tance of various types of evidence, as indicated by its substantial reliance on supervisors' and a magistrate's approval, and to introduce a new, more objective mode of analysis akin to a rational basis test for qualified immunity. *Messerschmidt* therefore will certainly have an influence — perhaps a deciding one — on the outcomes of many future qualified immunity cases.

3. Search and GPS Surveillance. — The Fourth Amendment prohibits "unreasonable searches,"[1] but the Supreme Court has struggled to craft a doctrine that adequately protects that right, guides lower courts, and applies flexibly in novel situations.[2] Justice Harlan's test from *Katz v. United States*,[3] defining a "search" as government conduct that violates a "reasonable expectation of privacy,"[4] has predominated for over four decades. However, commentators roundly criticize that test and yearn for a reinvigorated doctrine.[5] Last Term, in *United States v. Jones*,[6] the Supreme Court held that attaching a Global Positioning System (GPS) device to a car and tracking its movements for a month is a Fourth Amendment "search."[7] Justice Alito's concurrence reached this conclusion under *Katz*,[8] but Justice Scalia's majority opinion applied a test based on physical trespass.[9] Prudent opinions in this context should balance judicial minimalism with incremental doctrinal reform and the accretion of surplus reasons. On these terms, Justice Scalia's majority and Justice Alito's concurrence are too minimalist and insufficiently generative. Justice Sotomayor's separate concurrence does best. Striving for a minimalist holding, Justice Sotomayor also reflects expansively in dicta on *Katz*, offering ideas for reform and preserving a full doctrinal toolkit for posterity.

In 2004, a police task force grew suspicious that Antoine Jones, the proprietor of a District of Columbia nightclub, was trafficking in narcotics.[10] After an investigation using traditional techniques, officers obtained a warrant from a federal district court to use a GPS electron-

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1 U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

2 *See* Richard H. Fallon, Jr., *The Supreme Court, 1996 Term — Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 57–58 (1997) (arguing that "[a] crucial mission of the Court is to *implement* the Constitution successfully," in addition to finding its "meaning," *id.* at 57).

3 389 U.S. 347 (1967).

4 *Id.* at 360 (Harlan, J., concurring). The *Katz* test requires both (1) an actual, subjective expectation of privacy, and (2) an objective expectation recognized as reasonable by society. Smith v. Maryland, 442 U.S. 735, 740 (1979).

5 *See, e.g.*, Peter P. Swire, Katz *Is Dead. Long Live* Katz., 102 MICH. L. REV. 904, 923 (2004) (arguing that the Court should "create a new life for *Katz*" to address new technologies).

6 132 S. Ct. 945 (2012).

7 *Id.* at 949.

8 *Id.* at 962–64 (Alito, J., concurring in the judgment).

9 *Id.* at 949 (majority opinion).

10 *Id.* at 948. The joint task force included both federal and District of Columbia officers. *Id.*

ic tracking device on the Jeep Grand Cherokee that Jones drove.[11] The warrant required that the GPS device be installed within ten days and within the District of Columbia, but the officers installed the device a day late and in Maryland.[12] Officers used the GPS device to monitor the Jeep's movements for twenty-eight days and tie Jones to a Maryland stash house.[13] Based on this evidence, the government arrested Jones in October 2005 and seized cash and cocaine from the house.[14] The government charged Jones with "conspiracy to distribute and possess" controlled substances.[15]

Jones moved to suppress the GPS data.[16] The District Court for the District of Columbia declined to suppress data obtained while the Jeep was outside of Jones's home, finding that *United States v. Knotts*[17] controlled.[18] In *Knotts*, the Supreme Court held that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements," and that tracking such a person with a "beeper" device is therefore not a search.[19] The district court suppressed only data obtained while the Jeep was in Jones's garage, finding that *United States v. Karo*[20] controlled.[21] In *Karo*, the Supreme Court held that using a "beeper" to track movement in the home is a search due to heightened privacy expectations.[22] Based on the unsuppressed data,[23] a jury convicted Jones in January 2008.[24]

The D.C. Circuit reversed Jones's conviction.[25] Writing for the panel, Judge Ginsburg[26] held that "tracking [Jones's] movements 24 hours a day for four weeks with a GPS device" was an unreasonable search.[27] All parties agreed that *Katz* would govern the case.[28] Judge Ginsburg found long-term GPS tracking to be an issue of first impression because *Knotts* addressed only "movements during a *discrete*

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[11] *Id.* The Jeep was registered in the name of Jones's wife, but Jones was the "exclusive driver." United States v. Maynard, 615 F.3d 544, 555 n.* (D.C. Cir. 2010).

[12] *Jones*, 132 S. Ct. at 948.

[13] *Id.* at 948–49.

[14] United States v. Jones, 451 F. Supp. 2d 71, 74 (D.D.C. 2006).

[15] *Jones*, 132 S. Ct. at 948. Jones was charged with violating 21 U.S.C. §§ 841 and 846. *Id.*

[16] *Jones*, 451 F. Supp. 2d at 87.

[17] 460 U.S. 276 (1983).

[18] *Jones*, 451 F. Supp. 2d at 88.

[19] *Id.* (quoting *Knotts*, 460 U.S. at 281) (internal quotation marks omitted).

[20] 468 U.S. 705 (1984).

[21] *Jones*, 451 F. Supp. 2d at 88.

[22] *Id.* (citing *Karo*, 468 U.S. at 715).

[23] *See* United States v. Maynard, 615 F.3d 544, 567–68 (D.C. Cir. 2010).

[24] *Id.* at 549.

[25] *Id.*

[26] Judge Ginsburg was joined by Judges Tatel and Griffith.

[27] *Maynard*, 615 F.3d at 555.

[28] *Id.*

journey"[29] and "reserved the issue of *prolonged* surveillance."[30] He then held that Jones had a reasonable expectation of privacy in his month-long aggregated movements because he had not exposed that information to the public.[31] First, Jones did not *actually* expose his movements because "the likelihood a stranger would observe all those movements is . . . essentially nil."[32] Second, Jones did not *constructively* expose his movements via discrete trips. Just as a mosaic is more than a collection of tiles, "[p]rolonged surveillance reveals types of information not revealed by short-term surveillance."[33] Because Jones had not exposed his movements, and because "society recognizes as reasonable" his expectation of privacy,[34] use of the GPS device in this case was a search.[35] Judge Ginsburg reversed Jones's conviction, concluding that the GPS data were "essential to the Government's case" and the search was therefore not harmless error.[36]

The D.C. Circuit denied the government's petition for rehearing en banc.[37] Chief Judge Sentelle dissented,[38] arguing that "[t]here is no material difference between . . . a beeper [in *Knotts*] and . . . a GPS [here],"[39] and that the panel's "mosaic" theory is flawed.[40] Judge Kavanaugh filed a separate dissent.[41] He agreed that the panel erred in its analysis of the *use* of the GPS device,[42] but he suggested that a "narrower property-based Fourth Amendment argument concerning [its] *installation*" is "important" and "deserves careful consideration."[43]

The Supreme Court affirmed.[44] Writing for the Court, Justice Scalia[45] held that "the Government's installation of a GPS device on a

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[29] *Id.* at 556 (emphasis added).

[30] *Id.* at 558 (emphasis added). *See generally* Recent Case, 124 HARV. L. REV. 827 (2011) (criticizing the *Maynard* court for distinguishing *Knotts*).

[31] *Maynard*, 615 F.3d at 558.

[32] *Id.* at 560.

[33] *Id.* at 562; *see also* Orin Kerr, *D.C. Circuit Introduces "Mosaic Theory" of Fourth Amendment, Holds GPS Monitoring a Fourth Amendment Search*, VOLOKH CONSPIRACY (Aug. 6, 2010, 2:46 PM), http://volokh.com/2010/08/06/d-c-circuit-introduces-mosaic-theory-of-fourth-amendment-holds-gps-monitoring-a-fourth-amendment-search (criticizing "mosaic theory").

[34] *Maynard*, 615 F.3d at 564.

[35] *Id.* at 555.

[36] *Id.* at 567.

[37] United States v. Jones, 625 F.3d 766, 767 (D.C. Cir. 2010). Judges Ginsburg, Tatel, and Griffith concurred in the denial of rehearing en banc in a brief statement. *Id.*

[38] *Id.* (Sentelle, C.J., dissenting from denial of rehearing en banc). Chief Judge Sentelle was joined by Judges Henderson, Brown, and Kavanaugh.

[39] *Id.* at 768.

[40] *Id.* at 769 (reasoning that "[t]he sum of an infinite number of zero-value parts is also zero").

[41] *Id.* (Kavanaugh, J., dissenting from denial of rehearing en banc).

[42] *Id.* at 770.

[43] *Id.* (emphasis added).

[44] *Jones*, 132 S. Ct. at 954.

[45] Justice Scalia was joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Sotomayor.

target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'"[46] Justice Scalia noted that the Fourth Amendment protects property as well as privacy, and that "the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test."[47] Because "a vehicle is an 'effect'" under the Fourth Amendment,[48] physical intrusion into that constitutionally protected area in order to attach a GPS device, and subsequent use of that device to obtain information, constituted a search.[49] Justice Scalia found *Knotts* inapposite. The *Knotts* Court did not need to address the trespassory test because the government installed the beeper with the consent of the owner before Knotts purchased the effect.[50] *Jones* raised the issue squarely because Jones "possessed the Jeep at the time the Government trespassorily inserted the information-gathering device."[51] Finally, Justice Scalia argued that the trespassory test is superior because it avoids the "thorny problems" of the open-ended *Katz* inquiry and leaves unresolved the question of how much surveillance is "reasonable."[52]

Justice Sotomayor concurred.[53] She agreed with Justice Scalia's "irreducible constitutional minimum: When the Government physically invades personal property to gather information, a search occurs."[54] She argued that relying on *Katz*, instead of trespass, "erodes that longstanding protection for privacy expectations inherent in items of property."[55] She rested on the "narrower" trespassory analysis, joining Justice Scalia to form a majority.[56]

Justice Sotomayor also recognized that "physical intrusion is now unnecessary to many forms of surveillance" and suspected that "the

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[46] *Jones*, 132 S. Ct. at 949 (footnote omitted).

[47] *Id.* at 952. For support, Justice Scalia pointed to the Fourth Amendment's text, *id.* at 949 (quoting U.S. CONST. amend. IV), the use of trespassory tests in traditional case law, *id.* at 949–50 (citing Orin Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 816 (2004)), and the Court's continued protection post-*Katz* of property interests, *id.* at 950. The Fourth Amendment today "must provide *at a minimum* the degree of protection it afforded when it was adopted." *Id.* at 953.

[48] *Id.* at 949 (citing United States v. Chadwick, 433 U.S. 1, 12 (1977)). Justice Scalia denied that "*any*" technical trespass would suffice because "[t]he Fourth Amendment protects against trespassory searches only with regard to those items . . . that it enumerates." *Id.* at 953 n.8.

[49] *Id.* at 949.

[50] *Id.* at 952.

[51] *Id.* Justice Scalia noted that Jones "had at least the property rights of a bailee," and declined to "consider the Fourth Amendment significance of Jones's status" as non-owner of the Jeep because the Court of Appeals had found that status to be immaterial and the government had not raised the issue in the Supreme Court. *Id.* at 949 n.2.

[52] *Id.* at 954.

[53] *Id.* (Sotomayor, J., concurring).

[54] *Id.* at 955.

[55] *Id.*

[56] *Id.* at 957.

majority opinion's trespassory test may provide little guidance" in the future.[57] Accordingly, she offered her view that "at the very least, 'longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.'"[58] Going further than Justice Alito, she hypothesized that "even short-term monitoring" demands "particular attention": GPS surveillance provides a "wealth of detail" about intimate associations while "evad[ing] the ordinary checks [like the high cost of traditional surveillance] that constrain abusive law enforcement practices."[59] Justice Sotomayor would even "reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties," because disclosure is necessary for "mundane tasks" in "the digital age."[60]

Justice Alito concurred in the judgment.[61] He criticized the majority's trespassory test on legal grounds. Skeptical of the majority's "highly artificial" application of "18th-century tort law" to "a 21st-century surveillance technique,"[62] he noted that "early electronic surveillance cases" were "repeatedly criticized" for turning on physical trespass,[63] and concluded that *Katz* "finally did away with the old approach."[64] Justice Alito also criticized the trespassory approach on policy grounds, noting that it "attaches great significance" to a "trivial" physical intrusion and none at all to the "really important" issue of the device's "*use*."[65] Justice Alito voiced a preference for legislative solutions in an era of "dramatic technological change," but concluded that *Katz* is "[t]he best that we can do" given political inaction.[66] Applying the *Katz* test to GPS surveillance, Justice Alito would have held that, while "relatively short-term monitoring" is permissible under *Knotts*, "longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy."[67] He declined to "identify with

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[57] *Id.* at 955.

[58] *Id.* (quoting *id.* at 964 (Alito, J., concurring in the judgment)).

[59] *Id.* at 955–56.

[60] *Id.* at 957.

[61] *Id.* (Alito, J., concurring in the judgment). Justice Alito was joined by Justices Ginsburg, Breyer, and Kagan.

[62] *Id.* at 957–58. For a critique of Justice Scalia's use of the old common law in the Fourth Amendment context, see David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1743–44 (2000).

[63] *Jones*, 132 S. Ct. at 959 (Alito, J., concurring in the judgment).

[64] *Id.*; *see also id.* at 960 ("[*Katz*] held that '[t]he fact that the electronic device employed . . . did not happen to penetrate the wall of the booth can have no constitutional significance.'" (second and third alterations in original) (citation omitted) (quoting Katz v. United States, 389 U.S. 347, 353 (1967))). Justice Alito characterized *Karo* as reaffirming that "an actual trespass is neither necessary nor sufficient to establish a constitutional violation." *Id.* (emphasis omitted) (quoting United States v. Karo, 468 U.S. 705, 713 (1984)) (internal quotation marks omitted).

[65] *Id.* at 961.

[66] *Id.* at 964.

[67] *Id.*

precision the point at which the tracking of this vehicle became a search," but concluded that twenty-eight days was too many.[68]

Despite persistent calls for a major overhaul of Fourth Amendment doctrine, needed change should come through accretion, not convulsion. A prudent opinion in the Fourth Amendment search context should balance the virtues of judicial minimalism with the need to offer surplus reasons that can serve as resources for future courts. Justice Scalia's majority opinion and Justice Alito's concurrence do not meet this standard because they are too strictly minimalist and insufficiently generative of doctrinal reform. Justice Scalia's trespassory test is inapposite to modern challenges and Justice Alito's concurrence provides no guidance for future cases. Justice Sotomayor's concurrence does best by holding narrowly, reflecting expansively in dicta on *Katz*, and preserving a diverse doctrinal toolkit for posterity.

Dissatisfaction with Fourth Amendment doctrine is a near-permanent condition of the academy and the judiciary.[69] *Katz* is commonly criticized for being "fuzzy" and providing little guidance[70] or for underprotecting privacy from new technologies.[71] Accordingly, some critics call for major revisions to *Katz*[72] while others would replace *Katz* entirely.[73] Recent critics identify GPS surveillance as particularly fertile ground for cultivating bold new rules for privacy protection.[74]

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[68] *Id.*

[69] *See* Coolidge v. New Hampshire, 403 U.S. 443, 490 (1971) (Harlan, J., concurring) ("[I]t is apparent that the law of search and seizure is due for an overhauling."); Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468 (1985) ("The fourth amendment is the Supreme Court's tarbaby: a mass of contradictions and obscurities."); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757–59 (1994) (calling for a return to "first principles" to remedy the "embarrassment" of Fourth Amendment case law); Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 479 (2011) (identifying the incoherence of Fourth Amendment case law).

[70] *See, e.g.*, Minnesota v. Carter, 525 U.S. 83, 91 (1998) (Scalia, J., concurring).

[71] *See, e.g.*, Morgan Cloud, *Rube Goldberg Meets the Constitution: The Supreme Court, Technology and the Fourth Amendment*, 72 MISS. L.J. 5, 28–29 (2002); Katherine J. Strandburg, *Freedom of Association in a Networked World: First Amendment Regulation of Relational Surveillance*, 49 B.C. L. REV. 741, 772 (2008).

[72] *See, e.g.*, Cloud, *supra* note 71, at 49 (calling for "a coherent, functional test for regulating modern technology"); Orin S. Kerr, *Applying the Fourth Amendment to the Internet: A General Approach*, 62 STAN. L. REV. 1005, 1006–07 (2010) ("translat[ing]" Fourth Amendment principles for use online); April A. Otterberg, Note, *GPS Tracking Technology: The Case for Revisiting* Knotts *and Shifting the Supreme Court's Theory of the Public Space Under the Fourth Amendment*, 46 B.C. L. REV. 661, 664 (2005).

[73] *See* Daniel J. Solove, *Fourth Amendment Pragmatism*, 51 B.C. L. REV. 1511, 1521 (2010) ("[T]he [*Katz*] test cannot be resuscitated."); George C. Thomas III, *Time Travel, Hovercrafts, and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451, 1500 (2005) ("The [*Katz* test] is flawed to the core.").

[74] *See* Renée McDonald Hutchins, *Tied Up in* Knotts*? GPS Technology and the Fourth Amendment*, 55 UCLA L. REV. 409, 454–65 (2007); Otterberg, *supra* note 72, at 664.

These demands for a dramatic change are misplaced insofar as they seek convulsion rather than accretion. Prudent opinions in this context should balance judicial minimalism with the surplus reasoning that generates incremental reform. Minimalism, "the phenomenon of saying no more than necessary . . . and leaving as much as possible undecided,"[75] is particularly appropriate[76] in *Jones* for two reasons. First, courts need accurate information to design new rules,[77] but courts cannot know how technological developments will affect crime, policing, privacy, and property in the decades to come.[78] Minimalism accommodates such ignorance and avoids enshrining the wrong rule,[79] leaving innovation to a more democratically legitimate and flexible legislature.[80] Second, courts need "relative consensus . . . on underlying values" to support new rules,[81] but there is deep disagreement on Fourth Amendment first principles.[82] Minimalism's "incompletely theorized agreements" help generate an outcome even absent a rule of decision.[83] Yet strict minimalism is not always appro-

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[75] Cass R. Sunstein, *The Supreme Court, 1995 Term — Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 6 (1996).

[76] Although minimalism is an influential judicial impulse, *see* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 111 (1962) (espousing the "passive virtues" of restraint), it is far from universal, *see* RONALD DWORKIN, LAW'S EMPIRE 380 (1986) (arguing for "foundational" rulings justified by "the most philosophical reaches of political theory").

[77] *See* Sunstein, *supra* note 75, at 99 ("The case for minimalism is strongest when courts lack information . . . [justifying] a comprehensive ruling.").

[78] Moreover, courts lack information about how the police use *current* GPS technologies. *See* Transcript of Oral Argument at 60, *Jones*, 132 S. Ct. 945 (No. 10-1259) (statement of Deputy Solicitor General Michael Dreeben) (announcing for the first time in his rebuttal that installations of GPS devices by federal officers for law enforcement purposes number in "the low thousands annually.").

[79] *Cf.* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 777 (1996) (Souter, J., concurring) ("In my own ignorance I have to accept . . . that 'if we had to decide today . . . what the First Amendment should mean in cyberspace, . . . we would get it fundamentally wrong.'" (quoting Lawrence Lessig, *The Path of Cyberlaw*, 104 YALE L.J. 1743, 1745 (1995))).

[80] *See* Sunstein, *supra* note 75, at 7 (arguing that minimalism respects legislatures' comparative institutional competence and democratic legitimacy); Kerr, *supra* note 47, at 809 (advocating legislative rather than judicial solutions for the challenges posed by new technologies).

[81] Fallon, *supra* note 2, at 148.

[82] *See* Ronald J. Allen & Ross M. Rosenberg, *The Fourth Amendment and the Limits of Theory: Local Versus General Theoretical Knowledge*, 72 ST. JOHN'S L. REV. 1149, 1150 (1998) ("None of the commentators agree on what the proper Fourth Amendment theory is."). Jurists disagree regarding which values the Amendment protects. *Compare Jones*, 132 S. Ct. at 949 (property), *with id.* at 955 (Sotomayor, J., concurring) (privacy). *See also* Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 104 (2008) (security). They also disagree on methodologies. *Compare* Amar, *supra* note 69, at 759 (advocating originalism and textualism), *with* Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 823–25 (1994) (criticizing Professor Amar's methodology as insensitive to modern needs).

[83] Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735 (1995); *see also* Sunstein, *supra* note 75, at 16.

priate.[84] Incremental doctrinal change[85] and common law constitutionalism[86] require that opinions leave behind more than the bare minimum of reasons.[87] They must yield a surplus. Such surplus reasons can then serve as raw resources for future courts to fashion into doctrine.[88] In sum, any judicial opinion in the Fourth Amendment context should attempt to balance these dual goals of minimalism and generative reasoning.

Both Justice Scalia's majority and Justice Alito's concurrence fall short of this balanced standard. Both are minimalist in that they say little and leave much for the future to decide. As Justice Alito observed, Justice Scalia's trespassory test rendered his majority opinion irrelevant for many modern surveillance techniques because purely electronic intrusions are not trespasses as defined in 1791.[89] As Justice Scalia noted,[90] Justice Alito's *Katz* analysis will be similarly unhelpful because it offered only a single paragraph of analysis in determining that four weeks was too long.[91] Indeed, it may intentionally provide little guidance in order to avoid this line-drawing problem altogether.[92] Together, these undertheorized opinions produce a clear outcome — that a search occurred — but no broad rationale.[93] Al-

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[84] *See* Fallon, *supra* note 2, at 60–61 (identifying "[e]xtraordinary" cases that require a "fresh reexamination of underlying 'first principles'"); Sunstein, *supra* note 83, at 1753 (recognizing that "more ambitious thinking becomes necessary" on rare occasions).

[85] *See* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 778 (1996) (Souter, J., concurring) (noting the decades-long development of the modern obscenity rule, public forum analysis, and the clear and present danger rule).

[86] *See* David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 935 (1996) (noting that common law constitutionalism "forthrightly accepts, without apology, that we depart from past understandings, and that we are often creative in interpreting the text").

[87] *See* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2067 (1994) (identifying a constitutionally required minimum number of "reasons" judges must provide to satisfy Article III's "obligation . . . to exercise 'judicial Power'" (quoting U.S. CONST. art. III, § 1)).

[88] *See id.* at 2066–67 ("[A] judge writes and publishes an opinion because she believes . . . that her reasons . . . will play some important role in a later case."); *cf.* Neal Kumar Katyal, *Judges As Advicegivers*, 50 STAN. L. REV. 1709, 1716 (1998) ("[Judicial] advicegiving [to political branches] can attain minimalism's advantage . . . while simultaneously tempering minimalism's dangerous tendency to reduce predictability and guidance."). Professor Katyal focuses on courts advising political branches, *id.* at 1710, but a similar dynamic exists among courts as well, *see* Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1253 (2006) ("[D]icta often . . . assist future courts to reach sensible, well-reasoned results.").

[89] *See Jones*, 132 S. Ct. at 962 (Alito, J., concurring in the judgment).

[90] *See id.* at 954 (majority opinion) ("[I]t remains unexplained why a 4-week investigation is 'surely' too long." (quoting *id.* at 964 (Alito, J., concurring in the judgment))).

[91] *See id.* at 964 (Alito, J., concurring in the judgment).

[92] Justice Breyer suggested that the Court avoid drawing the line, citing favorably the judicial bribery cases like *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), that merely set an outer boundary. *See* Transcript of Oral Argument, *supra* note 78, at 14–15.

[93] *See* Orin Kerr, *Why* United States v. Jones *Is Subject to So Many Different Interpretations*, VOLOKH CONSPIRACY (Jan. 30, 2012, 4:59 PM), http://www.volokh.com/2012/01/30/why-united

though such parsimony arguably comports with the strictest tenets of minimalism,[94] it does not leave future courts with enough surplus reasons to generate incremental change in the doctrine. Justice Alito gestured toward hypothetical *legislative* innovation[95] but offered no thoughts on a *judicial* role. Justice Scalia's majority may *enable* judicial innovations that establish as a constitutional floor "the degree of protection . . . afforded [in 1791],"[96] but it does not *lead the way* to such innovations. Accordingly, Justice Scalia's majority and Justice Alito's concurrence are overly minimalist and insufficiently generative.[97]

Justice Sotomayor's concurrence did best by striving for minimalism while facilitating doctrinal change. Because Justice Scalia's trespassory test "suffice[d],"[98] Justice Sotomayor joined his opinion to form a majority. However, she recognized that trespass's limited import in the digital world would restrict the opinion's usefulness,[99] and accordingly offered some surplus thoughts on the contours of a modern *Katz* inquiry. Where Justice Alito drew an outer boundary without a rule of decision and thereby limited the usefulness of his concurrence, Justice

-states-v-jones-is-subject-to-so-many-different-interpretations ("[N]ot very much is clear from the Supreme Court's decision in *United States v. Jones*.").

94 There are reasons to doubt the minimalist bona fides of each opinion. First, Justice Alito's freewheeling *Katz* inquiry, though rooted in stare decisis, may *expand* rather than *limit* judicial discretion and invite "novelty into our jurisprudence." *Jones*, 132 S. Ct. at 954. Second, although Justice Scalia purported merely to *reiterate* the trespassory test, *see id.* at 949–53, he may instead have *invented* it. *See* Kerr, *supra* note 93 ("Justice Scalia creates a new test . . . without being fully candid that he's doing something quite new."). Moreover, Justice Scalia did not specify what type of trespass or property interests count. *See* Orin Kerr, *Three Questions Raised by the Trespass Test in* United States v. Jones, THE VOLOKH CONSPIRACY (Jan. 23, 2012, 6:57 PM), http://www.volokh.com/2012/01/23/three-questions-raised-by-the-trespass-test-in-united-states-v-jones (noting different types of trespass); *Jones*, 132 S. Ct. at 949 n.2 (declining to examine Jones's property interest in the Jeep). Thus, the deceptively simple trespassory test may "export" decision costs to lower courts. *See* Sunstein, *supra* note 75, at 17.

Although there are reasons to doubt the minimalism of the two opinions, they are best understood as part of a long-running disagreement between Justices Scalia and Alito concerning what minimalism requires: applying an established, freewheeling test or a new, crisp rule. *Compare* NASA v. Nelson, 131 S. Ct. 746, 756 n.10 (2011) (Alito, J., majority opinion) (following precedent by assuming without deciding that there is a constitutional right to informational privacy), *with id.* at 765 (Scalia, J., concurring in the judgment) (finding, despite precedent, there is no such right).

95 *See Jones*, 132 S. Ct. at 962–63 (Alito, J., concurring in the judgment).

96 *Id.* at 953 (majority opinion).

97 *See* Pamela S. Karlan, *Big Brother Buys a GPS*, BOSTON REV., (Jan./Feb. 2012), http://www.bostonreview.net/BR37.1/pamela_s_karlan_supreme_court_gps.php ("We are still left wondering, how should we understand privacy in an electronic age?"); Tom Goldstein, *Why* Jones *Is Still Less of a Pro-Privacy Decision than Most Thought*, SCOTUSBLOG (Jan. 30, 2012, 10:53 AM), http://www.scotusblog.com/2012/01/why-jones-is-still-less-of-a-pro-privacy-decision-than-most-thought (arguing that the *Jones* Court did not conclude "that technological advances require . . . a new or broader conception of personal privacy").

98 *Jones*, 132 S. Ct. at 955 (Sotomayor, J., concurring).

99 *See id.* (noting that "physical intrusion is now unnecessary to many forms of surveillance").

Sotomayor made two potentially influential moves. First, Justice Sotomayor advocated reconsidering the rule that "an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties."[100] If adopted, this change would have a sweeping effect on judicial protection of modern privacy interests given the pervasiveness of third-party disclosure in online communications.[101] Second, Justice Sotomayor noted that GPS technology's falling cost and rising accuracy ease police resource constraints and increase information available via surveillance.[102] She was primarily concerned that this phenomenon will "chill associational and expressive freedoms" and alter citizen-state relations.[103] Thus, Justice Sotomayor subtly transformed privacy from an end in itself, regulated by objective expectations, to a variable to be adjusted instrumentally in order to secure essential democratic liberties. This pragmatic, instrumentalist turn is novel[104] and may have far-ranging consequences.

Justice Sotomayor's generativity lies not only in contemplating a new direction for *Katz* but also in embracing both Justice Scalia's rule and Justice Alito's standard.[105] By spanning these two positions, she opens up a new plane of doctrinal possibilities. Although Justice Scalia's trespassory test "supplies a narrower basis for decision,"[106] actively engaging with both lines of doctrine provides a wider spectrum of resources to future courts for protecting Fourth Amendment rights in specific cases. The choice between the two doctrinal paths of Justices Scalia and Alito[107] is not obvious[108] in the abstract, and both should be available for use in future cases.[109] Justice Sotomayor thus gets the best out of the two other opinions by keeping both approaches alive. Not only is privacy an instrumental variable, but so too are doctrinal

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100 *Id.* at 957.

101 *See, e.g.*, Deirdre K. Mulligan, *Reasonable Expectations in Electronic Communications: A Critical Perspective on the Electronic Communications Privacy Act*, 72 GEO. WASH. L. REV. 1557, 1562–63 (2004) (summarizing the impediments to Fourth Amendment protections online).

102 *See Jones*, 132 S. Ct. at 955–56 (Sotomayor, J., concurring).

103 *Id.* at 956.

104 *See* Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1340 (identifying the "five dominant species of legal privacy," none resembling Justice Sotomayor's).

105 Although Justice Sotomayor "join[ed]" Justice Scalia's majority, *Jones*, 132 S. Ct. at 954 (Sotomayor, J., concurring), she also "agree[d]" with Justice Alito's concurrence, *id.* at 955.

106 *Id.* at 957.

107 Although Justice Scalia denied that he would "make trespass the exclusive test," *id.* at 953 (majority opinion), his opinion is arguably part of a larger, decades-long "campaign" to reorient Fourth Amendment doctrine around eighteenth-century common law, *see* Sklansky, *supra* note 62, at 1813. His approach is thus distinct from Justice Sotomayor's ecumenical efforts.

108 *Cf.* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 777 (1996) (Souter, J., concurring) ("[The] proper choice among existing doctrinal categories is not obvious.").

109 *See* Kathleen M. Sullivan, *The Supreme Court, 1991 Term — Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 122 (1992) ("[T]here is no telling in the abstract how [rules and standards] will play out. Their dynamic becomes apparent only in context.").

tools, serving to calibrate the Fourth Amendment's guarantees to the current needs of the case and the long-term needs of the Court.

It will not be clear for some time whether Justice Sotomayor's concurrence will be a generative "mustard seed" or a fruitless "mule."[110] But her concurrence, like Justice Harlan's in *Katz*,[111] has at least the potential to become the most influential opinion from the *Jones* trio. If the Court eventually develops a doctrine that adequately implements the Fourth Amendment in an online world, it will likely follow a steady approach that respects minimalism and incrementally draws on the surplus ideas from Justice Sotomayor's concurrence in *Jones*.

C. Fifth Amendment

1. Miranda *Custody*. — "[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law," a court must "decide only the latter."[1] Last Term, the Supreme Court departed from that principle in *Howes v. Fields*.[2] Contending that he had never received the warnings prescribed by *Miranda v. Arizona*,[3] an inmate challenged the use of statements he made during a jailhouse interrogation.[4] The Supreme Court first explained that the Antiterrorism and Effective Death Penalty Act of 1996[5] (AEDPA) precluded habeas relief because the state courts' rejection of his claim was not "contrary to, or . . . an unreasonable application of, clearly established Federal law, as determined by the Supreme Court."[6] Even though that statutory holding sufficed to dispose of the case, the Court went on to hold that the use of the inmate's statements comported with *Miranda* because the inmate's interrogation was not "custodial."[7] *Fields* and other cases like it signal the Court's willingness to look past avoidance principles when interpreting the constitutional provisions governing criminal investigations and adjudications. The distinctive features of constitutional criminal procedure justify that approach.

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110 Fallon, *supra* note 2, at 127 (predicting "a period of waiting to see whether [an extraordinary case] will prove to be a 'mustard seed' or a 'mule'" (quoting Charles Fried, *The Supreme Court, 1994 Term — Foreword: Revolutions?*, 109 HARV. L. REV. 13, 45 (1995))).

111 Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

1 Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

2 132 S. Ct. 1181 (2012).

3 384 U.S. 436 (1966).

4 *Fields*, 132 S. Ct. at 1186.

5 Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code).

6 *Fields*, 132 S. Ct. at 1187 (quoting 28 U.S.C. § 2254(d)(1) (2006)).

7 *See id.* at 1189–94.