in part on tort doctrine, noting that common law principles treat the touching of one person by another without consent as a battery and observing that "[t]he informed consent doctrine has become firmly entrenched in American tort law."<sup>39</sup> In

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37. Professor Kerr accepts that legislatures often act with only a general sense that, as a matter of policy, there should be a law regulating some species of investigative conduct, rather than with a specific attitude about the Constitution. The point here is that the dichotomy Professor Kerr offers suggests he believes that when legislatures act without a precise sense of how the Constitution should regulate the conduct in question (or when they act because they believe the Fourth Amendment does not apply to the activity at issue), the resulting statute can provide no insight into societal values of constitutional significance. I disagree with that proposition.

38. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).

39. *Cruzan by Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 269 (1990); see also *Glucksberg*, 521 U.S. at 725 ("The right assumed in *Cruzan*, however, was not simply deduced from abstract concepts of personal autonomy. Given the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment, our assumption was entirely consistent with this Nation's history and constitutional traditions.").

reaffirming a constitutional liberty interest in refusing medical treatment the following year, the Court again noted that the common law doctrine of informed consent is “viewed as generally encompassing the right of a competent individual to refuse medical treatment.”<sup>40</sup> Yet the judges who formulated the informed consent doctrine the Supreme Court later considered part of the history and tradition supporting the existence of a constitutional right were assessing claims by aggrieved plaintiffs seeking tort damages from defendant physicians, not the limits of government power.<sup>41</sup> Nonetheless, to the Court, these tort principles helped establish deeply felt societal norms relevant to due process analysis.

In defining the scope of Sixth Amendment rights, the Court has also looked to positive law of a sort, in the form of professional codes of conduct.<sup>42</sup> Thus, in assessing a defendant’s claim that the Sixth Amendment protected his right to counsel of his choice despite a potential conflict of interest, the Court found it relevant that both the American Bar Association’s Model Rules of Professional Conduct and the Rules of Professional Conduct of the State Bar of California placed limits on multiple representation of clients.<sup>43</sup> This was in keeping with the Court’s seminal articulation of the standard for determining ineffective assistance of counsel claims, in which the Court asserted that “[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable, but they are only guides.”<sup>44</sup> Yet, in accepting that such standards have some role to play in defining the scope of the constitutional right to counsel, the Court gave no indication that it believed their drafters had written them with the contours of the Sixth Amendment in mind, or that it believed it would be desirable if they had.

In evaluating the existence of national consensus against the use of certain forms of punishment, which the Court has found relevant to its Eighth Amendment jurisprudence, the Court has also looked to state legislation.<sup>45</sup> When it considered the constitutionality of executing mentally retarded individuals, for example, the Court noted that legislation provides the

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40. *Glucksberg*, 521 U.S. at 724 (quoting *Cruzan*, 497 U.S. at 277).

41. *See Cruzan*, 497 U.S. at 269 (citing *Schloendorff v. Society of New York Hospital*, 105 N.E. 92, 93 (N.Y. 1914); W. PAGE KEETON ET AL., *PROSSER & KEETON ON LAW OF TORTS* § 9, 39-42 (5th ed. 1984)).

42. *See Wheat v. United States*, 486 U.S. 153, 161–62 (1988).

43. *Id.* at 160.

44. *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

45. *See, e.g., Atkins v. Virginia*, 536 U.S. 304, 311–14 (2002).

“clearest and most reliable objective evidence of contemporary values.”<sup>46</sup> Once again, the Court made no suggestion that it believed such legislation would be a useful guide only if those responsible for it had contemplated the way the Constitution should regulate the punishment at issue.

Part of Professor Kerr’s response to these examples would be that the Court’s invocations of positive law in these other areas of constitutional decision-making have not been exemplars of principled jurisprudence.<sup>47</sup> To illustrate the point, Professor Kerr asserts that, in the Eighth Amendment context, the Court has found legislative consensus only by “counting in creative ways.”<sup>48</sup> Professor Kerr quotes Justice Scalia’s contention that the *Roper v. Simmons* majority’s identification of a national consensus against execution of juvenile offenders was achieved only through obfuscation: “Words have no meaning if the views of less than 50% of death penalty States can constitute a national consensus.”<sup>49</sup> Yet, as others have pointed out, it is Justice Scalia who has engaged in “creative counting” in Eighth Amendment cases in his insistence on ignoring states that have outlawed the death penalty altogether.<sup>50</sup> By including those states, which by proscribing all executions necessarily also proscribed the execution of juveniles, one finds a clear majority of states opposed to the practice.<sup>51</sup> Such inclusion seems entirely reasonable, for it takes no great inferential leap to conclude that a state that entirely prohibits capital punishment would oppose even more strongly the use of the punishment for those who are most vulnerable, more likely to be wrongly convicted (because they may be more susceptible to false confession and less capable of assisting in their own defense), and less susceptible to deterrence (because they are less in control of their faculties than competent adults).<sup>52</sup>

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46. *Id.* at 312 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)).

47. *See* Kerr, *supra* note 1, at 1152.

48. *Id.*

49. *Id.* at 1152 n.218 (citing *Roper v. Simmons*, 543 U.S. 551, 609 (2005) (Scalia, J., dissenting)).

50. Akhil Reed Amar & Vikram David Amar, *Eighth Amendment Mathematics (Part One): How The Atkins Justices Divided When Summing*, FINDLAW (June 28, 2002), <http://supreme.findlaw.com/legal-commentary/eighth-amendment-mathematics-part-one.html> (discussing the *Atkins* Court’s determination that execution of mentally retarded offenders violates the Eighth Amendment).

51. *Id.*

52. *Id.*

The Court's reliance on positive law in its inquiries about whether a claimed right is "deeply rooted" in our history and tradition has also had a constraining effect on its substantive due process jurisprudence. That effect is perhaps most evident in the Court's recent abandonment of the principle that history and tradition are dispositive when adherence to that framework would have led to outcomes contrary to the Court majority's impulses. Thus, in *Lawrence v. Texas*, in assessing the claim that proscriptions against homosexual sodomy were unconstitutional, the Court asserted that "[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry."<sup>53</sup> In dissent, Justice Scalia observed that the *Lawrence* majority made no attempt to contradict the determination of the *Bowers v. Hardwick* majority that the right to homosexual sodomy was not deeply rooted in the nation's history and tradition.<sup>54</sup> Instead, the *Lawrence* majority focused on an "emerging awareness" that adults have a significant liberty interest in "deciding how to conduct their private lives in matters pertaining to sex."<sup>55</sup>

Likewise, Chief Justice Roberts decried the majority's abandonment of the "deeply rooted" framework in its inquiry in *Obergefell v. Hodges* as to whether homosexual marriage is a protected due process right.<sup>56</sup> As Chief Justice Roberts noted, an "approach grounded in history imposes limits on the judiciary that are more meaningful than any based on [an] abstract formula."<sup>57</sup> In other words, it is precisely because the focus on history and tradition would have led the Court to a conclusion contrary to the moral impulses of the majority that the majority simply discarded that formula. As I have discussed above, and as Professor Kerr acknowledges,<sup>58</sup> that traditional inquiry into history and tradition in substantive due process cases

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53. *Lawrence v. Texas*, 539 U.S. 558, 572 (2003) (quoting *Country of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998)).

54. *Lawrence*, 539 U.S. at 594, 598 (Scalia, J., dissenting).

55. *Id.* at 572.

56. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2618 (2015) (Roberts, J., dissenting).

57. *Id.* (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 504 n. 12 (1977)); see also Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 162 (2015) ("The *Glucksberg* restrictions—the restriction based on tradition, the restriction based on specificity, and, less formally, the restriction based on the negative nature of the liberty exercised—placed severe constraints on substantive due process jurisprudence.").

58. See Kerr, *supra* note 1, at 1135.

has included assessment of legislation and other positive law, both at the time of the framing of the Constitution and of the Fourteenth Amendment and afterward.

In addition to questioning the utility of reliance on legislation in other areas, however, Professor Kerr bases his conclusions on distinctions between the Fourth Amendment and other fields of constitutional interpretation.<sup>59</sup> As Professor Kerr observes, the signal of societal values relevant to the Fourth Amendment that one can perceive from investigative legislation is more likely to be lost in noise than is the case in, for example, the Eighth Amendment context.<sup>60</sup> Professor Kerr attributes this to the distortion problem, described above, and the relative complexity of Fourth Amendment decision-making.<sup>61</sup> Specifically, Eighth Amendment problems are “binary and specific. Either the criminal law allows a punishment or it doesn’t.”<sup>62</sup> On the other hand, Fourth Amendment analysis requires answers to three interrelated questions: 1) does the government’s conduct implicate the Fourth Amendment?; 2) if the government’s conduct constitutes a Fourth Amendment search or seizure, what standard must the government satisfy in order to make its conduct reasonable?; and 3) what remedy is available if the government violates that standard?<sup>63</sup> A court relying on investigative statutes to answer only one of those questions risks developing Fourth Amendment law in ways that are inconsistent with the values that would be revealed through comprehensive analysis of the legislation.<sup>64</sup> Moreover, because of the diversity of possible legislative approaches to answering each of the three questions, assessing the significance of disparate statutes from multiple jurisdictions presents considerable logistical challenges for a court determined to draw on legislative wisdom for a more holistic analysis of Fourth Amendment protection.<sup>65</sup> These are trenchant observations, and anyone committed to the use of legislation in Fourth Amendment decision-making must grapple with them.

As with other aspects of his argument, however, Professor Kerr demands more in his assessment of the distortion problem than is necessary to make legislation relevant to constitutional analysis. It is true, for example,

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59. *See id.* at 1153.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *See id.*

65. *See id.*

that a court that refers to legislation regulating government conduct in a particular realm to conclude that such conduct constitutes a Fourth Amendment search might end up implementing Fourth Amendment rules inconsistent with the entire legislative scheme; if statutes regulate conduct but impose permissive standards for engaging in the conduct and weak remedies for violations, and the court, having relied on the legislation to conclude the conduct constitutes a search, applies the presumptive Fourth Amendment warrant requirement and the exclusionary rule for violations, then this would be the case. It is also true that the legislators who passed the statutes in question might have preferred no regulation of the government conduct at all to a warrant requirement and the exclusionary rule.<sup>66</sup> But this is a problem only if one conceives of legislation as relevant to constitutional interpretation only in the narrow circumstances in which such legislation can serve as a finely calibrated poll on the precise meaning of the Fourth Amendment in context. As I have argued above, though, this is unnecessary. In the above example, a court might reasonably conclude that the legislation in question reflects a societal consensus that the government conduct at issue intrudes on a privacy interest worthy of protection, which is enough to trigger Fourth Amendment regulation.<sup>67</sup> The court might also reasonably conclude that it has a responsibility to determine the contours of that regulation independent of the popular consensus reflected in legislative action.

It is worth noting as well that the issues Professor Kerr identifies with the distortion problem are not specific to investigative legislation. Rather, anytime the Court looks to any marker of societal norms to answer only one of the three Fourth Amendment questions, there is an analogous potential for mismatch between the Fourth Amendment regulatory scheme and the preferences of those responsible for articulating the external referent. For example, one test for determining whether a Fourth Amendment search has occurred is whether the government has physically intruded into a constitutionally protected area to gather information.<sup>68</sup> The common law tort principles upon which the Court might draw to determine whether such an “intrusion” has occurred can offer a general sense of the kinds of interests

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66. *See id.* at 1161 (citing *Virginia v. Moore*, 553 U.S. 164, 174 (2008) (arguing that constitutionalizing state law could lead states to “abandon restrictions on arrest altogether.”)).

67. *See Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

68. *United States v. Jones*, 565 U.S. 400, 406 n.3 (2012).

society deems worthy of protection.<sup>69</sup> Nonetheless, deciding that government conduct constitutes a trespass cannot offer insight into whether those who developed the common law principles at issue would have favored the use of a warrant to justify the intrusion or the use of the exclusionary rule as a remedy for doing so without one. In fact, it is certain that the judges who formulated common law trespass principles did not contemplate the possibility of exclusion of reliable evidence of guilt in criminal trials merely because the government obtained the evidence illegally.<sup>70</sup> In other words, the distortion problem that Professor Kerr identifies (to the extent that it is a problem) is intrinsic to the complex nature of Fourth Amendment decision-making in general, not a particular problem with using legislation as a guide to societal values.

Professor Kerr's assessment of the federalism problem is also overly dire. Theoretically, the fact that state legislators cannot bind the federal government does create some uncertainty about the discernable signal from state-level investigative legislation. Maybe state legislators passing investigative legislation act with the belief that the conduct they are regulating implicates significant privacy concerns that require restrictions on government action, or maybe they simply believe institutional advantages at the federal level suggest the federal government should have a monopoly on the use of the investigative techniques in question.<sup>71</sup> Nonetheless, in most instances in which state and local governments pass investigative legislation, those responsible for it are likely concerned with the general balance between individual rights and the public interest in societal security, rather than with ensuring that only actors at a higher level of government engage in the conduct at issue without restriction. In fact, Professor Kerr's own analysis may inadvertently reveal his skepticism of some aspects of his argument. In discussing the conceptual difficulty of discerning legislative intent, he notes:

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69. *See id.* at 418 (Alito, J., concurring) (“Ironically, the Court has chosen to decide this case based on 18th-century tort law.”).

70. The Supreme Court adopted the exclusionary rule for federal cases in the early twentieth century. *See Weeks v. United States*, 232 U.S. 383, 398 (1914). The Court determined that the exclusionary remedy would apply in state prosecutions in 1961. *See Mapp v. Ohio*, 367 U.S. 643, 657 (1961). At the time of the framing of the Fourth Amendment and for over a century afterward, tort law remedies were the only remedies anyone supposed would be available for Fourth Amendment violations. *See, e.g., Akhil Reed Amar, Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 786 (1994).

71. *See Kerr, supra* note 1, at 1145–46.

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.<sup>72</sup>

Professor Kerr's suspicion that most state legislators would not be capable of fully grasping the question should also lead him to question the notion that legislators are likely making judgments only about the relative advantages of federal and state law enforcement agencies, rather than about the general balance of privacy and security interests, when they pass investigative legislation.<sup>73</sup>

I believe Professor Kerr's description of the necessity problem also overstates the difficulty of distinguishing the legislative signal from irrelevant noise. Again, part of the problem with Professor Kerr's argument here is that he presents a false dichotomy: either a statute represents a legislative demand for privacy, or it represents the legislature's expectation that the courts would stay out of the matter at issue.<sup>74</sup> Instead, as I have suggested, investigative legislation might reflect both a demand for privacy and a belief that courts are unlikely to apply the Fourth Amendment to the conduct in question. Even under these circumstances, courts might identify values relevant to constitutional interpretation in the legislative scheme.

Overall, Professor Kerr is simply too willing to throw in the towel in the face of any obstacle to interpreting legislative action or inaction. Professor Kerr's observation that a legislature's failure to pass legislation in

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72. *Id.* at 1147.

73. Of course, the federalism problem, to the extent that it is a serious problem, is not limited to the Fourth Amendment context. For example, in theory, one might conclude that a state legislature's prohibition of the execution of juveniles reflects not a general determination that such a practice is morally abhorrent, but, rather, that only the federal government, with its institutional advantages in investigating and prosecuting crime and in administering punishments, should have the authority to execute children. In this context as well, however, there are reasons to be skeptical of the idea that such a statutory directive reflects primarily a concern with the comparative institutional advantages of different levels of government.

74. Kerr, *supra* note 1, at 1149.

a given realm might reflect either a determination that privacy interests in that realm are unimportant or an acknowledgement that statutory protection is unnecessary in light of existing Fourth Amendment protection is certainly accurate.<sup>75</sup> Nonetheless, in many cases the legislature's signal should be fairly easy to identify. In Professor Kerr's example of the absence of statutory requirements of warrants to enter homes,<sup>76</sup> for example, it should be perfectly clear that legislative inaction is not a signal that society places little value on privacy within the home, but merely a reflection of the legislature's awareness of Fourth Amendment precedent on the issue.<sup>77</sup> Of course, less straightforward cases will arise, and sometimes courts will have to make difficult judgments. This is not, however, a reason to abandon reference to legislation (or its absence) in Fourth Amendment interpretation altogether. In the case of the absence of statutory protection, for example, when there is no clear Fourth Amendment precedent on the issue, one might examine whether law enforcement agencies regularly engage in the conduct in question. If they do not, then one might reasonably conclude the absence of legislation is not a signal that society believes the conduct implicates no significant privacy interest. Rather, it would reflect a determination that it is unnecessary to create solutions for nonexistent problems. If, on the other hand, law enforcement personnel regularly engage in the challenged conduct, then the absence of statutory regulation might reasonably indicate the legislature thought the privacy interests at stake to be minimal. One exception to this would be issues involving emerging technology, where the legislature might not have had adequate time to absorb the implications of the technology's use and to react accordingly.<sup>78</sup> The overall point, though, is that

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75. *See id.* at 1147.

76. *Id.*

77. *See supra* note 35 and surrounding text.

78. *See* Richard M. Re, *The Positive Law Floor*, 129 HARV. L. REV. F. 313, 327 (2016) ("The new technology might simply be too rare, obscure, or ill-understood to warrant any kind of opinion. And lawmakers may have other priorities that command their attention, creating a regulatory lag. As a result, a lack of regulation directed toward a new technology is not reliable evidence that lawmakers or the public have condoned the technology's use."). One might argue that this caveat suggests that my proposal contains a hidden normative agenda. If legislatures have acted to provide statutory protection during a time of technological flux, such action could provide some evidence that society deems the privacy interests at stake to be worthy of protection, weighing in favor of Fourth Amendment protection. On the other hand, the absence of statutory protection against new technologies would

taking careful account of context will often solve Professor Kerr's necessity problem.<sup>79</sup>

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demonstrate nothing. Thus, one might argue, these precepts act like a ratchet, favoring more Fourth Amendment protection or providing no useful evidence, but never weighing against Fourth Amendment protection in the case of new technologies. Courts could minimize this tendency, however, by exercising caution about extending Fourth Amendment protection when the use of the technology at issue and societal responses to it have not yet stabilized. Once that stabilization has occurred, an absence of statutory protection would often provide true evidence that society places a low value on the asserted privacy interest and would militate against Fourth Amendment protection.

79. Again, difficult cases testing the boundaries of these principles will arise. Consider the example of cell-site simulators. Some police departments began using these devices a little over a decade ago, and it appears that police departments in a significant number of states now rely on them. *See Stingray Tracking Devices: Who's Got Them?*, AM. C. L. UNION (Mar. 2018), <https://www.aclu.org/issues/privacy-technology/surveillance-technologies/stingray-tracking-devices-whos-got-them>. A few courts have addressed the Fourth Amendment implications of police use of cell-site simulators, but most have not. *See, e.g.*, *State v. Andrews*, 134 A.3d 324, 357 n. 20 (Md. Ct. Spec. App. 2016) (finding that use of a cell-site simulator constitutes a Fourth Amendment search); *People v. Gordon*, 68 N.Y.S.3d 306, 311 (N.Y. Sup. Ct. 2017) (same). Likewise, only a few legislatures have reacted to the use of this investigative tool. *See* CAL. PENAL CODE § 1546.1 (West 2017); MINN. STAT. ANN. § 626A.42 (West 2017); UTAH CODE ANN. § 77-23c-102 (West 2017); VA. CODE ANN. § 19.2-70.3 (West 2017); WASH. REV. CODE ANN. § 9.73.260 (West 2017). How should a court interpret this legislative landscape? On the one hand, I have suggested that legislative inaction in the face of widespread police use of an investigative technique can be some evidence that society places little value on the asserted privacy interest. On the other hand, I have asserted that new technologies are an exception to this idea. Interpreting the lack of widespread statutory protection against cell-site simulators requires answers to several related empirical questions: 1) Just how widespread is police use of cell-site simulators?; 2) If the use of cell-site simulators can be characterized as widespread today, for how long has that been the case?; 3) If the use of cell-site simulators can be characterized as widespread, has the technique entered the popular (and legislative) consciousness, such that a failure to react to their widespread use could be characterized as evidence that society believes the technique raises no significant privacy concerns? Answering these questions is difficult because the use of cell-site simulators by law enforcement has been "shrouded in secrecy," and federal and local law enforcement agencies have attempted to "conceal their use from public scrutiny." *Stingray Tracking Devices*,

## II. IMPLEMENTATION QUESTIONS

Professor Kerr identifies several important questions courts must answer if they are committed to implementing the influence approach in a principled manner. First, Professor Kerr observes that courts have not adopted or articulated consistent standards for determining the combination of legislation sufficient to trigger the influence approach.<sup>80</sup> As a consequence, courts interpreting the Fourth Amendment have invoked investigative legislation in unpredictable and contradictory ways.<sup>81</sup> For example, in assessing the applicability of the Fourth Amendment to government collection of historical cell-site location information (CSLI), the Northern District of California referred to six state statutes requiring warrants for its collection and six additional state statutes requiring warrants for real-time cell phone tracking in support of its conclusion that CSLI collection is a Fourth Amendment search.<sup>82</sup> In contrast, in *United States v. Carpenter*, the Sixth Circuit relied in part on Congress' determination that the government may obtain CSLI with less than probable cause in deciding that procuring CSLI from an individual's wireless carrier does not constitute a Fourth Amendment search.<sup>83</sup> In fact, courts have wavered not only with regard to the question of how to apply the influence approach, but whether to apply it at all. The Supreme Court itself has sometimes purported to follow the influence approach, but on other occasions it has rejected that approach in

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AM. C. L. UNION (Mar. 2018), <https://www.aclu.org/issues/privacy-technology/surveillance-technologies/stingray-tracking-devices>. Perhaps the very fact that it is difficult to know how extensively law enforcement use cell-site simulators should lead courts to discount the lack of widespread statutory protection. The point, however, is that tracking the frequency of government use of an investigative technique and the extent to which that technique has become broadly understood by society and its representatives can be difficult empirical questions. Likewise, determining the amount of time within which one should reasonably expect a concerned legislature to respond to such a technique can require a difficult judgment call. This is not, however, a reason to conclude that legislation (or the lack thereof) provides no useful insight into societal values relevant to Fourth Amendment analysis.

80. Kerr, *supra* note 1, at 1121, 1149.

81. See Kerr, *supra* note 1, at 1128 (citing *In re Application for Tel. Info Needed for a Criminal Investigation*, 119 F. Supp. 3d 1011 (N.D. Cal. 2015)).

82. *Id.*

83. See *id.* (citing *United States v. Carpenter*, 819 F. 3d 880 (6th Cir. 2016)).

favor of independence.<sup>84</sup> Professor Kerr is certainly correct that in the absence of consistent standards for assessing the legislative landscape, reliance on investigative statutes to interpret the Fourth Amendment can look more like picking out one's friends from a crowd than principled jurisprudence.<sup>85</sup>

As I will explain in more detail below, I believe the general approach to reliance on investigative legislation in Fourth Amendment interpretation should entail its use only in marshaling evidence of broad national consensus. Nonetheless, one must answer multiple additional questions in determining how to assess the existence of such consensus. For example, should courts treat all state legislatures equally, or should they give more weight to a statute promulgated in a state with a larger population than to one from a smaller state?<sup>86</sup> How much weight should be given to a federal statute?<sup>87</sup> How much weight should courts afford local ordinances?<sup>88</sup> Should courts take account of a recent trend in legislation in assessing its significance?<sup>89</sup>

The Supreme Court has attempted to address some of these questions in other constitutional contexts, and one might borrow from its approach in those other realms.<sup>90</sup> The Court has also already offered its perspective on recent trends in its Fourth Amendment jurisprudence. In *Mapp v. Ohio*, the Court found the recent trend among states adopting the exclusionary rule worth noting in support of its analysis.<sup>91</sup> Likewise, in *Payton v. New York*, the Court found the decline in the previous decade in the number of states

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84. Compare, e.g., *Virginia v. Moore*, 553 U.S. 164 (2008) (independence), and *California v. Greenwood*, 486 U.S. 35 (1988) (independence), with *United States v. Watson*, 423 U.S. 411 (1976) (influence).

85. Kerr, *supra* note 1, at 1140.

86. See *id.* at 1151.

87. *Id.*

88. *Id.*

89. *Id.*

90. For example, in *Atkins v. Virginia*, in determining the Eighth Amendment status of capital punishment of the mentally retarded, both Justice Stevens' majority opinion and Justice Scalia's dissent counted states without giving extra weight to those with greater populations, and Justice Scalia's opinion dismissed the idea of doing so as "quite absurd." 536 U.S. 304, 313–15, 346 (2002).

91. 367 U.S. 643, 651 (1961) ("While in 1949, prior to the *Wolf* case, almost two-thirds of the States were opposed to the use of the exclusionary rule, now, despite the *Wolf* case, more than half of those since passing upon it, by their own legislative or judicial decision, have wholly or partly adopted or adhered to the Weeks rule.").

permitting warrantless arrest in the home to be relevant to its determination that an arrest warrant would generally be required for arrests in the suspect's home.<sup>92</sup> Of course, the Court has not always articulated principled bases for its approaches to these issues,<sup>93</sup> and it has failed to grapple with others in any significant way. Although it is beyond the scope of this article to offer precise answers to all of these questions, Professor Kerr is certainly correct that it would be useful for the Court to develop a taxonomy for evaluating these various indicia of public attitudes.<sup>94</sup>

Even so, Professor Kerr mildly overstates the inconsistency of the Court's approach to investigative legislation in its Fourth Amendment cases.<sup>95</sup> He implies that cases like *Virginia v. Moore* and *California v. Greenwood*, in which the Court declared the insignificance of state law to Fourth Amendment interpretation,<sup>96</sup> are inconsistent with cases like *United States v. Watson*,<sup>97</sup> in which the Court relied on federal and state statutes permitting warrantless felony arrests in public to conclude that the practice comported with Fourth Amendment requirements.<sup>98</sup> Yet, as I pointed out in a recent article, cases like *Moore* and *Greenwood* are distinguishable from the cases in which the Court has given some weight to investigative legislation.<sup>99</sup> In both *Moore* and *Greenwood*, the Court rejected the idea that the law of a single state could alter the meaning of the Fourth Amendment in that state.<sup>100</sup> This is eminently sensible in light of the interest in Fourth

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92. 445 U.S. 573, 599 (1980) (“But these current figures reflect a significant decline during the last decade in the number of States permitting warrantless entries for arrest”).

93. See, e.g., Amar & Amar, *supra* note 50 (asserting that Justice Scalia's claim that it would be “absurd” to take account of State populations in assessing legislation for Eighth Amendment purposes lacked sufficient reasoning and was itself absurd).

94. See Kerr, *supra* note 1, at 1121.

95. *Id.* at 1152.

96. *Virginia v. Moore*, 553 U.S. 164, 166–67 (2008); *California v. Greenwood*, 486 U.S. 35, 44 (1988).

97. 423 U.S. 411 (1976).

98. See Kerr, *supra* note 1, at 1125–26, 1132–34.

99. See Nicholas A. Kahn-Fogel, *An Examination of the Coherence of Fourth Amendment Jurisprudence*, 26 CORNELL J. L. & PUB. POL'Y 275, 326–329 (2016).

100. *Moore*, 553 U.S. at 172 (“[W]hether or not a search is reasonable within the meaning of the Fourth Amendment,’ we said, has never ‘depend[ed] on

Amendment uniformity,<sup>101</sup> and in light of the perverse disincentive to offering any statutory protection at all that could result from giving constitutional effect to a single state's investigative legislation.<sup>102</sup> On the other hand, in *Watson* and some other cases,<sup>103</sup> the Court has taken account of broad trends from numerous states, though it has not always given weight even to nationwide consensus.<sup>104</sup>

Professor Kerr notes that a final problem with implementation of the influence approach is the question of whether it applies to each of the three stages of Fourth Amendment analysis, to some combination of them, or only to one of them.<sup>105</sup> He asserts that if courts pick and choose, rather than applying the approach at all three stages to “constitutionalize the entire

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the law of the particular State in which the search occurs.”) (quoting *Greenwood*, 486 U.S. at 43).

101. *But see* William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1862 (2016) (arguing that “the degree of nonuniformity that would result under the positive law model is easy to overstate.”); Daniel B. Yeager, *Search and Seizure and the Positive Law: Expectations of Privacy Outside the Fourth Amendment*, 84 J. CRIM. L. & CRIMINOLOGY 249 (1993) (“Given, however, that all states have nearly identical laws of abandonment and trespass, and deal daily with issues of contract and statutory interpretation, the threat of widespread state-by-state discrepancies is chimerical.”).

102. *See, e.g., Moore*, 553 U.S. at 174.

103. *See, e.g., Missouri v. McNeely*, 133 S. Ct. 1552, 1566 n.9 (2013) (finding it “notable” that most states either placed significant restrictions on non-consensual blood testing or prohibited the practice entirely in support of conclusion that the threat of loss of evidence because the body metabolizes alcohol did not support a per se exception to the warrant requirement); *Maryland v. King*, 133 S. Ct. 1958, 1968 (2013) (finding it significant that most States and the federal government permitted DNA testing of some arrestees in upholding a law that authorized the practice); *Atwater v. City of Lago Vista*, 532 U.S. 318, 340, 344 (2001) (observing that all 50 States and the District of Columbia allowed warrantless arrests for misdemeanor offenses other than breaches of the peace in support of its conclusion that a rule against the practice had not become “woven . . . into the fabric of American law” after the founding era).

104. *See, e.g., Samson v. California*, 547 U.S. 843, 863 (2006) (Stevens, J., dissenting) (noting that “[w]ith only one or two arguable exceptions,” neither the federal government nor the States subjected parolees to suspicionless searches); *Id.* at 855 (finding the near uniform rejection of suspicionless searches of parolees to be of “little relevance”).

105. Kerr, *supra* note 1, at 1154.

legislative scheme wholesale,” then they must articulate a reason for doing so.<sup>106</sup> I would argue that courts should apply the influence approach only at the initial stage, the question of whether government conduct implicates the Fourth Amendment.

The reason for this is twofold. First, Supreme Court precedent expressly calls for examination of “understandings that are recognized and permitted by society” only with reference to the threshold question of whether government conduct constitutes a search.<sup>107</sup> Professor Kerr himself has recognized this in his criticism of Professor Christopher Slobogin’s proposal that courts should use positive law and opinion surveys to gauge societal views on the intrusiveness of investigative techniques in determining both the applicability of the Fourth Amendment and the manner in which such techniques should be regulated when they do implicate the Fourth Amendment.<sup>108</sup> Justice Harlan’s concurrence in *Katz v. United States*, which the Court later came to adopt, defined a Fourth Amendment search as occurring when government conduct intrudes on a person’s subjective expectation of privacy, and when society is prepared to treat that subjective expectation as reasonable.<sup>109</sup> Examination of the directives society has implemented through its elected representatives is one potential means for ascertaining societal values. The Court has never, however, evaluated societal expectations of privacy to determine how to regulate conduct it has already characterized as a search.<sup>110</sup> Thus, Supreme Court precedent alone is a compelling reason to evaluate legislation only with regard to the threshold question of what conduct the Fourth Amendment should regulate.

Second, limiting the use of legislation to the threshold question of what government conduct should be regulated by the Fourth Amendment,

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106. *Id.*

107. Orin S. Kerr, *Do We Need a New Fourth Amendment?*, 107 MICH. L. REV. 951, 960–61 (2009) (critiquing CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK* (2007)).

108. Kerr, *supra* note 107, at 961; *see also* Christopher Slobogin, *Proportionality, Privacy, and Public Opinion: A Response to Kerr and Swire*, 94 MINN. L. REV. 1588, 1606 (2010) (conceding that Kerr’s observation was “technically correct”).

109. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *see also* *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring) (noting that the “*Katz* test . . . has come to mean the test enunciated by Justice Harlan’s separate concurrence in *Katz*”).

110. Kerr, *supra* note 107, at 961.

rather than how it should be regulated and what the remedy should be for violations, preserves the independent role of the courts in interpreting the scope of constitutional rights and minimizes the risk of reducing all Fourth Amendment analysis to an exercise in circularity. One danger of the *Katz* test is that it risks turning Fourth Amendment interpretation into a popularity contest. As Professor Slobogin has conceded, looking only to societal views on the nature of privacy interests “does smack of putting search and seizure law up for a vote, which runs against the constitutional grain.”<sup>111</sup> Indeed, courts play a vital role in enforcing fundamental rights against majoritarian excesses. The judicial function in Fourth Amendment law should not be reduced to that of putting a rubber stamp on those excesses.

Looking to legislation as one means of determining whether a Fourth Amendment search has occurred need not pose a serious threat of constraining individual rights by putting search and seizure law up for a vote, even at the initial stage of analysis. First, if one treats legislation as merely one mechanism for discerning societal expectations of privacy, then majoritarian impulses cannot definitively delineate the boundaries of individual rights.<sup>112</sup> This is especially the case given that the Court’s assessment of the reasonableness of an expectation of privacy has often, in actuality, hinged on “normative assessments of the costs and benefits of subjecting a legal technique to constitutional regulation,” rather than on anything resembling a poll of the populous.<sup>113</sup> Additionally, since 2012, in addition to the *Katz* test, courts can determine whether a search has occurred with reference to a conceptually more straightforward formula: the government conducts a search whenever it intrudes into a constitutionally protected area to gather information.<sup>114</sup> Only if the application of that formula

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111. See Slobogin, *supra* note 108, at 1602 (referring to the use of surveys to gauge societal values).

112. See, e.g., Yeager, *supra* note 101, at 251 (arguing that when positive law recognizes no privacy interest, courts should use the traditional, open-ended *Katz* test to determine whether a search has occurred); see also Re, *supra* note 78, at 333 (asserting that positive law should serve as a presumptive floor for determining Fourth Amendment rights, but that in the absence of positive law protection, Fourth Amendment protection should nonetheless be available when “laws applicable to private parties are tilted toward the politically powerful or are too feeble to constrain the government’s special incentives and capabilities.”).

113. Kerr, *supra* note 107, at 961 n.14.

114. *United States v. Jones*, 565 U.S. 400, 406 n.3 (2012). This is not to suggest that applying this formula will always be straightforward. For example, in

does not lead to the conclusion that the government has conducted a search should courts resort to *Katz* at all.<sup>115</sup> On the other hand, giving legislation effect at each stage of Fourth Amendment analysis, particularly if the effect is strong, risks hinging the status of constitutional protection on the whims of the majority.

Even with regard to the question of whether government conduct constitutes a Fourth Amendment search under *Katz*, investigative legislation should not be the exclusive measure of societal values. The existence of widespread statutory regulation of an investigative technique is powerful evidence that society deems the individual interests at stake worthy of some protection. Likewise, under certain conditions, the absence of legislation can be evidence that society believes privacy interests are comparatively weak.<sup>116</sup> Nonetheless, legislation is not the only means of discerning whether society is prepared to recognize an expectation of privacy as reasonable. Courts might also examine the text and history of the Fourth Amendment, common law tort principles, ideas developed through Supreme Court precedent, or public opinion surveys, and, as suggested above, courts implementing the values reflected in some of these sources might also refer to normative principles that contradict majoritarian impulses to define the scope of the Fourth Amendment.

Of course, even if courts work out a more precise scheme for prioritizing various sources of investigative legislation inter se and in relation to other indicia of societal values, it may be impracticable to reduce the

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2013, the Court was deeply divided over the question of whether bringing a drug sniffing dog onto the defendant's curtilage constituted such an intrusion or, alternatively, whether police had an implied license to enter the curtilage briefly for that purpose. *See Florida v. Jardines*, 569 U.S. 1 (2013). Additionally, one might construe the *Jones* test itself as a putting Fourth Amendment law up for a vote, in the sense that the question of whether a "physical intrusion" has occurred seems to invite reference to positive property law. Nonetheless, as Professors Will Baude and James Stern have noted, the Court has actually applied this test with reference to a sort of Platonic conception of property law, rather than to any actual statute or case law from a specific jurisdiction. *See Baude & Stern, supra* note 101, at 1835.

115. *Jardines*, 569 U.S. at 11 ("The *Katz* reasonable-expectations test 'has been *added to*, not *substituted for*,' the traditional property-based understanding of the Fourth Amendment, and so is unnecessary to consider when the government gains evidence by physically intruding on constitutionally protected areas.") (quoting *Jones*, 565 U.S. at 409).

116. *See supra* note 78 and accompanying text.

determination of whether government conduct implicates the Fourth Amendment to a definite formula in every case. However, the principled use of investigative legislation might lead to more consistent results than are possible under what many have asserted is a rubric founded on the essentially unfettered intuition of judges tasked with ascertaining society's views of reasonableness.<sup>117</sup>

### III. LEGISLATIVE GAMESMANSHIP AND THE SOFT INFLUENCE APPROACH

Professor Kerr's final critique of reliance on legislation in interpreting the Fourth Amendment is that doing so risks distorting the legislative process itself, compromising the benefits of having a dual regime of both constitutional and statutory regulation of searches and seizures.<sup>118</sup> Maintaining such a dual system is desirable because, despite the obvious importance of constitutional limits on investigative conduct, legislators have more freedom to craft precisely tailored solutions than courts interpreting the Fourth Amendment.<sup>119</sup> Because legislators are not bound by text, history, and precedent, they can simply balance all relevant policy considerations to create whatever law seems optimal under the circumstances.<sup>120</sup>

Imagine, however, a regime in which courts give legislation strong effect when interpreting the Fourth Amendment.<sup>121</sup> Instead of considering only the optimal directives for regulating investigative conduct, legislators would also need to take into account the Fourth Amendment implications of any potential statutory framework.<sup>122</sup> For example, a statute that regulates an investigative technique but that provides a low bar to its use (e.g., a relevance standard for obtaining a court order) and weak remedies might be used by courts to determine that the conduct in question constitutes a Fourth

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117. See, e.g., *Jones*, 565 U.S. at 427 (Alito, J., concurring) (acknowledging that “judges are apt to confuse their own expectations of privacy with those of the hypothetical reasonable person to which the *Katz* test looks.”); *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring) (referring to *Katz* as a “self-indulgent” test and claiming that the expectations of privacy society is prepared to recognize as reasonable “bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable.”).

118. Kerr, *supra* note 1, at 1160–61.

119. *Id.* at 1158–59.

120. *Id.*

121. See *id.* at 1160.

122. See *id.* at 1160–62.

Amendment search.<sup>123</sup> And if courts then use independent analysis to apply the presumptive Fourth Amendment requirements of probable cause and a warrant, the result will be a regulatory landscape very different from what legislators imagined when they first set out to regulate.<sup>124</sup> The possibility that passing any law that regulates investigative conduct could lead to constitutionalization of the interests at stake and that the constitutional framework might be quite different from the scheme the legislature had in mind could be a powerful incentive not to legislate at all.<sup>125</sup>

With regard to the displacement approach, legislators interested in maximizing privacy rights would have an incentive not to enact any statutes because doing so would be a rational means of inviting courts to apply Fourth Amendment protection.<sup>126</sup> On the other hand, lawmakers who favor giving law enforcement agencies relatively free rein would have an incentive to pass laws just strong enough to trigger displacement, but less protective of privacy interests than the Fourth Amendment would presumably provide.<sup>127</sup> Professor Kerr observes that an influence or displacement model also impacts executive decision-making, given the executive's dual function in approving legislation and prosecuting crime.<sup>128</sup> In short, both the executive and legislative branches would, in considering possible legislation, be likely to engage in gamesmanship based on the potential implications for constitutional law, instead of simply focusing on an ideal statutory framework for regulating investigative conduct.

Professor Kerr's incisive critique should give serious pause to any advocate of a strong influence or displacement model. Nonetheless, Professor Kerr's assertion that even a softer version of influence or displacement would create "considerable uncertainty" is unduly pessimistic.<sup>129</sup> Imagine a regime in which a statute from a single state would

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123. *See id.* at 1160.

124. *See id.* at 1160–61.

125. *See id.* at 1161.

126. *See id.*

127. *See id.*

128. *See id.* at 1162–64.

129. *Id.* at 1160. In an earlier article, Professor Kerr argued that positive law can serve as a useful guide to the reasonableness of government conduct in some cases, but that it should not be a universal model. *See* Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 532–34 (2007). Although Professor Kerr's discussion of positive law in that article included sources other than investigative legislation, his earlier argument that positive law might sometimes be

never be sufficient to trigger the Fourth Amendment. This would be the case under a rubric in which legislation would be insufficient to indicate society's willingness to treat an expectation of privacy as reasonable unless there were a combination of statutes suggesting nationwide consensus on the importance of the privacy interests at stake. Under this approach, a single statute's effect on the Fourth Amendment (with the possible exception of a federal statute) would be so attenuated that it would be difficult to imagine legislators giving any consideration to the constitutional implications of investigative legislation.

Of course, it is conceptually possible that a state legislator might wonder whether passing proposed investigative legislation in her state could tip the national balance toward a judicial finding of consensus on the topic at hand, but it seems as unlikely in this situation as in analogous constitutional contexts. Such a model would be consistent with the Court's approach to Eighth Amendment decision-making.<sup>130</sup> In the Eighth Amendment context as well, one could imagine a state legislator who would otherwise be willing to experiment with a statute prohibiting some species of punishment, but reluctant to do so on the grounds that the law might be marshaled, along with other laws from other states, in support of a finding of national consensus on standards of decency regarding punishment, thus depriving the legislature of the chance to change course. There too, however, such calculus seems unlikely. Likewise, in theory, a legislator considering a bill regarding sexual autonomy (e.g., the legalization of prostitution) or assisted suicide might, in theory, think twice based on the possibility that the law might one day be used as evidence that the right is deeply rooted in the nation's history and tradition, supporting a substantive due process claim and wresting the choice of how to regulate the issue from legislative control. That possibility seems remote as well.

This proposed model would also be consistent with the Supreme Court's demonstrated willingness, on occasion, to evaluate the statutory landscape in search of nationwide consensus in the Fourth Amendment context.<sup>131</sup> Additionally, this approach would advance the interest in having the Fourth Amendment apply uniformly; statutory protection in one state against a given category of investigative conduct would not lead to the applicability of the Fourth Amendment to that conduct only in that state, but

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useful in Fourth Amendment decision-making may nonetheless be in some tension with his more recent rejection of even a soft influence approach.

130. See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 312 (2002).

131. See *supra* notes 103–104 and accompanying text.

not in other states if their legislatures chose to leave the same conduct unregulated. And, of course, this model's focus would be consistent with the "society" to which *Katz* seems naturally to refer—the nation as a whole.<sup>132</sup>

#### CONCLUSION

At times in his article it seems that, for Professor Kerr, the relevant inquiry in determining the advisability of an approach to constitutional interpretation is whether it is susceptible to manipulation. I believe that is the wrong question. Instead, the utility of a framework depends on whether it is capable of being applied in a principled way and whether it is feasible to identify instances of manipulation when they occur. Because it is possible for courts to make principled reference to legislation to determine broad national consensus on whether an expectation of privacy is reasonable, I believe such a technique can be useful. The approach has the added benefit of consistency with both Fourth Amendment precedent and other areas of constitutional interpretation. Professor Kerr is right to point out the need to develop standards for implementing this model, and he identifies many relevant questions courts must answer if they hope to use the model in a consistent manner. Even if they do so, however, Fourth Amendment decision-making will remain a complex endeavor, even at the initial stage of identifying the conduct to which it applies. Legislation is not the only indicium of societal norms, and *Katz* is no longer the exclusive test of what constitutes a Fourth Amendment search. As Professor Kerr acknowledges in his defense of the independence approach, "[t]he Fourth Amendment is not mathematics."<sup>133</sup> Be that as it may, courts can use legislation to forge a more predictable, principled Fourth Amendment jurisprudence.

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132. See, e.g., *Florida v. Riley*, 488 U.S. 445, 450 (1989) (plurality opinion) (noting that private and commercial helicopter flights in public airways are "routine in this country" in concluding that defendant had no reasonable expectation of privacy against observation of his curtilage from a helicopter flying 400 feet above the property).

133. Kerr, *supra* note 1, at 1157.