

RECORDINGS OF POLICE, ALL PUBLIC OFFICIALS
(AND LIKELY ALL OF US) IN PUBLIC AT GROUND LEVEL
AND BY DRONE “EYES IN THE SKY” — “FIRST AMENDMENT
EXCEPTIONALISM” AND THE SPECTER OF AN
ORWELLIAN AMERICA, PART II

*David A. Elder**

INTRODUCTION

Part I¹ criticized at length the “growing consensus” among appellate courts in recording-police-in-public cases. The appellate courts have improperly applied the First Amendment’s freedom of the press to invalidate almost all attempts to constrain citizen-journalists’ recordings of acts and expressions of police officers in public. These precedents, if left uncorrected, will likely extend to all public officials and private persons engaged in matters of “public concern”—an all-encompassing term without standards or boundaries. As demonstrated in Part I, the Supreme Court’s restrictive First Amendment protection for newsgathering is not consistent with the appellate courts’ ever-broadening protection of all journalists and so-called “citizen-journalists” or information-hunters or gatherers wielding a cell phone and posting on the Internet anything they deem newsworthy. This article, Part II, argues that the First Amendment does not extend to a right to record everything with “eye in the sky” drones. Expanding First Amendment protections to drone overflight is radical and asks the Supreme Court to reevaluate whether privacy remains a fundamental value, or whether the “freedom of the press” requires Americans to tolerate the escalating, omnipresent threat of overhead drone surveillance in public—and even in backyards.

* Regents Professor of Law Emeritus, Salmon P. Chase College of Law, Northern Kentucky University.

¹ David A. Elder, “First Amendment Exceptionalism” and the Specter of an Orwellian America: Recordings of Police, All Public Officials (and Likely All of Us) in Public at Ground Level, 34 GEO. MASON U. CIV. RTS. L.J. 1 (2024) [hereinafter Elder, Part I].

The issue remains as to whether any right to record police in public, whatever its status at ground level, applies to a drone hovering 150 feet overhead and recording police while they respond to and investigate even routine events, such as a multiple vehicle accident. Faced with these facts, the district court in *Rivera v. Foley* held there was no clearly established right to record police in public, and even if such a right existed, it was limited to ground-level recordings and did not apply when a drone operator “effectively trespass[es] onto an active crime scene.”² The drone flying overhead provided “arguable reasonable suspicion that Plaintiff was interfering with police activity.”³ The cases cited in support of a right to record involved only photography or videography without any such interference with the police action in question.⁴

One eminent constitutional scholar indicates it is unclear why such a drone-overflight-surveillance videotape is any more intrusive into a law-enforcement investigation than equivalent videotaping from either diagonally above or horizontally adjacent at ground level.⁵ Ground recording with telephoto lenses in fact occurred in *Rivera*, and was more intrusive than the drone, but was never questioned or sanctioned in any manner.⁶ Other commentators argue it is improbable that future courts would be as contemptuous as the *Rivera* court in its aerial-trespass finding. Those commentators assert there are huge benefits of drone newsgathering—e.g., cheapness, ability to access locations dangerous to humans or inaccessible to other aircraft, ability to remain in the

² *Rivera v. Foley*, Civ.Act.No. 3:14-cv-00196 (VLB), 2015 U.S. Dist. LEXIS 35639 at *25 (D. Conn. Mar. 23, 2015) [hereinafter *Rivera*].

³ *Id.* at *20 (emphases supplied) (explaining that the case involved “operation of an unusual and likely unidentifiable device into a cordoned off area at the scene of a major vehicle accident and ongoing police investigation”). This analysis is more consistent with the criteria enumerated in *Colton v. Kentucky*, 407 U.S. 104 (1972) (discussed in Elder, Part I, *supra* note 1) than the actual-interference standard relied on the precedents discussed above. *See* Elder, Part I, *supra* note 1, text accompanying notes 370–78.

⁴ *Rivera*, at *25 (first citing *Glik v. Cunniffe*, 655 F.3d 78, 86 (1st Cir. 2011)) (discussing filming from a “comfortable” distance); then citing *Am. Civ. Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 607 (7th Cir. 2012) (addressing dispersal orders for video recording absent “behavior that obstructs or interferes”).

⁵ Clay Calvert et al., *Newsgathering Takes Flight in Choppy Seas: Legal Obstacles Affecting Journalist Drone Use*, 26 FORD. INTELL. PROP. MEDIA & ENT. L. J. 535, 555 (2016) (quoting Eugene Volokh, *No Drone Surveillance of Crime Scene (Even From 150 Feet Above), Police Say*, WASH. POST: VOLOKH CONSPIRACY (Mar. 30, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/30/no-drone-surveillance-of-crime-scene-even-from-150-feet-above-police-say> [http://perma.cc/8AF9-3R9X] (“[A]t least unless a police helicopter was nearby or was likely to be nearby[.]”)).

⁶ *Id.* (quoting Matthew Shroyer, President of the Professional Society of Drone Journalists).

air for long periods, ability to carry very sensitive and sophisticated technology⁷—while ignoring that those same drone capabilities exemplify major concerns about drones’ enhanced propensities to invade privacy. The same authors also conclude that the reasonable restrictions authorized by recording-police-in-public cases create difficulties for mainstream broadcast journalism, because of the nebulousness of the standard and the deep deference likely to be accorded police in making such a reasonableness assessment.⁸ By contrast, the then-dean of the Columbia School of Journalism pointedly posed the question, “[w]hat can you use a drone for, that you can’t achieve by the other means, that really matters, that is in the public interest, and is not just for the sake of doing it?”⁹

The above pro-drone scholars give exceedingly short shrift to the apples-and-oranges distinction between recording from a fixed location and recording with mobile, fast-moving drones. Envision a swarm of circling and hovering drones operated by amateurs, media, and high-tech companies, over a major crime, accident, demonstration, or parade. While drones compete with helicopters for airspace, two or more aerial actors collide, or a drone crashes into a building.¹⁰ Broken drones and helicopters rain metal and flammable debris over the site itself and

⁷ *Id.* at 538. See also Marc Blitz et al., *Regulating Drones Under the First and Fourth Amendments*, 57 WM. & MARY L. REV. 49, 87 (2015) (asserting that Alvarez’s “logic applies with equal force” to drones overhead).

⁸ See Calvert et al., *supra* note 5, at 553–55. Examination of the cases discussed in Elder, Part I suggests the authors may overstate this deference. Elder, Part I, *supra* note 1 § III (discussing the gaps in the “growing consensus”).

⁹ Louise Roug, *Eye in the Sky*, COLUMBIA JOURNALISM REVIEW, http://archives.cjr.org/cover_story/eyes_in_the_sky (quoting Steve Coll, who also notes that drones “capture people’s anxieties and imagination and so it’s natural to get excited about taking possession of that technology for your own purposes”).

¹⁰ See Nabiha Syed & Michael Berry, *Journo-Drones: A Flight over the Legal Landscape*, 30 COMM. L. 3 (2014) (citing a drone crashing into a building in Brooklyn and falling amidst pedestrians on the sidewalk below) [hereinafter Syed & Berry]; George Cho, *Unmanned Aerial Vehicles: Emerging Policy and Regulatory Issues*, 22(2) J. OF L., INFO. & SCIENCE 201, 210–11 (2013) (discussing the “lack of a ‘detect and avoid’ system for civilian drones”); Matt Waite, *The Drone Age is Here, and So are the Lawyers*, NEIMANLAB, <http://www.neimanlab.org/2013/12/the-drone-age-is-here-and-so-are-the-lawyers/> (discussing several incidents—including a drone crashing in Manhattan and nearly colliding with someone and a drone crashing into the spectator stands of a suburban Virginia running-of-the-bulls event and emphasizes that such dangers won’t result from malicious intent: “They’ll just lose control. Or they won’t understand that the blinking red light means land now because your battery is going to die. Or the wind will pick up. Or another paparazzo will slap the controller out of their hand so their competitor doesn’t get the shot.” The author suggests it’s “a matter of time . . . until a paparazzo with no training and a drone bought off the Internet crashes into a very pretty face.”). Compare Troy Rule, *Airspace in the Age of Drones*,

any gathered observers at ground level. Chaos reigns supreme, leading to the well-documented phenomenon of a violent and potentially fatal stampede.¹¹ Thus, drones overhead are materially different from observers recording at ground level or from a fixed diagonal position, who are often physically blocked or cordoned off by the authorities. The danger posed by non-drone recorders, if it exists at all, is dramatically less direct and immediate than the severe risk posed by unconstrained drones flying overhead.

The potential physical risks—to police, other first responders, and others who will be trampled or run over in an ensuing stampede, are self-evident, indeed incontrovertible.¹² That is without considering government's other compelling interest in barring overflight access by drones and helicopters in order to effectively respond to natural disasters, terrorist attacks, or other potentially volatile or violent situations, where prompt arrival of first responder or military helicopters is critical.¹³

95 B.U. L. REV. 155, 201 (2015) (noting the “[n]umerous valuable safety features” available or in-progress that the FAA could require for drones) [hereinafter Rule, *Age of Drones*].

¹¹ See *Glasgow Realty Co. v. Metcalfe*, 482 S.W.2d 750, 751–58 (Ky. 1972) (holding that negligence in maintaining a building overlooking a public sidewalk made defendant liable where glass from a window fell and caused a stampede of people trying to avoid the falling glass and resulted in serious injury to plaintiff on the sidewalk where she had a right to be—this was a foreseeable result of negligence). See also *List of stampedes and crushes*, WIKIPEDIA, Wiki/List_human_stampedes_and_crushes (collecting a very detailed historical Wikipedia listing of “stampedes”); Tracey Hresko Pearl, *Crowd Crush: How the Law Leaves American Crowds Unprotected*, 104 KY. L. J. 1, 4–5, 45 (2015) (discussing tort liability in negligence for the “troubling, inexplicably overlooked, and growing issue” of “an unusually high number of crowd crush incidents”).

¹² Any other conclusion seems dubious, both at ground level and at overflight level, particularly as to instantaneous public disseminations in volatile situations. Compare Ashukosh Bhagwat, *Producing Speech*, 56 WM. & MARY L. REV. 1029, 1063 (2015) (concluding that “at least one of the potential harms motivating restrictions on recording police officers—concerns about physical risk in inherently dangerous situations—has no relationship to the communicative impact of the recording”) with Elder, Part I, *supra* note 1 at 65–67 (discussing the threats of instantaneous public dissemination).

¹³ One can imagine gunshots from a helicopter aimed at the unrestricted drones, or a weaponized drone crashing in a crowded park or The Mall in Washington, D.C. or at the 911 memorial in New York City, or at January 6th. This is a real problem. See Hillary B. Farber, *Keep Out! The Efficacy of Trespass, Nuisance and Privacy Torts As Applicable to Drones*, 33 GA. ST. L. REV. 349, 366, n. 22 (2017) (citing examples); Blitz et al., *supra* note 7, at 101 (citing the example of the airspace above a political march or protest, the authors acknowledge the security risks from drones colliding with a person or vehicle and FAA reluctance to authorize civil drone use in populated areas, provide as an example of sites of massive political or social demonstrations or protests, as in Ferguson, Missouri in 2014, but also suggest the value of independent data in the case of factual controversies – “even if it is unsafe to allow any and all citizens to fly [drones] over such an area, perhaps it is essential that there be at least *some* eyes in the sky not covered

These emergency responders should not be required to compete with or avoid independently operated horde of drones merely because the operators claim to be “gathering news.”

Clearly, these legitimate risks to the people below and to the authorized responders in the air justify a prohibition on non-law-enforcement and related government drones over emergency locations—and likely over other crowded spaces, including outdoor stadia or other event centers and infrastructure—posing major security concerns.¹⁴ Multiple cell-phone and comparable recorders at ground level pose no comparable risks. Add to the above the impact of buzzing, circling, and hovering drones operated by a potentially unlimited number of so-called newsgatherers. With no way to distinguish a drone used for newsgathering from one modified to cause active harm (possibly with weapons¹⁵), the collective impact on police is to both distract and

by government blinders”). They do not suggest who those eyes might be. *Id.* at 100–03 (rejecting any special First Amendment protection for journalists). *See also id.* at 129, n. 348 (conceding that drone operators “pose safety risks, not only to other aircraft but also to those below”).

¹⁴ A few state statutes prohibit drone overflight over sports venues. *See* TEX. CODE ANN. §§423.0046(a)–(d) (stating that it is a misdemeanor to intentionally or knowingly operate a drone over a sports venue with a minimum seating of 30,000 unless of one eight exceptions applies); DEL. CODE ANN. §11:1334(1)(d) (stating that it is a misdemeanor to knowingly fly a drone over any event with more than 1500 attendees, with more severe penalty where injury to person or property results); TENN. CODE ANN. §§39-13-903(a)(3), (b)(1) (stating that it is a misdemeanor to knowingly capture an image without the event owner or operator’s consent of either a person or event—or to drop any items into—an “open-air venue” with over 100 present for a ticketed event); NEV. REV. STAT. §§493.100(1)(a)–(c) (stating that it is a misdemeanor to engage in acrobatic activities, flying at low-altitude, endangering persons on the ground, or recklessly dropping objects in “a heavily populated area or over a public gathering”); TENN. CODE ANN. §§39-13-903(a)(4)(A), (b)(1) (stating that it is a misdemeanor to knowingly fly over fireworks display or discharge site). *See also* John J. Ashburn Jr., *What’s Hovering at Your Bedroom Window?*, Letter to Editor, WALL ST. J., A14 (July 11, 2016) (criticizing any suggestion for modifying current line-of-sight limitations for commercial-drone users) (“But if these rules are relaxed and drones are allowed to fly freely carrying 50-pound-plus payloads, how long would it take for some enterprising terrorists to discover this is a ready platform for delivering a bomb into a stadium or other target?”); David Von Drehle, *The Security Threat We’ve Been Ignoring: Terrorist Drones*, WASH. POST, Sept. 29, 2017, <https://www.washingtonpost.com/opinions/the-security-threat-were-ignoring-terrorist-drones/2017/09/29> (discussing proposed federal legislation, the Islamic State’s modifications of off-the-shelf drones to drop grenades, and FBI Director Christopher Wray’s expectation that such use is “coming here imminently,” with the advent of the autonomous drone that can circumvent available prevention systems, and suggesting what may come next: “[a] nearly silent, low altitude little helicopter bearing a small bomb or supply of toxic material hums over metal detectors and barriers and bodyguards to strike a public gathering or senior official or hallowed landmark”—noting the 2015 drone landing on the White House lawn).

¹⁵ Several states bar such. A few make it a felony to possess or operate a weaponized drone. *See* NEV. REV. STAT. §§493.106(1)–(2); N.C. GEN. STAT. §§14-401.24(a), (c); WIS. STAT. §941.292(2); OR.

induce anxiety and fear. The First Amendment cannot enable such a security risk and active interference with law enforcement.

Security risks are not the only risks¹⁶ posed by drones recording police officers, public officials, and likely all others involved voluntarily or involuntarily in matters of public interest. As discussed in Part I, the Supreme Court has repeatedly demonstrated concern (both in oral arguments and in its *Jones-Carpenter* jurisprudence) over the possibility of Orwellian drone surveillance. The Court's deep concerns transcend the liberal-conservative jurisprudential divide, with even the most pro-law enforcement Justices often sharing these concerns.¹⁷ It is worth emphasizing the Court's decisive rejection in *United States v. Jones* of the Obama Administration's Department of Justice's stunning argument—that there is no reasonable expectation of privacy while traveling on public streets—or, apparently, anywhere in public.¹⁸ The appellate courts that have created a near unlimited constitutional right to record police in public are hostile to these broader privacy concerns and the Court's unequivocal adoption of the “mosaic theory” in order

REV. STAT. §§837.365(1)–(2) (stating that it is a felony if the drone is fired and results in physical injury to person or property and is otherwise a misdemeanor). *See also* Margaret MacMillan, *The World That War Has Made*, WALL ST. J., Oct. 2020, at C2 (“The proliferation of relatively cheap, small weapons such as drones puts increased firepower into many dangerous hands.”). This is well-exemplified by their use by Russia and Ukraine. *See* Jillian Kay Melchior, *Drones Are Giving Ukraine a Wartime Edge*, WALL ST. J., Feb. 24, 2023, at A17 (asserting that the “humble drone” shows how “[j]ury rigged commercial drones” can take out heavy Russian equipment—what Ukrainian fighters refer to as “delivering pizza”—and direct psychological terror at Russian troops and enhance accuracy of Ukraine's artillery).

¹⁶ Wells C. Bennett, *Civilian Drones, Privacy and the Federal-State Balance*, BROOKINGS REPORT, Sept. 2014, at 11, 18, <https://www.brookings.edu/research/civilian-drones-privacy-and-the-federal-state-balance>, (explaining that the security-versus-privacy dichotomy is “often blurry” and the “dividing line between safety and privacy isn't especially neat or obvious”).

¹⁷ *See* Elder, Part I, *supra* note 1 § II.

¹⁸ *See* U.S. v. Jones, 565 U.S. 400, 404–12 (2021). *See also* Oral Arguments in *Jones* (Nov. 8, 2011), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2011/10-1259.pdf (Ginsburg, J.) (summarizing the government's argument “the government's position would mean that any of us could be monitored whenever we leave our homes. . . so, the only thing secure is the home”) (Breyer, J.) (characterizing the government's position, if it were to prevail, as “suddenly produc[ing] what sounds like 1984”) (Kagan, J.) (rejecting the argument that technology determines privacy expectations: “that seems too much to me . . . if you think about a little robotic device following you around 24 hours a day anyplace you go that's not your home, reporting on all your movements to the police, to investigative authorities, the notion that we don't have an expectation of privacy in that, the notion that we don't think our privacy interests would be violated by this robotic device, I'm not sure how one can say that”).

to avoid “shrink[age]” of privacy.¹⁹ The Court recently affirmed its determination to ensure that “the ‘progress of science’ does not erode Fourth Amendment protections” and to not “uncritically extend” old precedents to new privacy concerns precipitated by digital technology.²⁰ The Court’s concerns are not limited to governmental intrusions.²¹

More specifically, states could go beyond security and law-enforcement-effectiveness concerns (that may be content-neutral and prohibit drone overflight surveillance over first response or volatile sites) to protect personal privacy. Assume that a local state or city is concerned by the unique vantage points that drones provide and prohibits drone surveillance in emergency circumstances where a victim may be exposed (with intimate aspects of anatomy revealed) or suffering visible emotional distress (such as an accident victim whose clothes have torn off or is screaming in pain, or a relative expressing uncontrollable grief) during the period where first-responders, police, and other emergency personnel are investigating and rendering aid. The legislative pronouncement provides detailed specific criteria to ensure these and other exceedingly embarrassing or private moments are not recorded, and also specifically defines such situations as purely private matters.²² Assume such an enactment exists. Can amateur, media, and high-tech company drone operators violate the enactment and republish the footage widely? Can they claim protection under the First Amendment as to the acts of drone recording or dissemination?

¹⁹ See *Kyllo v. U.S.*, 533 U.S. 27, 34 (2001) (identifying the issue in the technological-trespass context: “what limits there are upon this power of technology to shrink the realm of guaranteed privacy”). For discussions of *Kyllo*, see *infra* text accompanying notes 391, 431–51, 570.

²⁰ *Carpenter v. U.S.*, 585 U.S. 296, 318–20 (2018) (quoting *Olmstead v. U.S.*, 277 U.S. 438, 473–74 (1928)) (Brandeis, J., dissenting).

²¹ See *infra* text accompanying notes 297–98; see also *Florida v. Jardines*, 569 U.S. 1, 6–17 (2013) (applying the same baseline-property-rights-implied-licensee-versus-trespasser criteria to government actors that would apply to nongovernmental actor like neighbors, strangers and snoops).

²² See DAVID A. ELDER, *PRIVACY TORTS*, §§ 3:6, 3:16–3:19 (2024–25 ed.) (reflecting the standards found in many but not all public-disclosure-of-private-facts cases and deemed, arguably, outside the protection of the First Amendment even where true) [hereinafter ELDER, *PRIVACY TORTS*]; see also *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (Breyer, J., concurring) (finding that the Court had not “create[d] a ‘public interest’ exception that swallows up the privacy protecting general rule” reflected in the statutes). *Id.* at 540 (Breyer, J., concurring) (concluding that even public figures do not forfeit *in toto* their privacy rights and stated that the matters before the Court were far distant from media publication of “truly private matters,” such as those involved in *Michaels v. Internet Entertainment Group Inc.*, 5 F. Supp. 2d 823, 841–42 (C.D. Cal. 1998), where the court found nothing of legitimate public concern in a video-recording of sex between two celebrities).

Four authors would apparently bar legislators from being allowed to “selectively restrict drone cameras to certain types of information in order to prevent the message they make possible.”²³ It’s doubtful that reflects the state of modern First Amendment doctrine. A state’s legislature should be able to legitimately determine that information uniquely available from a vantage point in the skies over which state governments co-exercise dual sovereignty validates the fundamental interest in personal privacy.²⁴ The above hypothetical enactment would emulate the Court’s famous Freedom of Information Act (FOIA) case of *National Archives and Records Admin. v. Favish*, involving Clinton aide decedent-Vince Foster’s family’s concern that the photographs of the graphic death scene “certainly would set off another round of intense scrutiny by the media” and “[u]ndoubtedly... be placed on the Internet for world consumption.”²⁵ The hypothetical enactment protects the justifiable privacy interest of live persons (not just the next of kin protected in *Favish*). Both would have the right to demand “their own refuge from a sensation-seeking culture for their own piece of mind and tranquility.”²⁶ This hypothetical enactment would protect people from drones, which “present an unprecedented challenge to individual privacy.”²⁷

²³ Compare Blitz et al., *supra* note 7, at n. 253 (discussing Professor Bhagwat’s right to regulate interference analysis) with *Clonmel Crash: Investigation Begins Into Use of Drone Near Site of Crash that Killed Four*, THE IRISH TIMES (2023), <https://www.irishtimes.com/ireland/2023/08/29/clonmel-crash-investigation-begins-into-use-of-drone-near-site-of-crash-that-killed-four> (discussing the drone surveillance of a crash site killing four in Clonmel, Ireland, that has precipitated a sense of national outrage for interfering with privacy rights and possibly interfering with the official investigation into the crash).

²⁴ See Laura K. Donohue, WHO OWNS THE SKIES? AD COELUM, PROPERTY RIGHTS, AND STATE SOVEREIGNTY, IN EYES TO THE SKY: PRIVACY AND COMMERCE IN THE AGE OF THE DRONE, at 24 (Matthew Feeney ed., Cato Institute, August 2021) (“The Air Commerce Act of 1926 acknowledged dual sovereignty and the rights of state governments.”). See *infra* § IV.B.2.

²⁵ 541 U.S. 157, 165–75 (2004) (applying a deferential standard of review in interpreting the exemption for what constitutes an “unwarranted invasion” of privacy).

²⁶ *Id.* at 166.

²⁷ S. Alex Spelman, *Drones: Updating the Fourth Amendment and the Technological Trespass Doctrine*, 16 NEV. L. REV. 373, 401 (2015); Farber, *supra* note 13, at 362, 370–71 (explaining their unique privacy threat—drones, “can cheaply and efficiently amass vast amounts of information about people and places . . . [as] the platform for enabling the surveillance; the on-board instruments gather, store, and transmit the data. Most [drones] are equipped with cameras with high-powered zoom lenses and photo sensors for high-resolution imagery. The more sophisticated systems offer more advanced on-board instruments, such as infrared sensors, night-vision cameras, GPS systems, wi-fi sniffers, and automated license plate readers. . . . These systems are easily operable from a ground control unit—often a smartphone or tablet. They can hover and fly in all directions. . . .

The personal privacy rights in the hypothetical are at least as important as those involved in the Court's cases where it rejected First Amendment attacks in the context of restricted release of addresses of arrestees or rap sheets in government control under state FOIA laws. In *Los Angeles Police Dept. v. United Reported Publishing Corp.*,²⁸ the four-Justice concurrence by Justice Ginsburg noted that the state statute in question—which allowed many entities to access arrestee address information but excluded those intended to use it for a commercial purpose—did not by its “selective disclosure” of such government-controlled information “impermissibly burden[] speech.”²⁹ The statute did not exclude based on impermissible standards such as viewpoint.³⁰ Justice Ginsburg responded to the argument that the regime “burdens speech in the sense of reducing the total flow of information” by stating that it is contingent on the point of comparison, because states could validly choose the option of maintaining proprietary information for themselves.³¹

In other words, disallowing selective disclosure of information in government control, including airspace, “would lead not to more speech overall but to more secrecy and less speech.”³² Accordingly, “free flow of information” might well support the state's approach “rather than imposing an all-or-nothing regime under which ‘nothing’ could be a state's easiest response.”³³ Even the dissenters agreed that

With its mounted camera, the drone can capture images and transmit video simultaneously to the ground unit. All of the data collected can be downloaded, stored, and disseminated like any other digital damage.”).

²⁸ 528 U.S. 32 (1988) (Ginsburg, J., concurring).

²⁹ Compare *id.* at 42–43 with *infra* § IV.B.1-4 (discussing the court's analyses of the federal district court's invalidation of key parts of the Texas drone statute discussed and the Fifth Circuit's reversal). See also *U.S. Dept. of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 752, 780 (1989) (allowing the government to refuse to disclose “rap sheets” synthesizing in the aggregate a person's criminal history, providing him or her “practical obscurity,” without violating the First Amendment, even though each individual informational item was available in theory as a public record available to enterprising members of the public willing to search for such). This was a variation of the Court's co-called “mosaic theory” in post-digital Fourth Amendment cases. See Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311 (2012).

³⁰ *L.A. Police Dep't*, 528 U.S. at 42–43 (Scalia, J., concurring).

³¹ *Id.* at 43. Note that judicial review of public regulation of non-public proceedings and investigations is subject to deferential review. See *Hils v. Davis*, 52 F.4th 997, 1002–04 (6th Cir. 2022) (analyzing in detail Court and other precedent according substantial discretion to governmental entities in controlling access to non-public proceedings).

³² Note this important conclusion by free-expression-protective members of the Court. Compare *L.A. Police Dep't*, 528 U.S. at 43.

³³ *L.A. Police Dep't*, 528 U.S. at 43.

the state could deny such *in toto* but found that barred access for uses the state determines are objectional invalidated the statute.³⁴ While the privacy of arrestees and victims would justify an absolute bar, access by other groups (scholars, journalists, media, politicians) “eviscerated any rational basis” for believing the statute would “truly protect” their privacy.³⁵ In light of the above Court’s FOIA cases and *Jones-Carpenter*’s adoption of the “mosaic theory”³⁶ in assessing privacy intrusions in public places, one cannot still reasonably claim that people forfeit all privacy in public areas,³⁷ at least as to such sensationalistic footage.

As Professor Richard J. Peltz-Steele has memorably concluded, scholarly exegesis and jurisprudence in several areas strongly reflect the Court’s definitive rejection of the all-or-nothing approaches to privacy that “portend a sea change”³⁸ in First Amendment doctrine. This extends co-equally to drone surveillance over private land and to drone surveillance over public properties, where many, particularly the poor, spend a great percentage of their time—or, almost all of their time, in the case of the homeless.³⁹ There is no justification for subjecting all who desire to enjoy or need to be out and about in public space to drone information-hunter-gatherers’ and newsgatherers’ unfettered claims of a right to engage in “trawl[ing] for evidence [of crime] with impunity”⁴⁰

³⁴ *Id.* at 45–48 (Stevens, J., dissenting).

³⁵ *Id.* Compare § V.B.2 (discussing the Fifth Circuit’s analyses of the Texas statute) with Elder, Part I, *supra* note 1 at 9–10 (discussing the D.C. Circuit’s analysis of *Price v. Garland*, focusing on the heightened scrutiny for statutory fee and permit requirements for commercial film-making on public land).

³⁶ See Kerr, *supra* note 29.

³⁷ This topic will be discussed further at length in David Elder, *Legal Vantage Point Absolutism, Privacy in Public, Federalism, and the Confluence of the First and Fourth Amendments* (forthcoming).

³⁸ Richard J. Peltz-Steele, *The New American Privacy*, 44 GEO. J. INT’L L. 365, 410 (2013).

³⁹ The Court has emphasized dramatically that the Fourth Amendment makes no wealth-based privacy distinctions, at least as to the home and curtilage. See, e.g., *Collins v. Virginia*, 584 U.S. 586, 600 (2018) (8-1 decision) (finding that the Fourth Amendment barred any distinction in protecting curtilage between those with “fixed, enclosed structure[s]” like garages and a partially enclosed but roofless parking area, as such would violate a cardinal principle of its jurisprudence); *U.S. v. Ross*, 456 U.S. 798, 922 (1982) (“[T]he most frail cottage in the Kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion.”). *Collins* implicitly affirmed that Fourth Amendment rights of those surveilled are not contingent on the property-owner/occupant’s duty to somehow protect themselves from fixed-wing aircraft observation or that they assume the risk of helicopter overflight, a mode of transportation limited to wealthy private individuals. See *infra* § V.B.

⁴⁰ *Florida v. Jardines*, 569 U.S. 1, 6–7 (2013).

or for anything else they deem newsworthy. The freedom of the press cannot be used to eviscerate the privacy rights of those who cannot spend their time hiding away from drones. Reasonable legislative restrictions on drone recordings must be allowed.

BACKGROUND

I. THE NEED FOR LEGISLATIVE REGULATION OF DRONE TORT LIABILITY

Some have suggested that many state statutes in the present “chaotically confused” drone legal environment are “fraught with First Amendment problems that cloud the skies” for the media.⁴¹ Such views suggest that legislatures should “avoid a rush to enact untested and possibly extreme legislative solutions” for matters resolvable under available tort doctrine.⁴² This emphasis on existing tort protection reflects the aggressive strategy of the opponents of any effective restrictions on drone use. For example, the National Conference of Commissioners on Uniform State Laws (NCCSL) Draft For Approval of 30 May, 2019—and particularly § 9 on privacy—merely incorporated state law.⁴³ The uniform act’s draft provisions reflect the ultimate success of the negotiating stance of media and high-tech companies, which believe that state privacy tort law is already designed to reflect variations in how different jurisdictions balance privacy rights and newsgathering.⁴⁴ In their view, a nationwide drone privacy law would not reflect the nuances that have evolved at the state level from deep experience in applying privacy tort standards in light of First Amendment protection for newsgathering, broadcasting, and publication. Consequently, they argue there is no justification for starting anew in developing a new

⁴¹ Calvert et al., *supra* note 5, at 539, 550. *See also* Jeffrey Koseff, *Drones: Aren't the Laws Already on the Books?* (Feb. 25, 2014), <http://iapp.org/news/a/drones-aren't-the-laws-already-on-the-books> (predicting Warren & Brandeis wouldn’t suggest novel drone-specific privacy rules but would use “the privacy principles that have been fundamental to our legal system for more than a century”). For other discussions of this adequacy argument, *see infra* text accompanying notes 42, 45, 90–91, 140.

⁴² Calvert et al., *supra* note 5, at 570; *id.* at 551 (asserting that this “legislative overkill . . . chills First Amendment freedoms”).

⁴³ *See infra* text accompanying notes 45, 47, 52, 64, 71–72, 115, 282–84, 548, 607–18, 612–14.

⁴⁴ U.S. GOV’T ACCOUNTABILITY OFF., GAO-B-330570, UNMANNED AIRCRAFT SYSTEMS: CURRENT JURISDICTIONAL, PROPERTY AND PRIVACY LEGAL ISSUES REGARDING THE COMMERCIAL AND RECREATION USE OF DRONES app. III, at 40 (Sept. 2020) [hereinafter GAO Report, 2020].

model act or new federal privacy rules that upset the existing drone-protective legal regime based on the common law.⁴⁵

Yet, the pervasive deficiencies in current tort law are apparent to all who choose to acknowledge them, of the collective state failure at the judicial level to effectively respond to the opportunity the Court has provided to develop legal rules to control newsgathering violations⁴⁶—

⁴⁵ As one commentator incisively concludes, the NCCSL uniform draft act process and parallel state efforts proposing easements over public roads have been “derailed by advocates . . . hoping Congress will one day codify federal control of all outdoor airspace.” *Id.*; see also Brent Skorup, *The Growing Controversy About Drone Trespass*, FEDSOC.ORG, <https://rtp.fedsoc.org/blog/the-growing-legal-controversy-about-drone-trespass/> [hereinafter Skorup, *Growing Legal Controversy*] (noting that “[s]trangely, industry talking points are creeping into” regulatory developments, indicating that the word “trespass” was deleted from the FAA’s 2018 statement). The coziness of the drone industry and the FAA has been noted by others. See Troy A. Rule, *Drones, Airspace, and the Sharing Economy*, at 9 (Mercatus Ctr., George Mason Univ., Working Paper, 2022) (noting that the FAA has been “a willing partner in the effort to reclassify very low airspace and thereby expand FAA jurisdiction and increase the agency’s size and relevance—changes that federal agencies characteristically tend to favor”) [hereinafter Rule, *Drones, Airspace, and the Sharing Economy*].

⁴⁶ Farber, *supra* note 13, at 379–80 (“The capability of drones, now and in the future, appears to extend beyond the reach of traditional common law torts designed to protect privacy and property rights... due in large part to a drone’s versatility to operate at lower and higher altitudes without compromising its ability to capture the quality of the imagery at ground level. Highly sophisticated sensory enhancing instruments . . . equipped to the drone’s platform make proximity to the target of the surveillance hardly relevant.”); Lyrissa Barnett Lidsky, *Prying, Spying and Lying: Intrusive Newsgathering and What the Law Should Do About It*, 73 TUL. L. REV. 173, 193–229 (1998) (noting how, among other tort law defects, intrusion-upon-seclusion’s inapplicability in public places is ineffective as to the “rather ingenious ways” reporters can gain access to private land, and the law’s failure to protect privacy in surreptitious surveillance cases like *Desnick v. American Broad. Co.*, 44 F.3d 1345, 1355 (7th Cir. 1995) and emphasizing that the Court has “created an opportunity” for more tort law restrictions on newsgathering, that states “remain relatively free to define the legal consequences of intrusive newsgathering in ways that do not give short shrift to privacy,” but have “never seized that opportunity” and adopted “crabbed interpretations”).

whether trespass-to-land,⁴⁷ nuisance,⁴⁸ intrusion-upon-seclusion,⁴⁹

⁴⁷ Farber, *supra* note 13, at 380–92 (detailing the difficulties of meeting section 159 criterion both under and above 500 feet); Lidsky, *supra* note 46, at 194–95; Memorandum from Gregory S. McNeal to Comm. Members on Introductory Issues of Tort Law Relating to Drones Act Drafters Comm., 5–8 (Nov. 9, 2017) (referring to the rule’s “absurd results in the context of drones, where a hand or a branch over a fence line will be a trespass, but a drone in the same location will not be,” and providing an example: “[c]onsider a drone hovering at 55 feet above a landowner’s property (note that the average two story house is 35 feet tall) . . . would be visible to the landowner, perhaps audible to the landowner, and likely troubling to the landowner, but based on existing precedents would likely not be actionable (or excludable from that airspace)” [hereinafter McNeal]; Rule, *Age of Drones*, *supra* note 10, at 180–97 (supporting state and local legislation and a model act to regulate drone overflight by adopting an exclusion zone of 500 feet that would replace the “costly, ad hoc, fact-specific inquiries” under the prevailing “governance” rules that apply both in trespass-to-land/nuisance-based claims, intrusion upon seclusion, and state privacy statutes focusing on surveillance, as the latter “cadre of fuzzy rules seems ill-suited” to the issues posed by drones and positing that this vertical-exclusion zone could use existing and developing geo-fencing and GPS and parallel technologies to provide “an easy and affordable way to define and enforce property rights in low-altitude airspace” while noting Amazon’s announcement that it will use geo-fencing to prevent delivery drones from moving off their intended or defined course). For a discussion of the model act, in which his well-reasoned views were, at first, very influential, see the 19 June 2018 Draft For Discussion Only, NCCSL, Prefatory Note, at 1–12. See *supra* note 43 and *infra* text accompanying notes 52, 64, 71–72, 115, 282–84, 548, 607–08, 612–14.

⁴⁸ Farber, *supra* note 13, at 395 (noting that drones are “a relatively new phenomenon distinct from conduct courts have traditionally deemed a nuisance”); accord McNeal, *supra* note 47, at 8–9 (explaining that trespass and nuisance are distinguishable only as to remedies available, as nuisance focuses as a “key factor” on whether the conduction in question is “out of character for the neighborhood”—a factor that may be of increasing importance for drafters where new neighborhoods may become areas where drone overflights might be frequent and concluding that nuisance law’s cost-benefit analysis might provide different results in cases involving commercial and recreational drone uses); Troy A. Rule, *Drone Zoning*, 95 N.C. L. REV. 133, 181 (2016) (“[J]ust as nuisance law and other general state law provisions ultimately proved inadequate on their own to govern land use conflicts in the early twentieth century, such laws will ultimately prove insufficient to govern drone use conflicts among neighbors.”).

⁴⁹ See Farber, *supra* note 13, at 402 (noting that absent change, individuals “will receive little legal recourse” from the tort); Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U.P.A. L. REV. 315, 352 (2011) (explaining that the intrusion tort provides a remedy “only against images involuntarily captured within the target’s own home or in facilities remote from the public”); Lidsky, *supra* note 46, at 203 (noting that this tort is “largely toothless in the face of an increasingly intrusive press” and a “disaster” as it “currently stands” and suggesting that section 652B is broad enough to encompass a wide swath of newsgathering conduct, it still has promise, and providing a detailed analysis, together with a proposed qualified privilege); McNeal, *supra* note 47, at 9–10 (citing the requirement that the intrusion be into a “legally cognizable private place or sphere”—and the difficult aspects of the tort posed by the public-vantage-point problem—reiterates that courts treat navigable airspaces as public passageways—the need to resolve issues related to the few limitations imposed by the FAA’s Parts 107 and 101 as to where drones can fly—the concomitant claim that most low altitude drone flights occur in navigable airspace, and states that the tort may require intrusions be “repeated with such persistence and frequency as to amount to a course of hounding”). See ELDER, *PRIVACY TORTS*,

IIED-“outrage,”⁵⁰ public-disclosure-of-private-facts.⁵¹ Accordingly, the common law, as currently construed, is stacked heavily against the victim and in favor of the overhead voyeur, whether by drone or helicopter.⁵² What the legal arguments against drone legislation tacitly reflect is the collective fear of the drone industry and newsgatherers:

supra note 22, § 2:18B; Elder, Part I, *supra* note 1, at nn. 69, 148, 318, 348–49 (remaining cautiously optimistic that adventurous courts, assisted by competent counsel, may make more effective use of this tort, as have a small minority in the past, based on the Court’s restrictive newsgathering precedent—particularly, *Bartnicki v. Vopper* and *Cohen v. Cowles Media Co.*, (see Elder, Part I, *supra* note 1, text accompanying nn. 11–17, 60, 176, 203, 235–40, 253, 285–86, 305, 308–14) and the Court’s recent Fourth Amendment jurisprudence discussed in detail herein, evidencing the Court’s bipartisan concern about the privacy-eviscerating effects of technology evolving at tsunami speed, with its potential to leave private citizens in what this author views as a privacy legal wasteland). Even some pro-newsgathering authors concede that the “or otherwise” language in § 652B’s black-letter rule clearly contemplates surveillance technologies such as drones. See Calvert et al., *supra* note 5, at 556–65 (noting as possible that a newsgathering drone hovering for a prolonged time at a very low level over a high wall creating an expectation of privacy might provide trespass-to-land, intrusion-upon-seclusion and IIED-“outrage” claims to a sunbathing celebrity or even to aerial videography of the arrest of a hostage-taker within a walled compound).

⁵⁰ Lidsky, *supra* note 46, at 196–98 (emphasizing that “abusive newsgathering” is “so common that it becomes very difficult to argue that it is abnormal, unusual, or beyond the public’s expectation of press behavior,” which may make it quite difficult to meet the required element of “extreme and outrageous conduct”). There are occasional cases to the contrary based on extraordinarily obnoxious circumstances. See ELDER, *PRIVACY TORTS*, *supra* note 22, at § 2:18B.

⁵¹ The public or general interest-newsworthiness limitation largely nullifies the tort, as this privilege is given exceptionally broad interpretation and viewed as largely open-ended and self-defining. Lidsky, *supra* note 46, at 198–201. See Blitz et al., *supra* note 7, at 105, n. 341 (“The Court’s key test for what counts as ‘a matter of public concern’ seems potentially applicable to just about any activity . . .”); Neil M. Richards, *The Puzzle of Brandeis, Privacy, and Speech*, 63 VAND. L. REV. 1295, 1344 (2010) (“American courts have tended to defer to the judgment of the press about what constitutes information in which there is a legitimate public interest . . . [making it] a largely useless tort.”); Diane Keats Citron, *Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1805, 1829 (2010) (noting that courts “often defer to the media’s judgment, all but guaranteeing the demise of plaintiff’s claim”); Clay Calvert, *VOYEUR NATION: MEDIA, PRIVACY, AND PEERING IN MODERN CULTURE* 149 (2004) (viewing the public-disclosure discussion in *Shulman v. Group W. Prods.*, a case involving depiction of a paralyzed accident victim (see *infra* note 319, 349–50) as a “victory for voyeurism,” as Shulman had the “tragic dumb luck . . . to be the unfortunate and unwitting victim of media voyeurism”). On the discussion of the impact of *Bartnicki* in potentially helping circumvent this defense/limitation, see ELDER, *PRIVACY TORTS*, *supra* note 22; Rodney A. Smolla, *Information as Contraband: The First Amendment and Liability for Trafficking in Speech*, 96 NW. U. L. REV. 1099, 1149–51 (2002) (suggesting that the Breyer-O’Connor concurrence in *Bartnicki*, together with the three Rehnquist dissenters, may have helped revive the public-disclosure tort by treating as “privacy contraband” those matters on the non-newsworthiness side of the divide: “there is nothing at all constitutionally offensive about empowering judges and juries to make the judgment that a particular fact revealed by the media is not newsworthy”).

⁵² See June 19, 2018, NCCSL Draft for Discussion Only, *Prefatory Note*, at 1–12. Unlike the draft’s proposed bright line-*per se* cause of action for drone-overflights for trespass to land, which emulated the rule at ground-level—and the existing rule for kites, balloons and projectiles—the

that the First Amendment does not and cannot “provide all citizens the right to gather information in any way they please,” as such a right “would crowd out privacy protection and many ‘countervailing legally recognized interests.’”⁵³ That concern applies equally to drone surveillance over both private and public lands.

II. A BRIEF OVERVIEW OF THE SUPREME COURT’S NEWSGATHERING JURISPRUDENCE AND ITS APPLICATION TO DRONES

The purported justifications for treating producing-creating-enabling speech as qualitatively different from the Court’s flat, wholly appropriate rejection of a broad newsgathering right do not withstand scrutiny. For example, in *Zemel v. Rusk*, Chief Justice Warren rejected a private-individual-tourist’s argument of a First Amendment-based right to travel to Cuba to gather information and inform himself, despite a government concession this restriction “renders less than wholly free the flow of information” about Cuba since “[t]here are few restrictions on action that could not be clothed by ingenious argument in the garb of decreased data flow.”⁵⁴ According to Professor Bhagwat, the leading

aerial-trespass action at present does not accord an automatic right to exclude unauthorized entrants.

⁵³ Blitz et al., *supra* note 7, at 102 (characterizing Professor Barry P. MacDonald’s analysis of *Zemel v. Rusk*). See also, Elder, Part I, *supra* note 1 (discussing newsgathering on the ground); Bhagwat, *supra* note 12, at 1052–54, 1078–80 (discussing that the Court had “flatly rejected such a general right in every single case” in which the issue was raised—“one area where the Court appears to have gotten it right”); *Branzburg v. Hayes*, 408 U.S. 665, 682–705 (1972) (detailing the “practical and conceptual difficulties of a high order” in defining a journalist’s privilege, including who qualified, suggesting that the informative function is also fulfilled by a host of others and indicated that almost any writer would correctly argue that he or she is “contributing to the flow of information,” relies on confidential sources, and will be silenced by compelled disclosures to a grand jury); David A. Elder, *The Supreme Court’s Restrictive Protection for Newsgathering: The Court’s Calculated Attempt to Keep the Media and Others from “Play[ing] Tyrant to the People Tyrants,”* 6 NOTRE DAME J. EMERGING TECHS. (2024) [hereinafter Elder, *Tyrant to the People*].

⁵⁴ 381 U.S. 1, 16–17 (1965). There is no indication *Zemel* would have been decided differently had the complainant been an accredited journalist. Access-to-criminal-trial cases are generally viewed as a “quirky exception” to the bright-line rule against protection of a right to newsgathering acquisition. See Peltz-Steele, *supra* note 38, at 399–400; Robert M. O’Neil, *Ride-Alongs, Paparazzi, and Other Media Threats to Privacy*, 33 U. RICH. L. REV. 1167, 1179 (2000) (“Even the well-established right of reporters to attend and report on criminal trials is really a right of the general public, from which the media could not be selectively barred. Once in the courtroom, a reporter’s access guarantees no more than use of pen and paper. Cameras are admitted by grace rather than right; tape recorders, laptops and sketch pads are usually allowed, but by judicial option rather than First Amendment fiat.”); Bhagwat, *supra* note 12, at 1053, 1079 (“If all members of the

proponent of this qualitative difference,⁵⁵ there are three justifications for treating production and distribution as “so closely connected” to communicative acts that “penumbral protection [of production] seems necessary”—which cannot be as easily said of gathering information.⁵⁶

First, the “causal and temporary connection” between “gathering information and speech” is “more distant” than the connection between “producing speech and actual speech.”⁵⁷ Second, “[m]ore fundamentally, unlike speech production, information-gathering often has no connection to speech at all.” For much or almost all of the population, information-gathering “may be an end in itself, a matter of self-education, with no plan to use the information to create speech.”⁵⁸ Third, he cites the fundamental and perhaps unresolvable difficulty of identifying who holds the rights to any gathered information since any attempt to segregate and distinguish between rights of persons and entities has abjectly failed.⁵⁹ Professor Bhagwat’s first two arguments fail, and the third is correct but demonstrates clearly why his proposal must be rejected.

The first two arguments do not survive close analysis in the context of either (a) the right to record police in public at ground level or by overflight drone or (b) the broader use of drones with cameras to produce speech over public or private spaces in general. Under Professor

public had such a right, the burdens on the government would be unmanageable . . . [it’s] hard to come up with a strong argument that the First Amendment requires open government.”); Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Internet Age*, 65 OHIO ST. L.J. 249, 275, 284–96, 327 (2004) (explaining that *Zemel* recognized that “to hold otherwise would open up a virtual floodgate of challenges to government regulations”—“the right of the people to ‘know’ certain information both as a means and an end [then makes it] well nigh impossible to pace any meaningful boundaries of that right” and asserting that this “general right to know . . . could be used to justify constitutional protection for a limited universe of conduct in the name of information or knowledge”). These analyses by the Court and by noted scholars above and in Elder, Part I have not been discussed regarding the “stock-of-information”/“flow of information” and equivalent squishy rationales on which the appellate cases discussed in Elder, Part I rely. See Elder, Part I, *supra* note 1, text accompanying notes 9, 104, 253, 257, 410–17. This demonstrates how little basis in Court precedent these rationales have, particularly in the digital era, where every cell-phone owner is potentially a citizen-journalist-hunter-gatherer. See, e.g., *infra* § IV.B.1.

⁵⁵ See Bhagwat, *supra* note 12, at 1052–54, 1078–81.

⁵⁶ *Id.* at 1078–79 (describing the access-to-information cases as a type of subsidy, since “the government will rarely be able to provide information to citizens without incurring costs”—a type of government enabling speech-creation).

⁵⁷ *Id.* at 1078.

⁵⁸ *Id.* at 1078–79.

⁵⁹ *Id.* at 1053.

Bhagwat's first argument, anyone with a cell phone or drone camera is a distant newsgatherer until the arbitrary point in ordinary observation when she sees something potentially newsworthy and photographs or videotapes and/or audiotapes and decides to disseminate such. Then, bingo, she becomes a speech-producer! And she may decide that this self-defined newsworthy matter should be shared, perhaps narrowly or perhaps broadly on social media. Not only is the "chain of causation"⁶⁰ not distant, the production and distribution of speech via pushing a few phone buttons may be almost instantaneous—as the recording-police-in-public cases readily concede.⁶¹ In other words, the camera-wielder—or drone operator—is miraculously self-transformed from a mere information-gatherer⁶² to a speech-producer-creator-disseminator in a matter of seconds.

The same is true as to the second justification, that camera-wielders in public at ground level or drones operated from above often gather information for a variety of purposes having no link at all to speech, *sans* any plan or intent to create speech. This would apparently include image or voice capture for personal education, pleasure, or a host of other reasons. But, according to Professor Bhagwat she suddenly becomes a speech-producer-creator-disseminator when a capture of a newsworthy⁶³ sight or event occurs. A moment's thought about the enormous amount of information posted on social media makes any other conclusion seem naïve. These giant leaps in logic are the direct results of dissolving the Supreme Court's time-honored conduct-versus-pure-expression dichotomy into speech-production-creation-enablement gobbledygook.

⁶⁰ See Bhagwat, *supra* note 12, at 1054.

⁶¹ See Elder, Part I, *supra* note 1, Introduction, §§ II-III, Conclusion.

⁶² Information-gathering is viewed as "necessary to produce speech" but is not an aspect of "production" thereof. Compare Bhagwat, *supra* note 12, at 1052–54 with Note, *First Amendment—Public Forum Analysis—D.C. Circuit Holds That Filming in Public Forums is Subject to Lower Level of First Amendment Protection Than Expressive Activities—Price v. Garland*, 45 F.4th 1059 (D.C. Cir. 2022), *reh'g en banc denied*, No. 21-5073, 2022 WL 15524454 (D.C. Cir., Oct. 21, 2022), 136 HARV. L. REV. 1252, 1252–53, 1256–59 (2023) (estimating that as many as fifty million cell-phone users make money as content-providers world-wide).

⁶³ Professor Bhagwat limits such to police officers and most scenarios involving public officials. Compare Bhagwat, *supra* note 12, at 1069–70 with Elder, Part I, *supra* note 1, n. 304 (discussing an alternative rule for public forums).

III. A FRUSTRATED ATTEMPT TO DRAFT A MODEL TORT LIABILITY STATUTE

Americans are greatly concerned, indeed cynical about, the risks to both safety and privacy posed by the hyped drone revolution.⁶⁴ When Americans and others were polled, sixty percent were either very or extremely concerned that drones will violate privacy.⁶⁵ Those polled were much more inclined to approve of drone usage in limited circumstances where drones have a unique or particularly useful function—evaluating bridges or monitoring wildlife or oil platforms at sea or remote and inaccessible areas, and where drones pose a lesser threat to safety and privacy.⁶⁶ The issue then becomes how the law responds to the common-sense concerns and deep-seated instinctive feelings Americans have about drones.⁶⁷

⁶⁴ Burcham Aydin, *Public Acceptance of Drones: Knowledge, attitudes and practice*, 50 *TECH. SOC.* 101180, 1 (2019) (“[D]rones were not well accepted at present except for public safety and scientific research applications. Commercial and hobby uses are not supported. Public sees the drone as a risky technology that directly interferes with their privacy.”); Joan Lowy & Jennifer Agiesta, *AP-GFK Poll: Americans skeptical of commercial drones* (Dec. 19, 2014), <https://apnews.com/b8452f65f5d54cb6b26d56c42ed900d0> [hereinafter Lowy & Agiesta] (finding Americans broadly concerned about privacy and safety of commercial drones); NCCSL Draft For Discussion Only, Prefatory Note, 10–11 (June 19, 2018) (A 2017 Pew poll found “most people want the benefit of drones but also want the ability to exclude [drones] from operating in certain areas, specifically ‘[w]hen it comes to what rules should apply to drone use, roughly half the people (54%) thought drones should not be allowed to fly near people’s homes,’ and that “[j]ust 11% think this should be allowed, while 34% think it is OK in certain circumstances;” it cited parallel European and Danish studies.); Blitz et al., *supra* note 7, at 58, 131 (In “the public mind” drones “raise the specter not only of death but also the death of privacy,” with “the Orwellian image of an all-seeing eye in the sky . . . approaching technical feasibility.” “[N]ot coincidentally, it has raised privacy concerns at all levels and across all branches of government.”); Farber, *supra* note 13, at 402 (The surveys reflect “mounting discomfort” with drones over private land.). This is reflected in the plethora of state drone statutes. See *infra* text accompanying note 534.

⁶⁵ Lowy & Agiesta, *supra* note 64; Spelman, *supra* note 27, at 383 (citing the same University of Nevada national survey that 93% of those polled approved using drones in remote terrain to find injured or missing individuals and that many more oppose drone surveillance by private citizens than by government).

⁶⁶ *Id.*

⁶⁷ See M. Ryan Calo, *The Drone as Privacy Catalyst*, 54 *STAN. L. REV.* (2011), <https://stanfordlawreview.org/online/the-drone-as-privacy-catalyst> (“Drones and other robots have the potential to restore the mental model. They represent the cold technological embodiment of observation... government or industry surveillance of the populace. . . . People would *feel* observed, regardless of how or whether the information was actually used. The resulting backlash could force us to reexamine not merely the use of drones but the doctrines that today permit this use.” “Tomorrow’s police and journalists might sit in an office or a vehicle as their metal agents methodically search for interesting behavior for recording and relay. Americans can visualize and

As stated above, the common law of torts has not been particularly helpful to-date⁶⁸ in dealing effectively with overflight intrusions by aircraft—whether fixed-wing or helicopter. Existing law failed to stop ten or so photojournalists and paparazzi from hovering in helicopters over adjoining land—some at only 100 feet—and disrupting the Streisand-Brolin wedding.⁶⁹ This example does not reflect a defensible accommodation of competing interests, as to celebrities or any other wedding couple deemed newsworthy. Drones are much cheaper and more widely accessible than the paparazzi helicopter that pestered the Streisand-Brolin wedding.⁷⁰ Legislatures have acted—often quite aggressively—to fill this vast privacy-law wasteland and legitimately so.⁷¹ Those who disagree, including the media and the drone industry, have aggressively applied their legal resources, political influence, and public outreach to make their voices heard.⁷²

The concerted effort of the media and drone industry rendered the resulting NCCSL Uniform Tort Law Relating to Drones Act toothless, favoring drone operators, and widely unacceptable to privacy and property interests. The May 30, 2019 Draft For Approval⁷³ “placed a heavy thumb on the scale” by placing a substantial, if not insurmountable, burden on the landowner to demonstrate that a

experience this activity as a physical violation of their privacy.”); Cho, *supra* note 10 (explaining that drones “engender both disquiet and discomfort given the unconscious feelings that there are ‘eyes in the sky’ observing and recording activities of private citizens.”).

⁶⁸ See *supra* text accompanying notes 46–52; Farber, *supra* note 13, at 365 (predicting that knowledge of the common law’s inadequate legal remedies “will strengthen future drone legislation”).

⁶⁹ See *supra* text accompanying notes 46–52; see also Andrew Morton, *Much Ado About Newsgathering: Personal Privacy, Law Enforcement, And The Law of Unintended Consequences For Anti-Paparazzi Legislation*, 147 U. PA. L. REV. 1435, 1467–72 (1999) (explaining that under the subsequently passed California anti-paparazzi statute that tied liability to the Court’s threshold *Katz* standard for helicopter overflights under its “shrinking zone of privacy,” *Florida v. Riley* “quickly would dispose” of the case, leaving “surprisingly little in the way of innovative personal privacy protection” under the statute). On the Court’s overflight cases, see *infra* § V.B.

⁷⁰ Rule, *Age of Drones*, *supra* note 10, at 162 (“Rather than relying on loud, gas-guzzling helicopters to cover traffic accidents or crime scenes, news outlets could eventually use agile drones to gather footage closer to the action at far less expense.”).

⁷¹ See Farber, *supra* note 13, at 409 (“[L]aws that give property owners express right to exclude drones from the navigable airspace directly above their property will ameliorate some of the deficiencies in how our existing torts are being applied to drones.”). See *infra* § IV.B.1-4.

⁷² See *supra* text accompanying notes 43, 45, 47, 52, 64 and *infra* text accompanying notes 115, 268–69, 282–84, 548, 607–08, 612–14 (discussing the NCCSL drone-act-model-law process).

⁷³ TORT LAW RELATING TO DRONES ACT (NAT’L CONFERENCE OF COMM’R ON UNIF. STATE LAWS, Draft May 30, 2019).

low-altitude overflight constituted a trespass, likely ensuring that only the wealthiest or most litigation-minded landowners will sue.⁷⁴ One critic identified the underlying problem: “It is mind boggling that a drone operator can fly around my home at one nano-meter above the lawn without that itself being actionable as a trespass. It is equally mind boggling why the industry folks would not agree to making that a trespass.”⁷⁵ Yet, the industry refused any clear rule or defined height for drone trespass, and instead successfully persuaded the committee to dramatically amend the final draft of the proposed act.⁷⁶

Of course, drone operators and “the industry folks” enjoy the protection of and strongly defend the adequacy of the operator-friendly common law.⁷⁷ The NCCSL’s Tort Law Relating to Drones Draft For Discussion Only of June 19, 2018 illustrates this point in compelling fashion. That draft concluded that “[u]nder existing aerial trespass doctrine, determining whether an entry into the immediate reaches requires a fact-specific inquiry which has historically caused uncertainty and a lack of uniformity.”⁷⁸ The prefatory note also indicated that states have erroneously incorporated standards from Takings law and nuisance into trespass doctrine, sometimes mandating substantial interference with the owner’s use and enjoyment of land.⁷⁹ The note concluded that this aerial-trespass rule had little justification in the drone context and that existing aerial-trespass and nuisance standards—requiring proof both of flight within the immediate reaches of the land *and* substantial interference with use and enjoy of the land—would leave landowners unable to exclude most drone operators from even very low altitudes adjacent to buildings and land. In comparison, the bright-line rule for surface trespasses is easily applied and enforced.⁸⁰

The June 19, 2018 draft proposed a new bright-line, per se aerial-trespass in § 301 for any non-consensual entry into the zone between the surface and 200 feet above the land surface or improvements built

⁷⁴ Memorandum from Joint Editorial Bd. for Unif. Real Prop. Acts to the NCCSL, 4–5 (June 5, 2019).

⁷⁵ Letter from Donald Joe Willis to the NCCSL, 8 (July 10, 2019).

⁷⁶ *Id.* (suggesting the only explanation was “to persuade a majority of the committee to give them all they ask for which in my view is what has happened”).

⁷⁷ See *supra* text accompanying notes 46–52.

⁷⁸ Prefatory Note, *supra* note 47, at 5.

⁷⁹ *Id.* at 6.

⁸⁰ *Id.* at 8.

thereon.⁸¹ The section did not, however, apply to “conduct protected by the First Amendment” or conduct in conformance with Fourth Amendment requirements.⁸² The draft also provided exceptions for public employees performing their duties, including firefighters, emergency medical personnel, and public-utility employees performing emergency duties involving an imminent danger to health, safety, or the environment, and also to other persons performing organized recovery efforts after an accident or natural disaster.⁸³ There was also a carve-out for easement holders, licensees or their employees acting within the scope of their duties and in accordance with the property interest in question.⁸⁴ This approach—a black-letter rule with carve-outs based on a careful balancing of competing interests—is consistent with the approach of many state legislatures.⁸⁵

The June 19, 2018, draft also made liable anyone that “commits tortious acquisition of images, recordings or physical or electronic impressions” while operating a drone and who “acquires a visual image, sound recording, or other physical or electronic impression of another person depicting private facts or a trade secret” where such is “acquired in a manner that is highly offensive to a reasonable person,” and where this acquisition is “not otherwise protected by the First Amendment” or is not in conformance with Fourth Amendment requirements.⁸⁶ The draft established a rebuttable presumption that the action was one “depicting private facts” if such a recording was not acquirable from ground level or from buildings where an observer has a legal vantage point.⁸⁷ The draft also included a rebuttable presumption of acquisition in a highly offensive manner if such occurred during or following a *per se* aerial trespass as defined by § 301 or by state law.⁸⁸ As one commentator indicates, trespass-to-land provides “an obvious

⁸¹ TORT LAW RELATING TO DRONES ACT (NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, Draft (June, 2018)

⁸² *Id.* §§ 301(b)(1)–(2) (emphasis supplied).

⁸³ *Id.* §§ 301(b)(3)–(5).

⁸⁴ *Id.* §§ 301(b)–(5).

⁸⁵ See, e.g., *infra* § IV.B.1-4 (discussing the Texas statute); *infra* note 531.

⁸⁶ TORT LAW RELATING TO DRONES ACT (NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, Draft June, 2019); *id.*, § 302(a)(1)–(3).

⁸⁷ *Id.* § 302(b).

⁸⁸ *Id.*

and peaceful remedy to prevent intrusion into the airspace above your property.”⁸⁹

The tightly organized drone industry and media coalition (including almost all the country’s media entities) viewed the June 19, 2018 draft as supremely unnecessary, arguing that existing aerial-trespass doctrine, together with extant privacy tort law and industry-developed best practices, provide an adequate set of legal rules protecting landowner safety and privacy concerns.⁹⁰ It should be noted that these so-called best practices are entirely voluntary and are inapplicable to news-reporting entities and newsgatherers. Under the latter, newsgatherers *should* operate under the standards and ethics rules of their organizations and in compliance with existing state and federal laws.⁹¹ The coalition lobbied heavily for and ultimately got an extravagantly pro-drone-industry-media substitute in the May 30, Draft For Approval at the NCCSL’s July 12-18, 2019 meeting that bore shockingly little resemblance to the earlier, more defensible draft, which had wide support.⁹² Section 5(a) of the later draft imposed liability for aerial trespass if the person intentionally and without permission operated in the airspace above the owner/possessor’s real property, but *only* if the person caused substantial interference with the use and enjoyment of the land.⁹³

Section (b)(1)-(13) of the May 30, 2019 Draft for Approval included a list of thirteen non-exclusive factors to be considered in determining

⁸⁹ Skorup, *Growing Legal Controversy*, *supra* note 45.

⁹⁰ Ballard Spahr, Comment of News Media Coalition to the NCCSL (Oct. 1, 2018).

⁹¹ *Id.* at 8–9, n. 8 (quoting from the Voluntary Best Practices for UAS Privacy, Transparency and Accountability). See https://www.btkd.doc.gov/files/ntia/publications_privacy_best_practices_6-2115.pdf. Which entities dominated the latter process is clearly evidenced by the introductory statement to the “Best Practices:” “Newsgathering and news reporting are strongly protected by United States law, including the First Amendment to the Constitution. The public relies on an independent press to gather and report the news and ensure an informed public.” *Id.* at 8–9 and n. 8. A recurrent theme of Parts I and II of this article is how the reporting-police-in-public decisions grossly overstate the level of First Amendment protection for newsgathering provided by the Supreme Court and grossly understate the level of protection states may accord individual privacy and related interests. One author strongly criticizes even the use of such journalistic standards in privacy or libel litigation. See Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CALIF. L. REV. 1039, 1079–80 (2009) (criticizing *Bartnicki v. Vopper* as a “potentially ominous” narrow victory). Professor Gajda does not discuss all of Bartnicki’s clear indicators that the newsworthiness privilege is inapplicable to matters unlawfully acquired. See Elder, Part I, *supra* note 1, at nn. 18–26, 60, 203, 235–40, 244, 256, 292, 308–14.

⁹² UNIF. TORT L. RELATING TO DRONES ACT (UNIF. L.COMM’N, Draft May 30, 2019).

⁹³ UNIF. TORT L. RELATING TO DRONES ACT (UNIF. L.COMM’N, Draft May 30, 2019).

substantial interference and created three mandatory rebuttable presumptions of no-substantial-interference—for law-enforcement operations consistent with the Fourth Amendment or the state constitution, authorized personnel in emergency situations acting for the protection of public safety, and where the drone “was being operated for . . . purposes protected by the First Amendment. . . .”⁹⁴ The comment to § 5 stated that the latter presumption was “not intended to create or imply the existence of a journalistic or First Amendment privilege” (or a privilege under a state constitution), and did “not sanction trespass by reporters under the guise” of the First Amendment’s free-expression provisions.⁹⁵

Absent “strong allegations” that § 5’s thirteen nonexclusive factors were met, “cases involving *activity* protected by the First Amendment should not be allowed to proceed.”⁹⁶ Note the drafters’ carefully crafted language. The use of “*purposes* protected” appears to encompass otherwise unprotected (by the First Amendment) criminal, tortious, or otherwise-wrongful and actionable *conduct*⁹⁷ if engaged in for a “*purpose*” protected by the First Amendment—that is, actions *intended* to gather information or news. In other words, *motive* was the controlling mandate.⁹⁸ The addition of “*activity* protected”—an obvious reference to resulting use or publication—meant that unlawful newsgathering for the right motive would be immune, as would subsequent publication. This is merely the boot-strapping icing on the privacy-and-property-eviscerating dense cake.⁹⁹

Unhappy with the changes, many concerned parties argued that the May 30, 2019 draft was a radical departure from common-law protection of landowner owner property rights. In response, the NCCSL quietly walked away foggily “on little cat feet”¹⁰⁰ from its attempt at a model statute. The Heritage Foundation’s statement was illustrative.

⁹⁴ *Id.* §§ 5(3) (1)–(3) (emphasis supplied).

⁹⁵ *Id.* comment to § 5.

⁹⁶ *Id.*

⁹⁷ See Elder, Part I, *supra* note 1, at nn. 11–17, 60, 69, 104, 143–44, 148, 241, 253, 255, 257, 285, 287, 291–94, 305, 308–16, 318, 322, 342–52, 368, 395, 402, 410–17, 428–37.

⁹⁸ While motive may be a modest factor in determining “highly offensiveness” in some intrusion-upon-seclusion cases, it was never meant to nullify or trump the black letter conduct-versus-expression dichotomy. See *Shulman v. Grps. W Prods.*, 955 P.3d 469, 493–97 (Cal. 1998).

⁹⁹ On the use of subsequent publication of newsworthy matter to “bookshop” from illegal to protected status, see Elder, *Tyrant to the People*, *supra* note 53; Elder, Part I, *supra* note 1, § I, III, CONCLUSION.

¹⁰⁰ Carl Sanburg, *Fog*, line 2.

The draft's convoluted, non-exhaustive thirteen-factor approach substantially impaired property owner's ability to protect their rights by chilling litigation by them under an approach which did not even accord them a rebuttable presumption that a drone operating mere inches above the surface has committed a trespass.¹⁰¹ The Heritage Foundation excoriated the drone industry for the industry's intense efforts—during the drafting process before Congress, and before federal regulators—to ensure that the draft preempted state and local action and “[gave] its largest commercial members the widest possible latitude to operate while holding them to the minimum level of account when their conduct offends those over whom they fly . . . no matter how low they may fly.”¹⁰²

If adopted by the NCCSL, the Heritage Foundation predicted this one-sided draft act would almost certainly not be passed in numerous state legislatures, if it passed in any. This was because it would install a drone “aerial highway” “in the backyards of millions of Americans.” It also included standards requiring fact-specific inquiries only resolvable by litigation that specifically entice courts to assess the legitimacy of a property interest and engage in “ad hoc, highly subjective judgments about the relative value of, say, a package delivery service compared to a solitary woman’s desire to relax in her backyard free of drone overflight 20 feet above.” This draft incentivized drone operators to litigate from a posture of persuading courts to balance out of existence owners’ rights.¹⁰³

¹⁰¹ Heritage Foundation Letter to the NCCSL (July 8, 2019).

¹⁰² *Id.* at 1–5.

¹⁰³ *Id.* Compare Brent Skorup, *Drones, Airspace Design, and Aerial Law in States and Cities*, 55 AKRON L. REV. 157 (2022) [hereinafter Skorup, *Drones*] (proposing federal and state courts adopt a presumption of trespass below 200 feet over private land) with Rule, *Drones, Airspace, and the Sharing Economy*, *supra* note 45, at 2–10, 17–39 (proposing a framework for “cooperative federalism” in leasing airspace corridors above public-rights-of-way while criticizing the drone industry’s existing obstructionist approach and developing in detail a proposal for a “private airspace sharing system . . . that could finally unleash commercial drop services throughout the country” by voluntary licensing of drone use of private land “on a pennies-per-use basis” using digital platforms to create “temporary airspace corridors” for low-altitude commercial use of drones, emphasizing how Amazon’s 150 million Prime subscribers would provide unparalleled leverage in getting property owners to participate in an airspace sharing app and submit bids).

IV. CONSTITUTIONAL CHALLENGES TO LEGISLATIVE REGULATION OF DRONES

A. *An Introduction*

Legislatures need (and largely have the right to broadly exercise) substantial freedom to remedy this vast privacy-law wasteland¹⁰⁴ by defining, both as privacy-and-trespass crimes and privacy-and-trespass torts, what drone newsgatherers can do, over both private and public property. State police power over both arenas is quite extensive. This power is based deeply in the Court's jurisprudence that First Amendment limitations apply almost exclusively to expression, not conduct¹⁰⁵—which is why drone videotaping and audiotaping are unpersuasively portrayed by supporters as inseparable, indivisible antecedents to publication and dissemination collapsing the conduct-expression dichotomy.¹⁰⁶ This framing is a bold and bald attempt to improperly superimpose existing precedent onto drone recording and operation. On the contrary, First Amendment precedent does not enable a self-proclaimed newsgatherer to make a video or audio recording of situations where the subject of the recording expects privacy. Hidden cameras are not “indispensable

¹⁰⁴ See Elder, Part I, *supra* note 1; *infra* text accompanying notes 307, 360–65; Katz v. U.S., 389 U.S. 347, 350–51 (1967) (“[T]he protection of a person's general right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States.”); Farber, *supra* note 13, at 409 (predicting that the limitations of common-law torts “will likely pave the way” for new drone statutes to “settle the ambiguity about where a property owner's rights to airspace begin and end”); Blitz et al., *supra* note 7, at 99 (“[H]uman beings engage in countless activities to collect and learn from evidence about the world. They do so not merely by using cameras to capture light, but also by collecting and applying forensic science to physical evidence. Not all of this can conceivably count as First Amendment ‘speech,’ even if it ultimately sheds light on matters of public importance. So, the Constitution leaves the government largely free to regulate such information-gathering (subject only to rational basis review), as long as it avoids doing so in a way that is aimed at suppressing speech or preventing audiences from learning the message (or learning the facts) such speech conveys. For example, surreptitious audio recording may not count as ‘speech’ or other First Amendment activity. But if Congress passes a law restricting such a recording only when it targets government officials and *only* to prevent the public from gaining a more accurate picture of its government, the restriction may nonetheless raise First Amendment alarm bells. When, on the other hand, the government restricts such audio recording in an evenhanded, content-neutral manner, that restriction would not trigger the First Amendment at all. A similar principle might govern most drone image capture.”).

¹⁰⁵ See Elder, Part I, *supra* note 1, text accompanying nn. 11–17, 60, 69, 104, 143–44, 146, 241, 253, 257, 285–87, 291–94, 305, 308–16, 344–52, 368, 395, 402, 410–17, 425–32; Elder, *Tyrant to the People*, *supra* note 53.

¹⁰⁶ See Elder, Part I, *supra* note 1, at 2, 51–53, 59–61.

means” of newsgathering,¹⁰⁷ nor are trespasses-to-land¹⁰⁸ or wiretaps.¹⁰⁹ They are unconsented-to, otherwise unauthorized audiotaping or videotaping, under circumstances where the recorded party can legitimately expect his or her privacy, anonymity, and dignity to be accorded respect, can be legitimately prohibited by state legislatures. Many legislatures have done so and will continue to do so, reflecting the legitimate concerns of their citizens, and will authorize exceptions where reasonable legislative assessments of the competing interests so justify.¹¹⁰ The courts should, and likely will, ultimately defer to the legislature’s judgment under the deferential rational basis standard of review.¹¹¹

B. *The Constitutionality of the Texas Drone Statute—Portends for American Privacy*

1. The Federal District Court’s Decision in *National Press Photographers Association v. McCraw*—A Critique of a Devastating Assault on Legislative Protection of Privacy

The devastating impact of rejecting the rational basis standard and applying heightened review in the drone operation context is exemplified by the recent privacy-devastating decision that eviscerated ch. 423 of the Texas drone statute, *National Press Photographers Association v. McCraw*.¹¹² The District Court Judge Robert Pitman adopted, “with hardly a scratch,”¹¹³ a facial challenge to the Texas drone-surveillance provisions. The plaintiffs offered familiar, self-interested public

¹⁰⁷ *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971) (rejecting any First Amendment license to use hidden cameras and “concealed electronic instruments” or to steal or trespass into a home or office). See Elder, *Tyrant to the People*, *supra* note 53; see also *infra* text accompanying notes 593–608.

¹⁰⁸ See *Dietemann*, 449 F.2d at 249; see *infra* text accompanying notes 178–83, 278, 593–608.

¹⁰⁹ *Id.*

¹¹⁰ See Elder, Part I, *supra* note 1, text accompanying nn. 103, 309, 363–68; *infra* § IV.B.1–4.

¹¹¹ On the application of the mere rationality standard, see Elder, Part I, *supra* note 1, text accompanying nn. 114, 232, 291, 294, 311–12, 428–29.

¹¹² 594 F. Supp. 3d 789 (W.D. Tex. 2022).

¹¹³ Daniel Conrad, *Press Attacks on Drone Photo Ban Survives Challenge*, COURTHOUSE NEWS SERV., 1–2 (Dec. 1, 2020), <https://www.courthousenews.com/judge-refuses-to-toss-challenge-to-texas-drone-photo-ban/> (quoting Leah Nichols, with Public Justice, who is also representing some of the plaintiffs).

statements railing against the chilling effect of the restrictive Texas drone surveillance regime. They claimed existing laws were sufficient: “You don’t want someone using a drone to look through someone’s windows or something like that. . . . There are already laws, unrelated to drones, that prohibit that kind of invasion of privacy, that’s not what we’re talking about here. There seems to be no sufficient reason for keeping this prohibition on speech.”¹¹⁴ Note that protections from looking in to windows likely would not extend to residential backyards, even with privacy fences, under this restrictive view.

General counsel for the named plaintiff, Mickey Osterreicher, who has been deeply involved in the drone-surveillance/photography controversy in multiple settings,¹¹⁵ publicly claimed that “[t]here are people who don’t want newsgathering done because they may be doing something they don’t want being reported on . . . those are very strong voices in Texas.”¹¹⁶ The plaintiffs’ complaint offered a parallel argument that the real purpose of the drone provisions was “to suppress coverage of potentially dangerous or embarrassing conditions at those sites of public interest. . . .”¹¹⁷ The plaintiffs claimed the Texas statute was amended to include multiple exceptions, but never one for visual journalists.¹¹⁸ Of course, the latter broader, potentially all-inclusive,

¹¹⁴ *Id.*

¹¹⁵ *Id.* (noting that an express exemption for newsgathering had been purposefully eliminated from the Texas statute). Osterreicher was involved in the Draft Drone Act process. *See infra* note 271.

¹¹⁶ Conrad, *supra* note 113, at 2–3 (quoting Osterreicher). Osterreicher claims that drones are “certainly safer” than a Bell Jet Ranger.” *Id.* at 3.

¹¹⁷ Pleading, Nat’l Press Photographers Ass’n v. McCraw, Civ. Action No. 1-19-cv-00946, (Sept. 26, 2019) [hereinafter Pleading], at 27 (“including . . . the conditions animals are kept in at concentrated feed lots, the deteriorating conditions of hydro-electric dams, and the negative environmental impact of oil, gas and chemical manufacturing facilities”).

¹¹⁸ *Id.* “Visual journalist” is the term used throughout the plaintiffs’ pleading and the court’s opinion. The term includes a broader group that may just wish to observe and report, but not photograph and disseminate photos. Indeed, plaintiffs make just such a claim above and beyond the right of image-capture. They, like others, “engage[] in gathering and dissemination of information of matters of public concern.” Pleading, *supra* note 117, at 7 n. 157. The prohibited visual journalism bars them from “gain[ing] insight and information important to his [or her] role as a journalist or to capture newsworthy images.” *Id.* Look at the construct inherent in the argument. Photography is an essential part of the publication process and thus constitutes expressive conduct under the recording-police-public cases. *See* Elder, Part I, *supra* note 1, §§ I–II. In addition, and as a necessary antecedent, these visual journalists have a pre-image-capture right to “gain insight and information” — a claimed legal right to observe and evaluate. So, *every* aspect of newsgathering becomes an indivisible whole.

group poses additional issues not addressed by the claimants¹¹⁹—who so qualifies—or directly considered by Judge Pitman in his opinion.¹²⁰

Judge Pitman followed the “analogous context of filmmaking” in the recording-police-in-public precedents and held that the restrictions on drone recording “necessarily constrain[ed]” the right to disseminate the resulting newsworthy matter.¹²¹ Thus, as a matter of law, drone recording implicated the First Amendment. Importantly, however, Judge Pitman declined to consider whether the statutory scheme should be reviewed under strict scrutiny. He did not independently extend the demanding strict-scrutiny standard to the entire statutory scheme based on the broader ground that all newsgathering is itself protected under the First Amendment.¹²² Instead, he exclusively relied on the content- and speaker-based restrictions he found in the statute.¹²³

Judge Pitman held that both the “Surveillance” and “No-Fly” restrictions were content-based because their restrictions focused on the subject matter recorded. The “Surveillance” provisions¹²⁴ require that the enforcing officer assess the contents of the image in determining whether such image capture and possession/disclosure/display/distribution is proscribed. As the prohibitions apply only to

¹¹⁹ Claimants refer at times to a broader class in their pleading *See* Pleading, *supra* note 117, at 2 (“speech and newsgathering activity”); *id.* (“chill and criminalize newsgathering activity”); *id.* (“visual journalism or newsgathering”); *id.* at 3 (“newsgathering purposes.”); *id.* at 5 (“chilling effect . . . on newsgathering activities and speech”); *id.* at 6 (“the act of gathering news”); *id.* at 7 (“visual journalists or those engaged in gathering and disseminating information on matters of public concern”); *id.* at 8 (“visual journalists or other newsgathering individuals or entities”); *id.* at 10 (“activities undertaken for the purpose of gathering the news”); *id.* at 26 (“inevitably single out journalists for disfavored treatment by prohibiting the use of drone for newsgathering purposes over facilities of public interest” and “burdens newsgathering activities protected by the First Amendment”); *id.* at 27–28 (“newsgathering activities”).

¹²⁰ *Nat’l Press Photographers Ass’n*, 594 F. Supp. 3d at 796 (accepting plaintiffs’ allegations as to the broad class of “visual journalists” without defining who qualifies as a “visual journalist”—that is, whether anyone with a drone so qualifies). Making such a decision—whether judicially or legislatively—creates its own problems, as the Court has never drawn a media-versus-non-media distinction as to First Amendment protection. *See generally* Elder, Part I, *supra* note 1; *infra* notes 232, 277; Elder, *Tyrant to the People*, *supra* note 53. This is why the conduct-versus-expression dichotomy is so important. Note that the FAA has regularly considered newsgathering as a “commercial use” and sent cease-and-desist directives to media entities using drones in reporting activities. Syed & Berry, *supra* note 10.

¹²¹ *Nat’l Press Photographers Ass’n*, 594 F. Supp. 3d at 804 (following Fifth Circuit precedent from *Turner v. Lieutenant Driver*, 848 F.3d 678, 689 (5th Cir. 2017)).

¹²² *Nat’l Press Photographers Ass’n*, 594 F. Supp. 3d at 804.

¹²³ *Id.*

¹²⁴ TEX. CODE ANN. §§423.002, 423.003, 423–006.

individuals and private real property, and not where the image capture subject is public property (or a person thereon), the statutory scheme identifies categories of captured images based on their content and then applies different limitations, i.e., a content-based restriction.¹²⁵ The “No-Fly” provisions were also subject to strict scrutiny because they condition legality based on the purpose of the image captured. If expression otherwise prohibited is “used for a commercial purpose,”¹²⁶ it is legally permissible.

Judge Pitman gave the example of a photojournalist hired to take photos of the Texas Rangers Globe Life Park for the Texas Rangers, but who is barred from sharing them with the media.¹²⁷ She is allowed to do take photos of the Rangers, but other photojournalists are not.¹²⁸ The “Surveillance” provisions were independently subject to strict scrutiny because they discriminate based on the identity of the speaker. The court cited the statute’s¹²⁹ detailed list of individuals whose drone use is not prohibited, such as professors, students, real estate brokers, and insurance companies. Journalists, however, are not included. The court adopted plaintiffs’ argument that images taken lawfully by a professor would be a misdemeanor if taken by a journalist.¹³⁰

Having thus found that Texas’s drone restrictions were subject to strict scrutiny, the court found that the actually-necessary requirement of strict scrutiny could not be met where the state has a variety of available means to implement its interest without prohibiting activities with First Amendment protection.¹³¹ Judge Pitman found that the cited state interests in individual privacy, private property, and the safety of critical infrastructure facilities could be achieved with alternative means offered by plaintiffs: criminal trespass statutes, voyeurism and recording states, common law claims such as intrusion upon seclusion, and the felony statute for knowingly damaging critical infrastructure

¹²⁵ *Nat’l Press Photographers Ass’n*, 594 F. Supp. 3d at 805–06.

¹²⁶ *See* TEX. CODE ANN. §§423.0045, 423.0046(c)(5).

¹²⁷ *Nat’l Press Photographers Ass’n*, 594 F. Supp. 3d. at 806.

¹²⁸ *Id.* at 806. This limitation recognizes the Rangers interest in protecting its intellectual property. *See infra* § IV.B.3.

¹²⁹ *Nat’l Press Photographers Ass’n*, 594 F. Supp. 3d. at 806 (citing TEX. CODE ANN. §423.002(a)(9)).

¹³⁰ *Id.*

¹³¹ *Id.* at 807.

facilities.¹³² The court also found that the statute did not meet strict scrutiny's narrow-tailoring requirement.

The court held both the "Surveillance" and "No-Fly" provisions were overinclusive and overbroad as "unnecessarily circumscribing protected expression" because the statute "effectively outlaw[ed]" drone use for newsgathering on private property—95% of the state.¹³³ The court adopted plaintiffs' claim that the "Surveillance" provisions bar journalists from utilizing drones to record what can be legally recorded from a helicopter, such as footage of public property or footage of private property taken while flying over adjacent public property. Moreover, the "No-Fly" provisions bar drone use even where such use does not involve the risks the state was attempting to prevent. For example, restrictions on filming an empty stadium "seem to belie explanation."¹³⁴

According to the court, both the "Surveillance" and "No-Fly" provisions were also underinclusive based on carve-outs that allowed the same risks as the state claimed drone journalists created. The "Surveillance" provisions exempted 21 uses of drones from the prohibition, none of which render unnecessary the purported privacy concerns from newsgathering, thereby raising serious questions regarding whether government is seeking to pursue its invoked interest "rather than disfavoring a particular speaker or viewpoint."¹³⁵ Similarly, the court believed the "commercial-purposes" and sports-venues exemptions allowed the same risks that the state claimed to be preventing by restricting journalist drone operators.¹³⁶ Judge Pitman cited plaintiffs' illustration of a photographer hired to take photos of the Texas Rangers' stadium for commercial purposes, as opposed to taking photos for journalistic purposes.¹³⁷ In extensive dicta involving a

¹³² *Id.*

¹³³ *Id.* at 808.

¹³⁴ *Id.*

¹³⁵ *Nat'l Press Photographers Ass'n*, 594 F. Supp. 3d. at 808.

¹³⁶ *Id.* at 808–09.

¹³⁷ *Id.* Judge Pitman ignored what this author argues is a plethora of differences between a photographer employed by the sports-venue owner and the other visual journalists—as to the former, the owner can mandate training and experience, insurance against risks and damage to its facilities, employees, patrons, etc., and secure protection of the privacy of the patrons and their and its intellectual property interests.

battle of dictionary definitions, the court found the term “surveillance” and “commercial purpose” were unconstitutionally vague.¹³⁸

The court’s decision included several critical omissions. At no point did the court or the plaintiffs state or suggest that a First Amendment right exists for plaintiffs to fly over or interfere with the use of the land or to observe or capture images of individuals having rights to property and privacy thereon. Nor could they. In fact, both the court and the plaintiffs fully conceded that the state of Texas may legitimately exercise its police power to exclude others under the law of trespass to land,¹³⁹ and to protect owners and occupants against privacy violations, including under Texas’s voyeurism statute.¹⁴⁰ Nor did the court or plaintiffs directly challenge the right of the state to regulate constructive intrusions from adjacency using sophisticated, privacy-eviscerating technology and a unique, privacy-impairing vantage point¹⁴¹ via drones. There is a plethora of precedent, particularly as to trespass to land, finding that there is no First Amendment right to enter onto property,¹⁴² which under *United States v. Causby* and black-letter law, extends above the land to some substantial extent.¹⁴³ Moreover, major constitutional scholars have vigorously defended the extension of those prohibitions on trespass to prohibitions on technology-driven

¹³⁸ *Id.* at 809–11.

¹³⁹ *Id.* at 807–08.

¹⁴⁰ *Id.* at 807 (accepting plaintiffs’ allegations as to “alternative channels” Texas could use to protect property, privacy, and safety of critical-infrastructure facilities, including the intrusion-upon-seclusion tort, the criminal-trespass statute, and the recordings and voyeurism statutes).

¹⁴¹ Plaintiffs’ pleading emphasized the importance of the vantage point of drone visual journalists. Pleading, *supra* note 117, at 12 (“Aerial imagery adds significant information and depth to a news story and conveys content in a manner that photography from the ground cannot.”). It’s noteworthy that the plaintiffs’ sole concern was “the compelling unique image to inform their audience.” *Id.* (“Strong aerial visuals allow them to tell newsworthy stories on matters of public concern and to add a level of understanding and information to stories that could not otherwise be conveyed.”).

¹⁴² See *Elder, Tyrant to the People*, *supra* note 53; the Takings Clause cases discussed in *infra* text accompanying notes 143, 285, 433–34, 609–14. Compare *PETA v. N.C. Farm Bureau Fed’n, Inc.*, 60 F.4th 815 (4th Cir. 2023) (applying heightened scrutiny and enjoining as applied to PETA legislative adoption of the duty-of-loyalty/trespass standards as to false employees), *cert. denied*, Order List of Monday, October 16, 2023, 601 U.S. __ (2023) with *Elder, Tyrant to the People*, *supra* note 53; the Fifth Circuit *infra* § IV.B.2.

¹⁴³ See *U.S. v. Causby*, 328 U.S. 256, 264–66 (1946) (protecting, without defining “precise limits,” the the “immediate reaches” as to overflights “so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land” in violation of the Takings Clause). See also, *infra* text accompanying notes 212–13.

incursions from adjacent property as a natural, logical and irrefutable corollary of this existing First Amendment jurisprudence.¹⁴⁴

Another deficiency was the court's extremely dubious reliance on the argument that photography is inherently expressive as an essential and indivisible part of First Amendment expression under precedents like *ACLU of Illinois v. Alvarez*.¹⁴⁵ The court's reliance on *Alvarez* and its progeny is subject to a multitude of criticisms. Above all, their suggestion that photography is itself inherently expressive collapses the Supreme Court's repeatedly reiterated conduct-versus-expression dichotomy.¹⁴⁶ Under the court's analysis, *everyone* with a cell-phone camera or a drone is a journalist and every time he clicks a photo or takes video via drone is protected by the First Amendment. But even *Alvarez* progeny's staunchest proponents have largely limited this line of precedent to official conduct in public places and have not suggested that the right to photography or videography extends to private property and to individuals thereon, whether from above or from adjacent public places.¹⁴⁷

The court's decision is a radical extension of *Alvarez* and its progeny. In those prior cases, the image capturer has the right to be where he is—an area open to the public.¹⁴⁸ The only questions those cases decide are whether the individual has the right of image-capture and dissemination from their legally occupied position.¹⁴⁹ Essentially, those cases rely on the camera operator being limited to the physical location they can legally operate, and observe with their own eyes. The camera-wielding journalist chooses to record only after having already seen the subject of the recording. But drone surveillance takes these cases an additional and quite dramatic step further. A drone operator flies the drone to record a new perspective they cannot see with their own eyes, and which may not be visible from a location the operator could legally occupy. Therefore, the drone operator necessarily chooses

¹⁴⁴ See, e.g., Erwen Chemerinsky, *Protecting Privacy from Technological Intrusions*, 1999 ANN. SURV. AM. L. 183, 183–92 (1999).

¹⁴⁵ Am. Civ. Liberties Union of Ill. v. *Alvarez*, 679 F.3d 583, 586, 592, 595, 599–607 (7th Cir. 2012), *cert. denied*, 568 U.S. 1027 (2012). For a detailed discussion of *Alvarez* and other cases following the “growing consensus” rule, see Elder, Part I, *supra* note 1, § II.

¹⁴⁶ See Elder, Part I, *supra* note 1, at 2, 51–53, 59–61.

¹⁴⁷ *Id.*

¹⁴⁸ See Elder, Part I, *supra* note 1, §§ I, II.

¹⁴⁹ *Id.*

to record before they can determine if the subject of the recording should be recorded, or is even newsworthy at all.

Alvarez and kin deal with journalists and others recording from locations they legally occupy. In contrast, a drone operator has no right under those cases to capture images from above private property or to use sophisticated technology to record private situations from an adjacent property. Thus, the court extended *Alvarez* beyond its critical inherent limitation—that the First Amendment only protects a right to record from *legally occupied* vantage points.¹⁵⁰

Lastly, Judge Pitman’s decision radically expanding the “growing consensus”—critiqued in Part I—made no reference to *Cohen v. Cowles Media*¹⁵¹ or *Bartnicki v. Vopper*.¹⁵² As developed therein, these cases addressed generally applicable laws involving conduct—like drones engaged in overflight of private property—that had an “incidental effect” on newsgathering. They control in the drone-surveillance context and provide states with considerable discretion to regulate or prohibit drone surveillance, subject only to the rational-basis test.¹⁵³ Instead, Judge Pitman adopted strict scrutiny and was hypercritical of the distinctions drawn by the Texas legislature, in order to find the restrictions were not narrowly tailored.¹⁵⁴

2. The Fifth Circuit Reversal—Dramatic Deference to Legislative Protection of Privacy and Property

The Fifth Circuit rejected the plaintiffs’ “sweeping” arguments that the “No Fly” restrictions violated the First Amendment because they barred “an unqualified... right” to engage in surveillance by photojournalists in the airspace above the listed facilities and of non-consenting private persons on private lands¹⁵⁵ and failed to provide a newsgathering exception for targeted speech, thereby depriving them

¹⁵⁰ See Elder, Part I, *supra* note 1 §§ II–III; see *infra* § IV.B.2.

¹⁵¹ *Cohen v. Cowles Media*, 501 U.S. 663 (1991). See Elder, Part I, *supra* note 1, text accompanying nn. 11–17, 60, 176, 203, 253, 285, 305, 313–14, 346.

¹⁵² *Bartnicki v. Vopper*, 532 U.S. 514 (2001). See Elder, Part I, *supra* note 1, text accompanying nn. 18–26, 60, 203, 235–40, 244, 286, 308–14.

¹⁵³ See *supra* notes 52–53.

¹⁵⁴ *Nat’l Press Photographers Ass’n*, 594 F. Supp. 3d at 806–09.

¹⁵⁵ *Nat’l Press Photographers Ass’n v. McCraw*, 90 F.4th 770, 798 (5th Cir. 2024).

of the right to capture newsworthy matter.¹⁵⁶ The court held that drone overflights were not “inherently expressive,” as they involve restrictions on conduct—flight—not speech-expression.¹⁵⁷ The court’s opinion by Judge Don R. Willett quoted at length from the Supreme Court’s pivotal decision in *Zemel v. Rusk*¹⁵⁸ regarding plaintiffs’ First Amendment claim based on the Texas statute’s failure to provide such overflight access: “There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow.”¹⁵⁹ Citing the example of barred access to the White House, the Fifth Circuit rejected newsgathering-overflight access as a right protected under the First Amendment: “The right to speak and publish does not carry with it the unrestricted right to gather information.”¹⁶⁰ Accordingly, the Fifth Circuit held that “No Fly” provisions not targeting speech and “hav[ing] *nothing* to do” with speech-expression activity did not bring the First Amendment into play.¹⁶¹

The Fifth Circuit found that limitations on filming in the “Surveillance” provisions did “implicate” speech “at least to some extent” and that the protection for filming was a matter of “ongoing and vigorous debate” in cases where such posed a threat to privacy.¹⁶²

¹⁵⁶ *Id.* at 777, 787–88 (but not precluding as-applied defenses to future prosecutions that might occur).

¹⁵⁷ *Id.* at 787–88.

¹⁵⁸ 381 U.S. 1, 16–17 (1965).

¹⁵⁹ *Nat’l Press Photographers Ass’n*, 90 F.4th at 788 (quoting *Zemel*, 381 U.S. at 16–17).

¹⁶⁰ *Id.*

¹⁶¹ *Nat’l Press Photographers Ass’n v. McCraw*, 90 F.4th 770, 788 (5th Cir. 2024) (emphasis supplied).

¹⁶² *Id.* The court referenced the Fourth Circuit’s recent panel decision providing animal-rights undercover operatives rights to surreptitiously embed themselves and record on private property in violation of a state statute. *People for the Ethical Treatment of Animals, Inc. v. N.C. Fed’n, Inc.*, 60 F.4th 815, 824–34 (4th Cir. 2023) [hereinafter *PETA*], *cert. denied*, 144 S. Ct. 325, 326 (2023) (mem.). Tellingly, the Fifth Circuit cited approvingly Judge Rushing’s dissent, indicating she “stress[ed] the point” that despite the “some” protection accorded newsgathering, the interest in gathering newsworthy information did “‘not confer a right to enter *private* property . . . and secretly record’ because ‘the mere act of recording by itself is not categorically protected speech.’” *Nat’l Press Photographers’ Ass’n*, 90 F.4th at 788–89 (quoting *PETA*, 60 F.4th at 845–47 (Rushing, J.) (emphasis supplied)). Judge Rushing’s views support and reflect those of the Fifth Circuit. *See infra* text accompanying notes 168–205. The Fifth Circuit also referenced another recent decision, *Project Veritas, Inc. v. Schmidt*, 72 F.4th 1043, 1055 (9th Cir. 2023), *vacated pending en banc review*, 95 F.4th 1152 (9th Cir. 2024) (indicating that, under the Ninth Circuit’s own “clear and binding precedent,” “the act of recording is itself an inherently expressive activity”). *Nat’l Press Photographers’ Ass’n*, 90 F.4th at 788–89. The Fifth Circuit cited approvingly Judge Christen’s biting dissent, concluding that “the right to free speech does not necessarily include an unrestrained right to record *others’* speech.” *Id.* at 789 (discussing *Project Veritas, Inc.*, 90 F.4th at 1069 (Christen, J., dissenting)). Note

The court reviewed many of the decisions supporting what courts have designated as the “growing consensus,”¹⁶³ including the Fifth Circuit’s own decision of *Turner v. Lieutenant Driver*,¹⁶⁴ in holding government officers accountable. This protection was “not unqualified” but provided “some level” of speech protection for filming not only as to police and government officials “but in general.”¹⁶⁵ The question raised was the level of scrutiny.

The Fifth Circuit concluded that aerial surveillance was not itself “inherently expressive” and that such surveillance’s non-speech features “predominate[d] over any expressive component.”¹⁶⁶ Nonetheless, adopting an explicit abundance-of-caution approach,¹⁶⁷ it applied an intermediate level of scrutiny to provisions that were not “pure drone operating” but that neither “directly or primarily regulate[d]” speech-expression and did not “target any particular message, idea or subject matter.”¹⁶⁸ The Fifth Circuit followed its decision in *Peavy v. WFAA-TV*,¹⁶⁹ which involved a First Amendment challenge to prohibitions on illegal interception of conversations—content-neutral laws based exclusively on the means of acquisition, as in the case before the court.¹⁷⁰ In essence, such have a concededly “incidental impact on speech [but] more closely resemble conduct regulations”—aerial surveillance—rather than free expression or operated as time/place/manner regulations on drone usage above eight feet.¹⁷¹ The court found that intermediate scrutiny “respects the First Amendment value” of photography “while remaining cognizant of the fact that recording

that the Christen dissent is consistent with and support supports the Fifth Circuit’s analysis above. See *infra* text accompanying notes 33–34.

¹⁶³ See *Nat’l Press Photographers Ass’n*, 90 F.4th at 788–89.

¹⁶⁴ 848 F.3d 678, 688–90 (5th Cir. 2017).

¹⁶⁵ *Nat’l Press Photographers Ass’n*, 90 F.4th at 789.

¹⁶⁶ *Id.* at 790.

¹⁶⁷ *Nat’l Press Photographers Ass’n v. McCraw*, 90 F.4th 770, 790 (5th Cir. 2024).

¹⁶⁸ *Id.*

¹⁶⁹ 221 F.3d 158, 188, 191 (5th Cir. 2000). *Bartnicki v. Vopper*, 532 U.S. 514, 522, n. 5 (2001), cited *Peavy*’s analysis of the speech-versus-speech dichotomy. The Court’s opinion did so in the context of the Court’s majority finding that the passively received matter acquired illegally by third persons involved pure expression. *Id.* at 526–35. The clear *Bartnicki* Court consensus as to matters involving active participation in illegally acquiring the newsworthy matter is consistent and reflects *Cohen*’s mere-rationality approach and the Court’s traditional posture. See Elder, *Tyrant to the People*, *supra* note 53.

¹⁷⁰ *Nat’l Press Photographers Ass’n*, 90 F.4th at 790.

¹⁷¹ *Id.* (emphasis supplied).

from the sky—something the average private person cannot avoid and from where the average photographer would not be able to reach—is *simply not the same thing as expressing one’s views*.”¹⁷²

The Fifth Circuit rejected plaintiffs’ strict-scrutiny argument that the provisions were content-based because they necessitated that the enforcing officer examine the drone-image’s content. This was inconsistent with the Supreme Court’s decision issued after the lower court’s decision.¹⁷³ The provisions were not content-based because the provisions determine image acquisition as illegal or legal according to *how* the capture occurs, not the *content* thereof.¹⁷⁴ The court acknowledged that a drone aerial recording may be unlawful thereunder but that parallel captures from a helicopter, high structure, trampoline, high ladder, or a drone flown under eight feet may be lawful.¹⁷⁵ Judge Willett also rejected the district court’s conclusion adopting plaintiffs’ favored-versus-unfavored-speaker argument, for example, the exception for scholars operating drones for scholarly research and the military for its operations.¹⁷⁶ While conceding the statute favors the latter, that did not suffice to invalidate it. The rationale for the favored-speaker argument—such can be “a facially content-neutral loophole” for suppressing government-disfavored views or content—did *not* exist in this case, as the statute distinguishes between the *manner* of taking the photographs, that is, the *photographer*, not the *content* or *message* of the photographs themselves, which is immaterial.¹⁷⁷

The Fifth Circuit strongly repulsed the direct-burden-on-newsgathering strict-scrutiny argument Judge Pitman had not addressed, affirming newsgathering’s importance, and held that the Court “in no uncertain terms”¹⁷⁸ had determined in *Branzburg*¹⁷⁹ that “the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally” and that the “incidental burdening” of the media by enforcement of

¹⁷² *Id.* (emphasis supplied).

¹⁷³ Nat’l Press Photographers Ass’n v. McCraw, 90 F.4th 770, 791 (5th Cir. 2024) (citing *City of Austin v. Reagan National Advertising of Austin LLC*, 596 U.S. 61 (2022) (holding that a law is not content-based merely because a sign must be read before determining whether it is lawful)).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 791–92.

¹⁷⁸ *Id.* at 792.

¹⁷⁹ 408 U.S. 665, 684 (1978).

generally applicable laws did not so require.¹⁸⁰ The Fifth Circuit cited *Branzburg*'s rejection of any special exemption for theft of documents, wiretapping, or right to access disaster or crime sites from which the public was barred.¹⁸¹ Thus, while drones are undoubtedly “a helpful tool in the journalist’s toolkit,”¹⁸² limitations on their use do not justify strict scrutiny. The court adopted a modernized, reformulated *Branzburg*: “From the beginning of our country the press has operated without constitutional protection for [drones] and [yet] the press has flourished.”¹⁸³

The Fifth Circuit cited *Cohen v. Cowles Media Co.*,¹⁸⁴ which held that state promissory-estoppel doctrine’s incidental impact on newsgathering and reportage did not run afoul of the First Amendment.¹⁸⁵ The Fifth Circuit then responded to the plaintiffs’ fundamental argument and held that newsgathering’s critical importance “affords no right to compel *others* to supply information” by conducting unconsented-to surveillance of private individuals and property¹⁸⁶—in other words, to make them involuntary information-providers.¹⁸⁷ The Court’s jurisprudence rejects any such right, as the media have “no special

¹⁸⁰ Nat’l Press Photographers Ass’n v. McCraw, 90 F.4th 770, 792 (5th Cir. 2024) (quoting *Branzburg*).

¹⁸¹ *Id.* at 792–93. See also *Pitta v. Medeiros*, 90 F.4th 11, 21–22 (1st Cir. 2024) (denying a parents’ right-to-record via videotaping as to IEP hearings in public schools, as such are “non-public spaces . . . closed to the public . . . involv[ing] discussion of personal, highly sensitive information”).

¹⁸² *Nat’l Press Photographers Ass’n*, 90 F.4th at 792–93.

¹⁸³ *Id.* (quoting *Branzburg*, 408 U.S. at 697–99, and its analysis rejecting a “virtually impenetrable constitutional shield” authorizing reporters to ignore grand-jury subpoenas as “treacherous grounds for a far-reaching interpretation” of the First Amendment).

¹⁸⁴ 501 U.S. 663, 669 (1991). See Elder, Part I, *supra* note 1, text accompanying nn. 11–17, 60, 176, 203, 253, 285, 305, 313–14, 346; Elder, *Tyrant to the People*, *supra* note 53.

¹⁸⁵ *Nat’l Press Photographers Ass’n*, 90 F.4th at 792–93.

¹⁸⁶ *Nat’l Press Photographers Ass’n v. McCraw*, 90 F.4th 770, 792–93 (5th Cir. 2024) (citing *Houchins v. KQED*, 438 U.S. 1, 11 (1978) (plurality)).

¹⁸⁷ See discussion of *Bartnicki v. Vopper* in Elder, Part I, *supra* note 1, text accompanying nn. 240–41; Elder, *Tyrant to the People*, *supra* note 53; the Fifth Circuit’s approval of Judge Rushing’s dissent in the *PETA*, *supra* note 162; note 199, *infra*. Note that Judge Willett’s opinion parallels that of the Court in 303 Creative LLC v. Elenis, 600 U.S. 570, 593–604 (2023) (Gorsuch, J.) (rejecting Colorado’s attempt to justify coerced speech by treating the speech-creative expression therein as conduct—a sale of a product—with only an “incidental” restriction on expression). The recording cases do the reverse, attempting to collapse prototypical conduct into protected speech while making the victim an involuntary information-provider (perhaps to the world), without any legal protection for privacy, reputation, potential damage to or loss of present or future employment, and the pursuit of happiness. That’s not and cannot be the law.

privilege to invade the right and liberties of others.”¹⁸⁸ The Fifth Circuit emphasized the express exemption for image capture of public property and persons thereon.¹⁸⁹

The Fifth Circuit held that “[at] *most*” intermediate scrutiny applied,¹⁹⁰ as the “Surveillance” restrictions do not regulate *what* images are taken but *where* and *how* they are acquired—by drone, with intent to engage in surveillance without consent.¹⁹¹ Applying intermediate scrutiny, it found *Peavy* controlling, as privacy rights are of “constitutional dimension”¹⁹² and drones have “singular potential” to assist in invading privacy—“they are small, silent, and able to capture images from angles and altitudes no ordinary photographer, snoop, or voyeur would be able to reach.”¹⁹³ The court also held that intermediate scrutiny’s “tailoring” requirements were met, as the government’s important interest in protecting privacy would be “‘achieved less effectively’ absent the Surveillance provisions.”¹⁹⁴ The provisions were also tailored to proscribe surveillance not available through ordinary methods, noting the eight-foot exemption.¹⁹⁵ The court applied the same analysis to the lower court’s overbreadth conclusion.¹⁹⁶

In sum, the Fifth Circuit applied a relaxed and flexible intermediate-scrutiny test, while interchangeably following Court cases like *Cohen* that are generally viewed as applying the rational-basis standard.¹⁹⁷ Indeed, the Fifth Circuit’s emphasis on the drone-operator’s surveillance *conduct* replicates the conduct-versus-pure-expression dichotomy in *Cohen* and *Bartnicki v. Vopper*.¹⁹⁸ And, it’s worth repeating, emphasis on what plaintiffs are attempting to achieve—use of private individuals and private land as involuntary information-providers—parallels what is

¹⁸⁸ *Nat’l Press Photographers Ass’n*, 90 F.4th at 793 (quoting *Branzburg*).

¹⁸⁹ *Id.* at 793, n. 122–23, 794–95.

¹⁹⁰ *Id.* at 793 (emphasis supplied).

¹⁹¹ *Id.* (emphasis in original).

¹⁹² *Nat’l Press Photographers Ass’n v. McCraw*, 90 F.4th 770, 794 (5th Cir. 2024).

¹⁹³ *Id.*

¹⁹⁴ *Nat’l Press Photographers Ass’n*, 90 F.4th at 794 (quoting *Peavy*, 221 F.3d at 192–93).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ See Elder, Part I, *supra* note 1, text accompanying nn. 11–17, 60, 63, 176, 203, 235–40, 244, 253, 285–86, 305, 308–14; Elder, *Tyrant to the People*, *supra* note 53, n. 15.

¹⁹⁸ *Id.*

strongly suggested in *Bartnicki*.¹⁹⁹ The Fifth Circuit’s powerful, parting parry to plaintiffs’ “sweeping” arguments repudiated any suggestion that anything in the First Amendment’s original meaning or the court’s precedent supports such:

In fact, nothing in the Constitution permits an individual to film his neighbor in the privacy of her home—stealthily from the air—for purposes of conducting “surveillance.” Under plaintiffs’ novel theory of the First Amendment, laws prohibiting stalking—and even voyeurism—would fall in the name of “free speech.”²⁰⁰

The Fifth Circuit denied a request for rehearing en banc.²⁰¹ Petitioners then filed a petition for a writ or certiorari on April 11, 2024, on multiple grounds,²⁰² including the Fifth Circuit’s alleged failure to apply strict scrutiny, and with particular focus on the court’s failure to apply “meaningful review” under an “anemic version”²⁰³ of intermediate scrutiny. Petitioners contended that the Fifth Circuit’s opinion will chill journalists and news entities from operating drones “to *create and publish* newsworthy speech” while allowing other “favored speakers” “to enhance their commercial interests.”²⁰⁴ Petitioners essential arguments are, of course, based on the media and other’s attempt to collapse the pure-expression-versus-conduct dichotomy, which both Parts I and II critique sharply as inconsistent with the Court’s longstanding First Amendment jurisprudence.²⁰⁵

The Supreme Court denied the petition on October 7, 2024.

¹⁹⁹ *Id.*; see also *Nat’l Press Photographers Ass’n*, 90 F.4th at 789, n. 85 (citing *Project Veritas, Inc. v. Schmidt*, 72 F.4th 1043, 1069 (9th Cir. 2023) (Christen, J., dissenting); *id.* at 794–95, n. 139 (citing *PETA*, 60 F.4th at 845 (Rushing, J., dissenting)). See also, *supra* text accompanying notes 162, 187.

²⁰⁰ *Nat’l Press Photographers Ass’n v. McCraw*, 90 F.4th 770, 798 (5th Cir. 2024).

²⁰¹ Petition For A Writ of Certiorari at 48a, *National Press Photographers Association v. Higgins* (April 11, 2024) [hereinafter *Petition*].

²⁰² *Id.*

²⁰³ Compare *id.* at 9, 37–38, with *U.S. v. Rahimi*, 144 S. Ct. 1889, 1921 (2024) (Kavanaugh, J., concurring). In *Rahimi*, Justice Kavanaugh offered a compelling, detailed critique of various levels of balancing analyses—“heightened scrutiny and the like”—that are “a relatively modern judicial innovation.” Having no basis in the Constitution’s text or original meaning, the balancing approach “require[s] highly subjective judicial evaluation of how important a law is,” necessitating judges to act more like legislatures who decide what the law *should* be rather than judges who “say what the law is.” *Id.* (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

²⁰⁴ *Petition*, *supra* note 201, at 37–38 (emphasis supplied).

²⁰⁵ See Elder, Part I, *supra* note 1, at 2, 51–53, 59–61; accord Elder, *Tyrant to the People*, *supra* note 53.

3. Additional Observations Why Courts Elsewhere Should Not Seek Solace in Judge Pitman's Opinion

While critics of Texas' drone statute view it as one of the "most restrictive" in the United States,²⁰⁶ the law, viewed as a whole, suggests something quite different. The statute reflects the Texas legislature's careful weighing of the state's interest in protecting the use of land (and the individuals thereon) for commercial, industrial, other business and private uses, including for residential purposes, against drone operators' potential malfeasance and misfeasance based on drones' maneuverability, widespread accessibility, secrecy and unconsented-to surveillance, and highly sophisticated technology.²⁰⁷ The statute does provide certain exemptions, both in general²⁰⁸ and specific (relating to critical infrastructures, correctional-detention facilities, and sports venues²⁰⁹). Those exemptions make clear that the Texas legislature was and is quite willing to allow private drone use in the specific circumstances where drone use is necessary or beneficial to the private use of property. Texas, like most other jurisdictions, has also created exceptions for law-enforcement use of drones—based on either a search warrant, or other enumerated criteria. These limited exceptions for government use reflect the state's legitimate interest in preventing law enforcement from abusing the rights of persons, (including businesses and the media), while also authorizing law enforcement to use drones where necessary to perform their duties effectively, responsibly, and safely.²¹⁰

Almost all the exceptions allowing drone use involve situations where drones are authorized to lawfully inspect, surveil, and

²⁰⁶ See Press Release: MFIA Files Suit Challenging Texas Drone Law (Sept. 27, 2019) (Yale Law School's Media Freedom and Access Clinic, of the Floyd Abrams Institute for Freedom of Expression), <https://law.yale.edu/yls-today/news/mfia-files-suit-challenging-texas-drone-law> (noting the Clinic is "dedicated to increasing government transparency, defending the essential work of newsgatherers, and protecting freedom of expression through impact litigation").

²⁰⁷ See Pleading, *supra* note 117, at 13 (para. 48) (stating that drones are "the most feasible, least expensive, and safest way[s] to engage in aerial [newsgathering]" since they "can fly at low altitudes, are largely maneuverable, and typically have technology to stabilize their cameras and capture smooth video and high definition still images . . . allow[ing] visual journalists to capture more information, more timely, and high quality images"); see also *supra* text accompanying note 193.

²⁰⁸ TEX. CODE ANN. §§423.002(a) (1)–(21), (b).

²⁰⁹ *Id.* at §§423.0045(c)(1)(A)–(E), 2(A)–(D), 423.0046(C)(1)–(8).

²¹⁰ *Id.* at §§423.002(a)(7)–(8)(A)–(G), 9(A)–(C).

photograph the targeted facility or person. The use and dissemination of the recordings is similarly limited to those uses directly related to the effective operation and functioning of the land or facility. In other words, the drone use allowed by the Texas statute involves a rule of limited dissemination for a specific use and purpose to a restricted range of recipients. These restrictions parallel and emulate the historical consensus reflecting common-law privileges applicable generally in defamation and privacy law.²¹¹ These scenarios are quite different from drone information-gathering and drone newsgathering-journalism in all its multivariate forms—mainstream reporters, photojournalists-visual journalists, and an endless array of other information-hunter-gatherers. These individuals all have their own, largely self-defined and limitless purposes for gathering information. Some have more specially targeted agendas (animal rights, the environment, and so on),²¹² while others have more basic, voyeuristic or exploratory purposes. Regardless of the reason a drone operator chooses to create a recording, an unrestricted operator has the undeniable potential to disseminate their drone footage publicly.²¹³

The federal district court did not distinguish these incomparable scenarios. Drone recording presents a huge potential for abuse and damage to property and privacy rights. Footage can be almost immediately disseminated the masses via the Internet. Allowing all drone recording has a categorically different effect from the carefully circumscribed statutory exemptions Texas has adopted.²¹⁴ For example, Texas has carefully and deliberately circumscribed uses by law enforcement, including extensive reporting and accountability requirements, in order to protect its private citizens and the public good from an Orwellian Big Brother.²¹⁵ Unquestionably, Texas

²¹¹ See Elder, Part I, *supra* note 1, § IV. See DAVID A. ELDER, DEFAMATION: A LAWYER'S GUIDE, §§ 2:23–2:28, 2:31–2:35 (2024–25 ed.) [hereinafter ELDER, DEFAMATION]; ELDER, PRIVACY TORTS, *supra* note 22, §§ 2:13, 3:10, 4:9.

²¹² See Pleading, *supra* note 117.

²¹³ Plaintiffs' pleading repeatedly stated that the intent of the visual journalist-plaintiffs was to use any photographs recording for public-dissemination purposes. For example, see Pleading, *supra* note 117, at 1 (using the example of "record[ing] newsworthy events for public dissemination"), at 26 (arguing the restrictive statutes "effectively censor critical comment by the press"). Use for public dissemination is inherent in newsgathering. *Id.* at 11.

²¹⁴ TEX. CODE ANN. §§423.002(a)(1)–(21), (b).

²¹⁵ See *Hils v. Davis*, 52 F.4th 997, 1002–03 (6th Cir. 2022) (rejecting the argument that officer-participants in an internal complaint-authority proceeding were entitled to record them and concluding that these proceedings involved a government function and constituted the

may legitimately treat information and recordings acquired by law enforcement as confidential and private, with disclosure or dissemination having *no* First Amendment protection. Some law-enforcement products may, at some point, ultimately become matters of public record and subject to compelled disclosure and subsequent dissemination under “fair report” standards.²¹⁶ Until then Texas may and has the right to exercise its police power to protect the property and privacy rights of its citizens.

The Texas statute has numerous carefully limited exemptions adopted to protect certain professions or businesses, which also mandate that the exempted drone operator stay within the bounds of the exemption to protect citizens from improper drone surveillance. For example, drone image-capture related to a licensed broker’s “marketing sale, or financing” of real estate is permitted so long as “no individual is identifiable” in the recorded images.²¹⁷ Professional land surveyors²¹⁸ and licensed engineers²¹⁹ are subject to a similar privilege and limitation. Insurance companies have a right to use drones in underwriting policies and evaluating and adjusting claims on real property—which must always occur within the operator’s Federal Aviation Administration (FAA) authorization.²²⁰ Texas has also made it equally clear that a pipeline owner may use drones to capture images of pipelines for inspection, maintenance, or repair purposes. This privilege must not be used with “the intent to conduct surveillance on an individual or [unowned] real property” in the state.²²¹ Parallel limitations are implicit in other exemptions—for example, the exemptions do not apply where the drone operator acts for a purpose outside the parameters of the exemption.²²²

government’s speech, not that of the officers in question, and that the First Amendment allows government to control that which government employees can say and cannot say while on the job).

²¹⁶ See ELDER, DEFAMATION, *supra* note 211 §§ 3:1–3:12; see DAVID A. ELDER, THE FAIR REPORT PRIVILEGE, Secs. 1:01–1:10 (1988); Elder, Part I, *supra* note 1 § IV.

²¹⁷ TEX. CODE ANN. §423.002(a) (13).

²¹⁸ *Id.* at §423.002(a)(19).

²¹⁹ *Id.* at §423.002(a)(20).

²²⁰ TEX. CODE ANN. §423.002(a)(21)(A)–(B)

²²¹ TEX. CODE ANN. §423.002(a)(16).

²²² Several of the exemptions in §423.002 have “purpose” limitations. See, e.g., TEX. CODE ANN. §423.002(a) (4) (satellite image captures “for the purposes of mapping”); §423.002(a)(11) (“for the purpose of fire suppression”); §423.002(a)(12) (“for the purpose of rescuing a person . . . in imminent danger”). Assume that a private entity or governmental entity acts outside such limited purposes to engage in intentional image-capture for other purposes—for example, as a

Judge Pitman incorrectly held that the exemptions were not content neutral and were speaker-selective, discriminatory, and targeted journalists because newsgatherers were not exempted but that engineers and insurances were exempted.²²³ This analysis failed to acknowledge the apples-and-oranges distinctions between an exemption for newsgatherers and the exemptions provided by the statute. Plaintiffs and the court focused heavily on the juxtaposition of photojournalists-visual journalists to those who use drones for the purpose of “professional or scholarly research and development or . . . on behalf of an institution of higher education.”²²⁴

The federal trial court failed to recognize the key distinction between journalists and researchers: common-sense, self evident (at least to an academic) structural safeguards. Not only do professional researchers have targeted focus, but they usually share the results thereof with parties and audiences with a shared common interest rather than merely disseminate their footage to the public. Moreover, these individuals and entities also have multiple constraints that help ensure that their image captures and surveillance are not misused: educational qualifications and training; institutional or employer-set standards of competence and professionalism; constitutional norms (for state actors, including private entities that qualify as such); independent governing standards of professionalism, often with disciplinary codes and procedures imposed by many professions and the corollary right to sanction unprofessional behavior, including licensure suspension/forfeiture; peer-group assessment and critique at multiple levels, within and outside the institution, and during any process for publication/use thereof; accountability to the institution’s governing body or board and controlling written and unwritten policies; professional and legal standards that govern use or publication of matters obtained; scope-of-employment supervisory responsibilities inherent in the “acting on behalf of” statutory mandate (as illustrated by the Texas statute discussed above).

ruse to surveil a political opponent, to use images captured for blackmail or extortion, or to engage in voyeurism—any such person would be subject to the criminal sanctions and the civil-liability provisions. See TEX. CODE ANN. §§423.004(a)–(b), 423.006(a)–(d). Note that actions outside the privilege forfeit protection under the law of defamation. See ELDER, *DEFAMATION*, *supra* note 211, §§ 2:31–2:35.

²²³ Natl. Press Photographers Ass’n v. McCraw, 594 F. Supp. 3d 789, 806 (W.D. Tex. 2022).

²²⁴ *Id.* at 795 (quoting TEX. CODE ANN. §423.002(a)(1)).

By contrast, few, if any constraints apply to journalists and other newsgatherers, a group which probably includes anyone with a cell phone.²²⁵ As is well-documented, journalists and the media fight ferociously against any binding or non-binding written standards of professionalism or accountability.²²⁶ Defining who is a journalist is a venture into an analysis of standards so nebulous that it cannot possibly be relied upon to protect the safety and privacy interests of every individual.²²⁷ Of note, as stated above, Judge Pitman's analysis in Texas's case did not discuss in detail or attempt to limit who qualifies as a journalist. Indeed, this is a legal, cultural, and "political thicket" that the courts "ought not to enter"²²⁸ and may be barred from doing so by the First Amendment.²²⁹ The court merely found that the plaintiffs did qualify as journalists.²³⁰ The categories of individual that fall within the court's holding (the class of non-neutral, discriminated-against and singled-out speakers) do not necessarily involve—although some do—any hierarchical relationship with a supervisory entity or employer.²³¹ The court's standing analysis covered many, including a named plaintiff, who are independent contractors.²³²

²²⁵ See *supra* text accompanying notes 118–20, 212–13; *infra* text accompanying note 269. See also Elder, Part I, *supra* note 1, at 53, § IV.

²²⁶ *Id.* See also, *infra* note 232 (discussing the concession in the Pleading); *supra* note 91; *infra* note 269.

²²⁷ This is evidenced by the interested parties calculated efforts to avoid any concrete definition of a journalist. See *Natl. Press Photographers Ass'n v. McCraw*, 594 F. Supp. 3d 789, 810 (W.D. Tex. 2022). Indeed, the term "journalist" seems to cover anyone engaged in drone photography. See *Petition for a writ of certiorari, Nat'l Press Photographers Ass'n v. Higgins*, 2024 WL 1600597 at *1–2 (Apr. 9, 2024) (treating the use of drones as intrinsically newsgathering).

²²⁸ *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

²²⁹ See *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 110 (1979) (Rehnquist, J., concurring in judgment) (Justice Rehnquist stated it was "difficult to take very seriously" under the First Amendment the state's asserted necessity of protecting juvenile anonymity from newspaper reporting when "equally, if not more, effective mean of mass communication" such as electronic publications were allowed to publish juvenile identities.). See also Elder, *Tyrant to the People*, *supra* note 53.

²³⁰ *Nat'l Press Photographers Ass'n*, 594 F. Supp. 3d at 795–98.

²³¹ Note that the status of being an *employee* necessarily subjects that person to a plethora of restraints. See *supra* § III.

²³² Two individual plaintiffs were described as independent or free-lance journalists. See Pleading, *supra* note 117, at 4, 12, 16, 19. The complaint emphasized the need for such independent visual journalists because visual newsgathering increasingly is increasingly dependent on these independent journalists because of financial issues facing mainstream media. *Id.* at 13. See also *Nat'l Press Photographers Ass'n*, 594 F. Supp. 3d at 806 (finding "uncontested that budgetary and other constraints may make drones the only option for recording certain events").

Plaintiffs’ and Judge Pitman’s treatment of the “No-Fly” provisions are particularly difficult to understand and defend. The 400-feet-and-below prohibition, when viewed in conjunction with the FAA’s prohibition of drone usage above 400 feet, effectively precludes intentional or knowing flights over critical infrastructure facilities, correctional-detention facilities, and sports venues.²³³ As stated above, the first two bar “contact with” the facility/person and also coming “within a distance . . . close enough to interfere with the operations of or cause a disturbance to the facility.”²³⁴ In other words, only physically invasive conduct is prohibited in all three scenarios. The plaintiffs did not assert that these restrictions failed to define surveillance or that inherently expressive image capture is involved. So, the only way journalists and newsgatherers could claim these restrictions violated the First Amendment was to allege speaker or content discrimination.

Judge Pitman invalidated the “No-Fly” provision as failing to accomplish the state’s governmental interest, by finding that the “commercial purpose”²³⁵ exemption discriminated against the journalist plaintiffs who might not fit within the divided dictionary definitions of “commercial.”²³⁶ Judge Pitman also held the “commercial-purpose” exemption void for vagueness.²³⁷ These two provisions deserve further attention. Each used identical language regarding drone use over critical-infrastructure facilities, correctional facilities,²³⁸ and sports venues.²³⁹ Drone use, as referred to in the statute, is unquestionably conduct, not speech, and is indistinguishable from a journalist-car-driver breaking the speed limit on the way to an accident scene to gather information for a story. These provisions only exempted a drone operator if the drone was “being used for a commercial purpose” that complied with “all required” authorizations by the FAA and “each applicable . . . rule, restriction, or exemption” adopted by the FAA.²⁴⁰ Failure to meet such

²³³ *Nat’l Press Photographers Ass’n*, 594 F. Supp. 3d at 796 (noting plaintiffs’ claim these two factors “effectively ban” drones from the listed locations).

²³⁴ TEX. CODE ANN. §423.0045(b)(1)–(3).

²³⁵ TEX. CODE ANN. §§423.0045(c)(1)(E), 423.00046(c)(5).

²³⁶ *Nat’l Press Photographers Ass’n*, 594 F. Supp. 3d at 811.

²³⁷ *Id.*

²³⁸ TEX. CODE ANN. §423.0045(c)(1)(E).

²³⁹ *Id.* at §423.0046(c)(5).

²⁴⁰ *Id.* at §423.0045(c)(1)(E), 423.0046(c)(5).

requirements removed the drone operator from the exemption and subjected the operator to the civil and criminal statutory penalties.²⁴¹

Judge Pitman's evisceration of the "No Fly" provision created an absurd and incredibly dangerous outcome. Consider a large sporting event attended by a large number of people. Such events are eminently newsworthy.²⁴² The stadium owner ordinarily controls what drones, helicopters, blimps, and airplanes can operate overhead during a game. This allows the stadium owner to ensure the safety of all attendees below and of those working in aircraft overhead. The "commercial purpose" exemption preserved this preexisting control. Under Judge Pitman's analysis, however, the statute engages in content and speaker discrimination by allowing the stadium, through the "commercial purpose" exemption, to dictate who can and cannot operate overhead during a sports event, *i.e.*, to exclude unaffiliated newsgatherers. The court's result prevents any statute from restricting who can fly a drone, at the expense of the safety of those on the ground and in the air over newsworthy events.

Yet, the stadium's exclusion of unaffiliated newsgatherers would also clearly be independently justifiable under the owner/governmental entity statutory consent exemptions,²⁴³ which involve the right to restrict access to their land to protect their exclusive proprietary and possessory interests, absent discrimination under federal, state, or local civil rights law (or, for government entities, where the property constitutes a public forum²⁴⁴).

The court's elimination of the "No Fly" provision creates chaos in the sky. And, of course, plaintiffs' claim, which Judge Pitman did not expressly adopt or reject,²⁴⁵ was that the narrow exclusion of law enforcement from the drone prohibitions is also unconstitutional, content discrimination.²⁴⁶ This dubious argument suggests that all

²⁴¹ *Id.* at §§ 423.003(a)–(d), 423.004(a)–(e), 423.0045(a)–(d), 423.0046(a)–(d), 423.005(a)–(f).

²⁴² See ELDER, *PRIVACY TORTS*, *supra* note 22, §§ 3:16–3:17; *supra* text accompanying notes 242–45, 247–54.

²⁴³ TEX. CODE ANN. §423.0046(c)(1)–(2), (6)–(8).

²⁴⁴ See § VI, *infra* (discussing public forums).

²⁴⁵ See Pleading, *supra* note 117, at 26 (para. 119) (noting that the "No-Fly" provisions "disfavored treatments . . . for newsgathering purposes over facilities of public interest, while broadly excepting governmental and commercial use of [drones] in these same zones . . . effectively censors critical comment by the press").

²⁴⁶ Note that government has the right to control what its employees can say and not say while so employed. See *Hills v. Davis*, 52 F.4th 997, 1002–03 (6th Cir. 2022).

manner of law enforcement—including federal entities such as the FBI, Department of Homeland Security, and others—must be treated, under any drone restrictions, as equivalent to all manner of journalists and other cell-phone-wielding-information-hunter-gatherers. Additionally, the court did not discuss the ramifications of allowing any individual to record sporting events on the lucrative intellectual-property interests that enable the sports-entertainment industry as a whole. Sports teams, their parent organizations, whether governmental or non-governmental, and individual players have huge investments in their game footage, which is protected under state and federal law, most notably copyright, trademark, and “right of publicity” law.²⁴⁷ Disallowing the right of sports entities to control *who* films and for *what* purpose will destroy the value of the sports entertainment industry. That is why the statute provides sports venues control under both the owner/operator exemption and the “commercial-purpose” exemption. A federal-court mandate of an “open-fly” zone that requires inclusion of all journalists and other information-hunter-gatherers would also likely bring into play the Fifth Amendment Takings Clause.²⁴⁸

4. Final Thoughts on the Implications of Judge Pittman’s Analysis

All drone-journalist newsgatherers have an undoubted interest in searching for evidence of criminal and other wrongdoing and all matters they deem of public interest. That is what investigative reporting is about. Yet, traditional First Amendment law has provided such newsgathering a very circumscribed level of protection.²⁴⁹ Under Judge Pitman’s analysis, would protected newsgathering tacitly extend to flying drones over or making contact with the facility or persons being recorded? Would a drone operator have a tacit constitutional privilege to come close enough to interfere with a facility’s operations or cause disturbance

²⁴⁷ *Zacchini v. Scripps-Howard Publ’g Co.*, 433 U.S. 562, 576–78 (1977) (finding that, like patent and copyright, theft of defendant’s “right of publicity” interest in his entire act was not protected by the First Amendment).

²⁴⁸ See text accompanying *infra* notes 284, 609–14. Judge Pitman declined to allow movant, East Texas Ranch, to intervene, finding that its claims—creation of “*de facto* easements” over private property—constituted an unconstitutional taking under the U.S. and Texas Constitutions. *Nat’l Press Photographers Ass’n*, 594 F. Supp. 3d at 795, 811–12. Such claims were “at best tangentially related to the case before him.” *Id.* at 812.

²⁴⁹ See generally Elder, Part I, *supra* note 1; Elder, *Tyrant to the People*, *supra* note 53.

to any and all critical infrastructure and correctional facilities?²⁵⁰ If a “commercial-purpose” exemption is unenforceable unless all self-identified newsgatherers are permitted, the question remains whether newsgatherers would then have an effective *right to be there*, unless the owner-operator exemptions²⁵¹ constitutionally authorize owners to bar access in order to protect their exclusive rights, as in the case of sports venues discussed above. Neither the parties nor Judge Pitman appear to directly question the right of a critical infrastructure or correctional-detention facility to engage commercially with photographers to do an assessment of the facility for its own protective or effective-functioning purposes. That work is expressly authorized by the owner/operator exemptions. Is effectively abrogating that right the next chess move in the slice-and-dice-via-narrow-tailoring’s inherent domino effect under either strict or intermediate scrutiny under another court’s decision emulating Judge Pitman’s deferential-to-newsgatherers’ approach?

What is clear is what the plaintiffs intended to accomplish with this aggressive attack on Texas’s reasonable statutory scheme: to defer and/or prevent passage and enforcement of all drone statutes or regulations that restrict access to drone image capture of private individuals and land from above (or from adjacent property).²⁵² As stated earlier, drone journalists of all varieties fervently believe that drone recording should be protected under the First Amendment merely because landowners and other individuals “*may* be doing something they don’t want being reported on” and any restriction on drones suppresses “coverage of potentially dangerous or embarrassing conditions at these sites of public interest.”²⁵³ According to drone journalists, the mere *possibility* that private land contains “something” an individual doesn’t want reported on, which could *possibly* include “dangerous or embarrassing conditions,” is enough to outweigh *any* right to privacy or the control of personal property. In their radical view, newsworthy sites include all

²⁵⁰ TEX. CODE ANN. §423.0045(b)(1)–(3).

²⁵¹ Compare *id.* at §§423.0045(c)(1)(A)–(B), 2(A)–(D) (providing the owner-operator exemption) with *Pitta v. Medeiros*, 90 F.4th 11, 20–21 (1st Cir. 2024) (finding recently that legal presence is not controlling in a case involving a parent’s purported right to videotape an IEP at a public school). The First Circuit perfunctorily rejected the legal-presence argument, providing the example of a jury member in a jury room. See *Pitta*, 90 F.4th at n. 9.

²⁵² Natl. Press Photographers Ass’n v. McCraw, 594 F. Supp. 3d 789, 808 (W.D. Tex. 2022) (quoting one declarant: “even if I am physically over public property, I am violating the law by documenting private real property or a person on that property”).

²⁵³ Conrad, *supra* note 113 (quoting Osterreicher, general counsel for the National Press Photographers Association); Pleading, *supra* note 117.

private properties where the conditions or actions of individuals thereon meet these speculative, boundless, privacy-eviscerating criteria.²⁵⁴

Litigants' bombastic assaults on private property rights and individual privacy rights essentially assume that companies, businesses, and individuals have little or no right to protection against any newsgatherers with privacy-negating technology.²⁵⁵ The Supreme Court has tried to deal aggressively with technology-driven shrinkage of privacy and continues to do so in assertively developing standards to respond to this technology-driven assault on the Fourth Amendment.²⁵⁶ States should have parallel police power to protect privacy. A unanimous Court has treated the right to privacy as a "highest order" interest equal in stature to free-expression interests of both media and non-media defendants.²⁵⁷ When legislating on surveillance and image capture (historically acknowledged as conduct, not speech),²⁵⁸ states should have substantial flexibility in making distinction and drawing lines. Judge Pitman's blunt takedown of the Texas statute provided major fodder for attacks on drone restrictions elsewhere, which would have lead to an Orwellian reality of unchecked newsgathering surveillance. Far from hyperbole, this result is evidenced by the court's conclusion that the Texas statute "effectively outlaws the use of [drones] for newsgathering on private property—constituting 95 percent of the state."²⁵⁹ Subjecting 95% of the state to unrestricted drone surveillance is not only Orwellian, but brazenly so.

The Founding Fathers would have recognized that a hired surveyor who climbed a tree with a telescope on adjacent property to assess a client's roof's stability²⁶⁰ observed that property for a self-evident

²⁵⁴ *Id.* If "commercial purpose" were to be narrowly defined as "for the purpose of cargo delivery," such might resolve the vagueness issue but would not eliminate the other First Amendment arguments that plaintiffs raised and Judge Pitman endorsed. *See Nat'l Press Photographers Ass'n*, 594 F. Supp. 3d at 811.

²⁵⁵ *See supra* text accompanying notes 113, 116–17, 119–20, 133, 182–83, 193, 199–200, 212–13, 223–27, 245–54.

²⁵⁶ *See infra* §§ VI.B–D.

²⁵⁷ *Bartnicki v. Vopper*, 532 U.S. 514, 518 (2001); *id.* at 536–38 (Breyer, J., concurring); *id.* at 544 (Rehnquist, J., dissent).

²⁵⁸ *Id.* *See also* *Fields v. City of Philadelphia*, No. 14-4424, 2016 U.S. Dist. LEXIS 20840, at *9 n.27 (E.D. Pa. Feb. 19, 2016) (treating implicitly the image capture as conduct without discussion).

²⁵⁹ *Nat'l Press Photographers Ass'n*, 594 F. Supp. 3d at 808.

²⁶⁰ For discussions of originalism, *see supra* text accompanying notes 39, 183; *infra* text accompanying notes 326, 329, 465–66, 487, 609, 614; Elder, Part I, *supra* note 1 text accompanying nn. 45–57 (discussing *Price v. Garland*, 45 F.4th 1059 (D.C. Cir. 2022)).

“commercial purpose.” The Founders would have had no difficulty distinguishing the surveyor from a journalist climbing the same tree to spy on an individual, in order to see if the person was “*doing something they don’t want reported on*” to report such to the reading public.²⁶¹ How is a modern drone operator any different from the journalist up a tree? Why should drone operators receive all the privileges of the surveyor who was given explicit permission to survey the property by the owners? States like Texas should be able to constitutionally draw such distinctions, thereby limiting drone use to certain situations. Drones do nothing except exacerbate the risk that a self-proclaimed newsgatherer invades an individual’s privacy or property rights. Drones and their accoutrements are no different from the telescope available in colonial times, other than in its greater potential for impairing property and privacy interests.²⁶²

In conclusion, Judge Pitman’s decision in *Nat’l Press Photographers Ass’n* raised fundamental issues about rights of property and privacy and the degree to which the states can constitutionally protect against incursions thereon. Focus for a moment on the rights of businesses—from the corporate multinational to the small family farmer or grocer—and their rights of reputation and goodwill and to operate legal businesses without harassment from third parties. Undoubtedly, some activity or conduct they engage in will interest some visual journalist or other newsgatherer. Businesses are subject to sometimes mindbogglingly intricate layers of regulations and oversight by federal, state, and local governments—the latter may include overlapping city and county regulations. Historically, physical boundaries and fences and the like²⁶³ provided lawful businesses substantial freedom to operate subject to the levels of regulation and oversight referenced above.

Traditionally, as demonstrated herein, states have had considerable flexibility under their federalism-infused police powers to accord a reasonable measure of protection to businesses at all levels to function profitably within the prevailing legal regime – and to thereby protect the interests of their employees in continued employment and personal

²⁶¹ See *supra* notes 116–17, 250–51 (emphasis supplied).

²⁶² See RESTATEMENT (SECOND) OF TORTS, § 652, cmt., illus. 2 (1977) (citing as a tortious intrusion a private detective seeking evidence for litigation who rents a room adjacent to plaintiff’s home and uses a telescope to take “intimate pictures” into plaintiff’s bedroom).

²⁶³ See Margot E. Kaminski, *Regulating Real-World Surveillance*, 90 WASH. L. REV. 1113 (2015).

privacy, the financial interests of their stockholders, and the interests of the public in continued access to the products and services they provide. Judge Pitman temporarily loosed upon the land a potentially huge group of undefined, probably undefinable, drone operators functioning as federal-court-appointed-and-approved private attorneys general²⁶⁴ who can by a single story based on incomplete, perhaps distorted information, perhaps based on a partisan or biased agenda, maybe published for malevolent reasons, devastate a large company or a small business, leaving them with only a few remedies under the law, with the law of defamation making that almost invariably a faint hope.²⁶⁵ Consider what Judge Pitman might hath wrought absent the Fifth Circuit's abject reversal.

States have the right to exercise within our federal system substantial discretion in determining how drone operators should be allowed to operate, for what purposes they should be allowed to operate, what limitations on surveillance and image capture they should be subject to, and what limitations should be imposed on use, duration and retention of images captured. This legislative discretion should be broadly construed and differentially applied in determining who qualifies as engaged in a "commercial activity." Many stakeholders in the Sept. 20, 2020 GAO Report made clear that the privacy threats from commercial actors were of particular concern. One group that included academic stakeholders suggested that "unique privacy problems" are more likely to occur with commercial than with recreational drone operators: "Commercial [drones] are typically equipped with cameras and other sensors capable of collecting personal information and may collect more information than consumers might imagine . . . tech[nology] companies . . . like to . . . collect information. So it's not out of the realm of possibility that technology used to navigate the airspace . . . will also be used to collect information about the environment and public below."²⁶⁶

Others make this same point more specifically, emphasizing that a cargo-delivery system's storage of addresses is one thing, but it's "another [thing] entirely for the delivery [drone] to record and store data on what bathrobe you were wearing each time you open your door to collect a package . . . And while layering on facial recognition technology

²⁶⁴ See *supra* § IV.B.1–4.

²⁶⁵ See Elder, Part I, *supra* note 1, at 53–58, 63–68, 70–71, 76, 81–86.

²⁶⁶ GAO Report, *supra* note 44, at app. III, at 32 (quoting Jerome D. Scott, Director, Electronic Privacy Center Domestic Surveillance Project).

could theoretically be valuable to the delivery service . . . that, too, adds a level of privacy concern that is unforeseeable when considering delivery [drones] in the abstract.”²⁶⁷ But, under Judge Pitman’s opinion, drones used for a “commercial purpose” cannot exclude all manner of visual or other journalists and information-hunter-gatherers. The effects of his decision were unbelievable, as it ignored the Supreme Court’s controlling newsgathering authorities and created the specter of Orwellian surveillance over private property and private persons. In jurisdictions elsewhere, the court’s opinion and reasoning may still hold sway. Fortunately for Texas and Texans’ rights of privacy and property (and other states, at least in the Fifth Circuit), the Fifth Circuit forcefully disagreed. The Supreme Court didn’t disagree with the Fifth Circuit.

ANALYSIS

V. THE SKIES AS A LIMITED PUBLIC FORUM—A HIGHLY UNLIKELY PROSPECT

A. *Four Scholars’ Proposal*

A strong deference to state law, and the premise of reasonable drone regulation, unnerves drone newsgatherers and the high-tech industry. They believe more technology is always better for the public interest—what one author calls the “church of techno optimism.”²⁶⁸ This unbridled “techno-optimism” should be viewed with unwavering skepticism.²⁶⁹ To drone enthusiasts, the air above public land must

²⁶⁷ *Id.* at 32, n. 177 (quoting comments by Professor Margot E. Kaminski, Amie Stepanovich, and Nabiha Syed participating in the NTIA-UAS Privacy Multi-Stakeholder Process).

²⁶⁸ Margaret O’Mara, *The Church of Techno-Optimism*, N.Y. TIMES, 4 (Sept. 29, 2019), <https://www.nytimes.com/2019/09/28/opinion/sunday/silicon-valley-techno-optimism.html> (noting that despite the “bipartisan backlash” in Congress, Big Tech’s “fundamental belief in techno-optimism” remains unchanged—“the best thing that government could do for tech was to get out of the way”). The latter attitude is well-reflected in the approach of the drone industry and its media-photographer allies’ divide-obstruct-and-conquer approach to the NCCSL uniform-drone-act-drafting process. *See supra* text accompanying notes 43, 45, 47, 52, 64, 115; *infra* text accompanying notes 269, 282–84, 548, 612–14.

²⁶⁹ Defenders of drone visual journalism and newsgathering have made some curious and unpersuasive arguments. One prominent lawyer-author endorsed a questionnaire respondent as opining that legitimate news organizations entities have long utilized mikes, hidden cameras, and sophisticated cameras without intruding upon privacy, and that it is not in legitimate news organizations’ interests to antagonize their audiences by invading or being viewed as so doing. So, they will act with the same degree of professional integrity with drones. Mickey H. Osterreicher,

be viewed as logical extensions of ground-level public spaces—public parks, buildings, roads, sidewalks, and so on—and protected as at least limited public forums for drone use. Four scholars—Professors Marc J. Blitz, James Grimsley, Stephen E. Henderso, Joseph Thai—make a spirited but contingent and very cautious proposal for treating airspace above such public areas as “a prominent site of important speech-related activity”²⁷⁰ and arguably a type of limited public forum, while admitting their proposal is the first of its kind, and that *no* case precedent provides forum status “nearly this expansive and pervasive.”²⁷¹ Furthermore, they concede that it can be argued that forum doctrine was “never designed to be scaled up to the heights of navigable airspace.”²⁷²

The authors nonetheless present arguments for treating such drone-permissible airspace as a limited public forum, viewing *Alvarez*

Charting the Course for Use for Small Unmanned Aerial Systems in Newsgathering, 42 PEPP. L. REV. 101, 123 (2015). Some of the survey data suggests that some newsgathering entities were likely operating outside the law and would likely continue to do so. The author concludes that drone newsgathering is occurring on a daily basis. He apparently means globally, and his concern is “whether those [FAA] regulations will be so outmoded and burdensome as to cause their widespread disregard, resulting in a situation no better than it is today.” *Id.* at 130–31. Overall, the article does not provide much comfort that there will be widespread compliance with legal constraints, whatever constraints are ultimately adopted, and further suggests that many will decline to comply in the interest of the public’s purported right to know. This article indicates in detail that relying on news organizations to self-regulate is the proverbial “fox-guarding-the-henhouse” but with no doors or windows for escape and with the hens blind-folded and tethered. There is little indication that cash-strapped media news entities do in fact fear antagonizing their readers and viewers. They seem to be often willing to obsequiously cater to and reaffirm the interests and predilections of their audiences—to secure their base—not unlike politicians. *See* David A. Elder, Neville L. Johnson & Brian A. Rishwain, *Establishing Constitutional Malice For Defamation and Privacy/False Light Claims When Hidden Camera Are Used By Newsgatherers*, 22 LOYOLA ENT. L. REV. 327 (2002). Osterreicher concedes that the FAA has stood by its no-commercial-use policy as to doves, including as to newsgathering. *See* Osterreicher, *supra* note 269, at 107–12. As indicated above, he seems to be tacitly conceding that such drone use is occurring and may, at least in part, be illegal. If such is true, his argument about professional integrity should be viewed as inherently self-serving and suspect. Osterreicher was heavily involved as a critic of the NCCSL draft-uniform-drone-act process and the proponent of the strongly-tilted-in-favor-of-the-media-and-drone-industry draft that suffered a well-deserved death in 2019. *See* Letter from Mickey H. Osterreicher, General Counsel to the NCCSL, National Press Photographers Association, 1–2 (July 24, 2018) (characterizing the June 19, 2018 200 feet exclusive zone as “pos[ing] a serious risk to uses by journalists to gather and disseminate the news to the public, and the public’s right to receive news” guaranteed by the First Amendment).

²⁷⁰ Blitz et al., *supra* note 7, at 80.

²⁷¹ *Id.* at 50, 80, 110, 124–25.

²⁷² *Id.* at 124. If adopted, such a forum would constitutionalize a national First Amendment minimum standard—a protective floor for speech-related drone activities. *Id.* at 110.

as logically extending with equal impact from the sky²⁷³ because such airspace is the site of “increasingly popular and important First Amendment activity.”²⁷⁴ Although they concede that the Court’s forum doctrine does accord government a large degree of authority over the public’s airspace, they nonetheless believe forum doctrine does not accord government “the kind of untrammelled and exclusive control” that individuals have over private property.²⁷⁵ The authors rely on the

²⁷³ See *id.* at 86–88; Calvert et al., *supra* note 5, at 555.

²⁷⁴ Blitz et al., *supra* note 7, at 80–81, 88 (citing *Alvarez*’s “major pillar,” information about operations of government, the authors reference drones’ ability to give a “bird’s eye image[] or video[] that reveal[s] information invisible to those on the ground” and to “learn important information or gain a valuable perspective from aerial footage of a protest—or the police response to it” which would otherwise be absent at ground level, and asserting that *Alvarez*’s right to record appears to protect not only drone cameras operated by investigative reporters but also with “equal force” by anyone else wishing to capture and to possibly post on social media, and then emphasizing that it was primarily conscientious onlookers of police-investigation subjects who captured and publicized the episodes leading to the deaths of Eric Garner and Walter Scott, essentially conceding under this anyone-else conclusion that there are few, if any limits, to those with an *Alvarez*-based right to engage in drone newsgathering). See Elder, Part I, *supra* note 1, at 7, 31, n. 179, 52, 83–84 (discussing privacy-chaos-in-the-skies as the logical corollary of the anyone-with-a-cell-phone-can-record-at-ground-level posture of the decisions discussed therein).

²⁷⁵ Blitz et al., *supra* note 7, at 81 (contrasting such with the exclusive control private landowners have over their own land and that individuals have to exclude third persons from private communications). This difference in control is relevant to many closely related issues. Compare Timothy Zick, *Space, Place, and Speech: Expressive Topography*, 74 GEO. WASH. L. REV. 439, 495–96 (2016) (criticizing *Int’l Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1972), finding an airport terminal to be a non-public forum: “[t]he Court treats the airport as a brute artifact, one without expressive possibilities. . . . [i]ndeed, the airport terminal is, in some sense, the successor to the public square. . . . the Court gave not so much as a nod to the conditions of modernity or the spatial paradox . . . that, where speakers used to have access to listeners on the street, these listeners increasingly have moved to other spaces of modernity”) with *Adderley v. Florida*, 385 U.S. 39 (1966) (upholding “even-handed enforcement” of the state’s property interests comparable to those of private landowners—a protected land for its “lawfully dedicated” purposes, and rejecting the protesters’ “major unarticulated premise . . . that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please”). Indeed, *Int’l Soc’y for Krishna Consciousness* would appear to be a major obstacle to a limited public forum for overflight drone newsgathering. See Elder, *Tyrant to the People*, *supra* note 53. The Supreme Court gave powerful recognition to the federal government’s right of air-wave sovereignty in *National Broadcasting Co., Inc. v. U.S.*, 319 U.S. 190, 226–27 (1943) (upholding FCC radio regulations because, “[u]nlike other modes of expression, radio inherently is not available to all” and is subject to government regulation; the FCC could regulate specific practices of networks but not choose applications based on “political, economic or social views, or upon any other capricious basis” without violating the First Amendment; however, “the right of free speech does not include . . . the right to use the facilities of radio without license,” and denial of a license based on the statutory criterion—“public interest, convenience, or necessity”—did not violate the First Amendment). These cases would appear to be major hurdles to a First Amendment-based drone-overflight limited public forum, in light of the Court’s discussion of

fact that Congress likely provided the FAA the authority to regulate drones based on safety and security, but not based on threats to or incursions on privacy.²⁷⁶ They concede that, if the FAA could regulate drones over privacy concerns, as they recommend, the FAA's ability to so regulate drones would be on "firmer constitutional footing."²⁷⁷ As neither Congress nor the Executive branch has subsequently had any interest in so doing,²⁷⁸ the authors' argument for the idea of a limited public forum enforceable by litigation seems, in retrospect, to be provocative but unpersuasive.²⁷⁹

The authors discuss in detail how to treat airspace above public and private land. They concede it is very difficult to apply traditional public-forum doctrine to private lands, which, unlike public properties, are not mere extensions of the property beneath. Public properties, by contrast, may be subject to a wide array of free-speech and assembly protections.²⁸⁰ Nor can the space above either public or private land be considered a dedicated public forum, since FAA authority is limited to passenger safety and (since 2012) drone integration and not for "promoting the free exchange of ideas."²⁸¹ The problem of classifying airspace as a protected forum is even "less clear" as to property within

states' proprietary rights in government information and their largely unlimited right to control access thereto as a matter of state FOIA law. *See supra* text accompanying notes 23–38.

²⁷⁶ Blitz et al., *supra* note 7, at 131–38, 141–42 (arguing that, based on limited-public-forum precedents, corporations and private persons utilizing drones for information-gathering photography and videography or other speech-related activities potentially generating privacy issues might contend that the FAA has no authority to limit drone use for privacy or other concerns "unrelated to preserving navigable airspace for safe and efficient flight operations") *See Bennett, supra* note 16 at 11, 18 (asserting that privacy and security are not easily disentangled).

²⁷⁷ Blitz et al., *supra* note 7, at 137–38.

²⁷⁸ *See infra* note 284.

²⁷⁹ *See* Blitz et al., *supra* note 7, at 131–38. The authors suggest that this line of privacy cases supports legislation to restrict drones on the grounds of privacy. *Id.* Interestingly, at no point do the authors explain why the FAA could not consider why the privacy-related and free-expression constitutional concerns the authors analyze in detail do not independently limit the FAA's authority. Nor did the authors delve into the issue of whether the Fourth and First Amendments independently give the FAA a degree of inherent authority to protect privacy-related and free-expression constitutional concerns. *See Elder, Part I, supra* note 1, text accompanying nn. 104, 242, 246–48, 253, 255, 285–93, 311–12, 315–18, 344–52, 361, 367–68, 395, 405–17, 429.

²⁸⁰ Blitz et al., *supra* note 7, at 123–24 ("Birds may have flown from 'time out of mind,' but not flags.").

²⁸¹ *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 682 (1992). *Accord* Blitz et al., *supra* note 7, at 124 ("Accordingly, navigable airspace above the immediate reaches of the land is most properly viewed for First Amendment purposes as a limited public forum devoted principally not to disseminating speech but to promoting and protecting flight.").

the immediate reaches that can be used for drone take-offs and serve as the hotly disputed basis for the FAA's claim for exclusive regulatory authority.²⁸² Much of that airspace (from just above the grass top) will be, by definition, above private property and "arguably . . . not in the public domain" under *United States v. Causby*,²⁸³ as it is within the immediate reaches over private land,²⁸⁴ unlike the parallel airspaces over traditional public forums, which can again be viewed as logical

²⁸² Blitz et al., *supra* note 7, at 124. The Prefatory Note to May 30, 2019 NCCSL Uniform Tort Law Relating To Drones Draft For Approval views as well-established that the FAA has "exclusive authority over aircraft operations in the national airspace, as well as other attendant operational concerns . . ." *Id.* This was the presumed basis for the drafting committee's determination that property owners have no right to exclude drones, as such are viewed as aircraft in a navigable airspace public highway, "even one inch above someone's backyard, while people are present for a private gathering." See Letter from the Heritage Foundation to the NCCSL, 1–2 (July 8, 2019). The FAA has not made such a determination, and one federal judge has rejected "so massive a regulatory power grab." Indeed, "Congress surely understand that state and local authorities are (usually) well positioned to regulate what people do in their own backyards . . . No clause in the Constitution vests the federal government with a general police power over all of the air or all objects that leave the ground." *Id.* at 1–2, n. 4 (quoting *Huerta v. Haughwout*, 2016 WL 3919799, at 8 (D. Conn. 2016)). Another federal court recently concluded that federal law has not totally preempted the field of drone overflight over buildings and structures and found insufficient indication of Congressional intent to bar states from approving additional drone regulations related to FAA rules. *Nat'l Press Photographers Ass'n v. McGraw*, 504 F.3d 568, 589 (W.D. Tex. 2022), *aff'd in part, rev'd in part on other grounds*, 90 F.4th 770, 795–98 (5th Cir. 2024) (noting federal law "expressly contemplate" and "permitted" such state regulation of drones, as evidenced by the FAA's "Fact Sheet" and the illustration of flight over types of infrastructure at low altitudes), *cert. denied*, Order List of Monday, October 7, 2024, 604 U.S. __ (2024). See also Rule, *Drones, Airspace, and the Sharing Economy*, *supra* note 45, at 15 (characterizing the joint position of the FAA and the drone industry as "wishful"); Wendell L. Kellington, *Drones*, 49 URB. LAW. 667, 669 (2018) (noting that Congress's and the FAA's authority to declare navigable airspaces does not accord "anyone, including pilots, the right to trespass, create nuisances, unconstitutionally take private property, invade privacy, commit crimes, or commit state law torts"). The Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo* may make such an extravagant claim untenable. See 144 S. Ct. 2244, 2270 (2024) (finding that *Chevron* deference was "fundamentally misguided" and a "judicial invention" at odds with the APA's mandate that courts "exercise their independent judgment in deciding whether an agency has acted within its statutory authority").

²⁸³ Blitz et. al, *supra* note 7, at 124 (citing *U.S. v. Causby*, 328 U.S. 256, 264–66 (1946)).

²⁸⁴ See *id.*, at 121–24 (explaining that it is unclear whether Congress could constitutionally claim sovereign rights over this expanded area within immediate reaches without compensating owners under the Fifth Amendment Takings Clause). See *infra* text accompanying notes 609–14. The authors understate the significance of the Takings Clause issue in *Causby*. *Id.* The applicability of *Causby*'s standards, adopted by the RESTATEMENT (SECOND) OF TORTS § 159(2) (1965) as the supposed black-letter rule for trespass to land by overflight by fixed-wing aircraft and its hotly debated application to drone overflight was the core area of dispute in the NCCSL uniform-act drafting process, as §159(2)'s requirements—substantial interference with use and enjoyment within the immediate reaches above the land—would have effectively eliminated any viable action for low-altitude drone flights. Lawyers, legal scholars, and major groups representing property-owners' interests ultimately defeated the draft that incorporated a thirteen-factor aerial-trespass

extensions of traditional public forums, and which have historically included protections for flags, banners, and similar expression.²⁸⁵

Nonetheless, despite the novel nature of the authors' proposal, *if* the airspace above public and private properties is in the "public domain," then "considerable practical and theoretical value" exists in evaluating the application of the limited public forum doctrine to identify "the constitutional floor of protection" for speech-related drone operations.²⁸⁶ To this end, the authors assume that both the airspace above immediate reaches and within immediate reaches is navigable airspace for public and private property.²⁸⁷ Under this dubious set of assumptions,²⁸⁸ the authors assert that "any regulation that burdens speech only needs to be viewpoint neutral and reasonable given the purpose served by the property."²⁸⁹

The authors' approach would, of course, federalize the drone-overflight issue as a First Amendment doctrinal matter since "classifying such a ubiquitous space as a limited public forum would allow the government to regulate speech literally over most of America under the lowest possible First Amendment standard"²⁹⁰ and subject all restraints on drone use—federal or state, where most of the action is, or local to intermediate-level review.²⁹¹ Under their proposed standard, content-neutral time, place, and manner regulations related to the safety and efficiency of drones would be permitted even if they incidentally burden drones' speech-related activities.²⁹²

The authors provide the example of restrictions on drones, even for activities such as photography, within a specific distance of an airport.²⁹³ By contrast, limitations based on the nature of the speaker or the subject matter would likely not be upheld, as Congress has not limited navigable airspace use to only official or governmental

rule as to drones. *See supra* text accompanying notes 43, 45, 47, 52, 64, 115, 268–69, 282–84; *infra* text accompanying notes 548, 612–14.

²⁸⁵ Blitz et al., *supra* note 7, at 124.

²⁸⁶ *Id.* at 125.

²⁸⁷ *Id.*

²⁸⁸ *See supra* text accompanying notes 24, 47–48, 103, 145, 282–84; *infra* text accompanying notes 529–30, 609–14.

²⁸⁹ Blitz et al., *supra* note 7, at 125.

²⁹⁰ *Id.* at 124.

²⁹¹ *Id.* at 113–42. *Compare supra* § IV.B.2 (discussing the Fifth Circuit's very relaxed intermediate standard) with *infra* text accompanying note 531.

²⁹² Blitz et al., *supra* note 7, at 126.

²⁹³ *Id.* at 126–27. *Compare* the Texas statute discussed *supra* § IV.B.1–4.

uses.²⁹⁴ Accordingly, if a particular type of drone use qualifies as First Amendment-protected activity (photography), then the identities of the drone operator (amateur) or subject matter (photojournalism) would not reasonably further Congress's intended purpose to preserve navigable airspace of general and diverse drone and manned-flight operators or operations. Any such limitation—unless necessary to ensure safety—would be invalid under the intermediate level of review standard.²⁹⁵

All of the authors' above analysis is based on Congress's failure to provide the FAA the authority to regulate drones for reasons other than their safe and efficient use.²⁹⁶ Yet, the authors' views on the impact of including privacy in the FAA's mandate and authority are worth exploring in detail. Drones represent "the death of privacy" and "[t]he Orwellian image of the all-seeing eye in the sky,"²⁹⁷ as evidenced by Justice Sotomayor's concerns about governmental and private drones "recording everything that's happening on what we consider our private property."²⁹⁸ Reading the relevant statute alone, pro-drone users (individuals and corporate entities) could argue that the FAA lacks authority to regulate drones used for photography, videography, information-gathering, or other similar speech-related activities.²⁹⁹

More importantly, the authors highlight the Court's extensive jurisprudence treating residential privacy as "the highest order in a free and civilized society."³⁰⁰ These precedents provide constitutional support for state or federal legislation restricting "targeted" drone surveillance. Specifically, the Court's precedent supports restrictions

²⁹⁴ Blitz et al., *supra* note 7, at 127–28. Nor any other limited category thereof – for instance, commerce, transportation, safety-security. *Id.* at 128.

²⁹⁵ *Id.* at 128 (citing *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 831, 834 (1995) (invalidating a limited public forum for student publications under policies to stimulate a diversity of views which denied funding for publications with religious perspectives). Similarly, under the FAA's then-existing recreational and commercial use distinction, the FAA will have an increasingly hard time justifying on safety grounds distinguishing similarly secure drone uses on grounds of industry usage or speech content. *Id.* at 128–30. Compare the Fifth Circuit's analysis indissolved *supra* § IV.B.2.

²⁹⁶ As indicated above, the FAA has repeatedly declined to accept the authority. *See id.*

²⁹⁷ *Id.* at 131.

²⁹⁸ Jacob Gershman, *Sotomayor: Americans Should Be Alarmed by Spread of Drones*, WALL ST. J.L. BLOG. (Sept. 12, 2014, 12:07 PM), <http://blogs.wsj.com/law/2014/09/12/justice-sotomayor-americans-should-be-alarmed-by-spread-of-drones> [<http://perma.cc/U28D-WDRA>].

²⁹⁹ *Id.* at 132, 135 (noting "*Chevron* deference . . . might persuade a court (though not the authors)," to exercise discretionary jurisdiction on privacy grounds). The Supreme Court's overruling of *Chevron* would strengthen the pro-drone users' argument. *See supra* note 285.

³⁰⁰ Blitz et al., *supra* note 7, at 133 (quoting *Frisby v. Shultz*, 487 U.S. 474, 484 (1988)).

on “surveillance of a single residence and perhaps entire residential neighborhoods” because “persistent and focused” aerial surveillance of residences “may expose the comings and goings of residents, as well as outside and inside activities in ways and degrees . . . that ‘inherently and offensively intrude[] on residential privacy.’”³⁰¹ The authors conclude these precedents might justify time limitations on residential surveillance—such as a half-hour per day—while providing a reasonable opening window for speech-related image capture.³⁰²

As indicated above, the authors suggest that a privacy addendum to the FAA’s authority would resolve constitutional issues related to the authors’ limited-public-forum analysis.³⁰³ They pose a few questions related to future drone regulations. First, they raise the question of whether navigable airspace could even be legislatively redefined to incorporate privacy.³⁰⁴ The authors then sketch out the alternative arguments, noting, on one side, the government’s great discretion³⁰⁵ to dedicate government property to intended uses, which is given “substantial, if not dispositive, weight” by the Court.³⁰⁶ Additionally, the authors conclude that the Court’s exalted protection of home privacy even in the “robust speech zones” of drones intruding on home privacy from traditional public forums would likely be extended to the treatment of navigable airspace as a limited public forum.³⁰⁷

On the other side of the issue, the authors emphasize the apparently “ad hoc totality of circumstances approach” adopted by the Court—which considers both historical and contemporary usage and the physical nature and character of the forum.³⁰⁸ In the case of

³⁰¹ *Id.* at 133–34 (quoting *Frisby*, 487 U.S. at 486). Compare the Supreme Court’s concern about new technology developed in §§ V.B–D.

³⁰² Blitz et al., *supra* note 7, at 134. If navigable airspace is deemed a limited public forum, the FAA would retain “regulatory leeway to incidentally or directly burden speech-related” drone activities if such would reasonably further safe manned air flight—including helicopters presumably—or drones. *Id.* at 135.

³⁰³ See Blitz et al., *supra* note 7, at 50, 130–31, 135–42.

³⁰⁴ *Id.* at 136 (apart from “traditional public forums”).

³⁰⁵ See *id.*

³⁰⁶ *Id.* The Supreme Court’s recent decision overruling the “*Chevron* doctrine” may call this interest into question. See *supra* note 285.

³⁰⁷ Blitz et al., *supra* note 7, at 136.

³⁰⁸ Compare *id.* at 137 (describing the approach) with Elder, Part I, *supra* note 1, at 9–10 (describing Senior Judge Douglas H. Ginsburg’s majority analysis adopting a strictly historical approach to public-forum doctrine regarding federal statutory fee and person ID requirements for commercial filmmaking, and rejecting heightened scrutiny in favor of a “reasonableness” assessment).

navigable airspace as a possible public forum, the same characteristics that make it a privacy threat—the enhanced vantage it provides to view property, people, and activities below—also make navigable airspace important for information gathering, image capture, and other speech related drone activities.³⁰⁹ Accordingly, if navigable airspace “continues to grow more ‘suitable for discourse,’” courts should be reluctant to pass any legislative affirmation of privacy so expansive as to leave little space for citizen speech-production in such “a unique and extensive forum as the skies.”³¹⁰ The authors’ proposed intermediate level of review for a limited public forum, if it were navigable airspace, involves an assessment of its appropriateness as a location for speech production as against the privacy and safety effect of allowing drone operation.³¹¹ So, any regulation failing to reasonably weigh the forum’s expressive potential against legitimate privacy and safety concerns “strikes [the authors] as problematic.”³¹²

If regulations only consider safety under this criterion, a total prohibition on image capture would likely not survive. Also, considering privacy would have a sounder constitutional foundation. Whether such would withstand First Amendment analysis would be contingent on whether the airspace’s expressive potential is “an inherent and infeasible part of its purpose” as one of the guidelines in deciding reasonableness.³¹³ If not indispensable, the total prohibition would withstand First Amendment scrutiny, as the prohibition reasonably furthers privacy and does not undermine any other forum function. If the expressive potential is indispensable to the airspace, then the severe disequilibrium between protecting privacy and limiting speech should make such a total prohibition “constitutionally suspect if not clearly unsound.”³¹⁴

³⁰⁹ Blitz et al., *supra* note 7, at 136–37.

³¹⁰ *Id.* at 137 (quoting Int’l Soc’y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 698 (1992) (Kennedy, J., concurring)). “[C]ourts should hesitate to approve any legislative assertion of privacy so broad as to leave little room for citizens to produce speech—if not directly to ‘gather and speak.’” *Id.* What the authors mean by this is unclear.

³¹¹ Blitz et al., *supra* note 7, at 131–37.

³¹² *Id.* at 137. This expressive-potential argument is itself dubious for the reasons provided in Elder, Part I. See Elder, Part I, *supra* note 1.

³¹³ Blitz et al., *supra* note 7, at 137–38.

³¹⁴ *Id.* at 138. *Contra* § V.B.2 (discussing the Fifth Circuit’s analyses).

The authors propose a modest legislative response to drone privacy issues.³¹⁵ Authors suggest that the FAA incorporate privacy into its existing security mandate, and adopt the following: (1) a “dedicated ‘eye zone’” from the ground to 500 feet over ground-level traditional public forums and between 300 and 500 feet over private lands; (2) a limit on drone recording above a private abode to a half-hour daily; and (3) a limit on image-capture to cameras without any sense-enhancing capacity such as, but not limited to, use of telephoto lenses.³¹⁶ To the authors, this type of regulation—content-neutral, regulating only time, place, and manner—“arguably strikes a reasonable constitutional balance” between “unique and valuable speech productive First Amendment activities” and *residential* privacy and does not impair privacy more than the Court’s “flyover” cases have authorized.³¹⁷

This author has several more concerns with this modest legislative proposal and the authors’ overall approach. First, the proposed legislation contains several flaws. It is unclear whether the authors’ proposal regarding ground-500 feet over public land would only apply to drones flying “over” the public property being recorded. Otherwise, it would absolve drone operators who record activities on private land using drones that hover “over” adjoining public property. If one concedes, as one must, that intrusion upon personal privacy can occur from an adjacent property—such as the zoo-like, intrusive scenario of the Streisand-Brolin wedding discussed above—then the government must have the authority to regulate drones directly above and adjacent to the property where the subject is being recorded. It would be naïve to assume that drone operators focus their surveillance cameras solely on the property directly below the drone³¹⁸ or that there is any way to enforce such a limitation.

³¹⁵ Blitz et al., *supra* note 7, at n. 134, 138, 371. Note that the authors do not seem at all concerned with privacy as to non-residential property. Compare § IV.B.1–4 (discussing the Texas drone statute litigation) with Elder, Part I, *supra* note 1, Introduction, § II and Elder, *Tyrant to the People*, *supra* note 53. Interestingly, the authors do not discuss the free expression interests inherent in privacy that the Court has recognized. *Id.*

³¹⁶ Blitz et al., *supra* note 7, at 138. *But see infra* notes 320–21.

³¹⁷ Blitz et al., *supra* note 7, at 138.

³¹⁸ Note that plaintiffs challenging the Texas statute claim the right to film private land, or persons thereon, from over public land. See discussion *supra* § IV.B.1–4. See also *Long Lake Township v. Maxon*, 970 N.W.2d 893, 905 (Mich. Ct. App. 2021) (discussing the impact of drone technology regarding a Fourth Amendment search, the court concluded “there is little meaningful distinction . . . between ‘just inside the property line’ and ‘just outside the property line.’”); *infra* the discussion of *Long Lake Township* in § V.C.

It is unclear what would define the half-hour window each day when drone recording is allowed. The article does not explain whether the FAA, the states, municipalities, or each drone operator would prescribe when recording would occur. If drone operators can each self-select their half-hour period, the sheer multiplicity of individual drone operators would allow for continuous surveillance of a home, even if each drone only recorded the house for a half-hour. An endless rotation of fresh “eyes in the sky” would leave residential occupants with no reasonable expectation of privacy in the backyard or within a home. A much more workable solution would be a state defined window (or windows) where specific activities, like drone package delivery, would be authorized. These measures, when coupled with state regulation of the use and distribution of any information gathered during those drone activities, would ensure that drones can operate in residential areas without destroying the privacy rights of the residents.³¹⁹

The authors similarly suggested limitation on sense-enhancing cameras would be unworkable, as it mirrors parallel language in the first iteration of the California anti-paparazzi constructive-invasion statute that was viewed as highly problematic.³²⁰ In 2014, the California legislature deleted the limitation sense enhancing language due to drones and related privacy concerns.³²¹ Incorporating the restrictions the authors suggest³²² would provide creative maneuvering room for the technically proficient and calculatingly devious. As the California legislature eventually realized,³²³ trying to regulate the capabilities of a

³¹⁹ Under the theses of this article, state regulation may require enforceable assurances that any drone-surveillance technology is strictly limited to delivery-and safety-requirements and not otherwise used, and that the data thereby acquired is quickly deleted or destroyed. Possibly such a well-publicized, time-specific drone makes sense in residential areas for limited purposes, such as cargo delivery.

³²⁰ CAL. CIV. CODE §1708.8(b) (1999) (incorporating language about “a visual or auditory enhancing device”) (amended 2016).

³²¹ CAL. CIV. CODE §1708.8(b) (2014) (changing the prohibition to “use of *any device*, regardless of whether there is a physical trespass, if this image, sound recording, or other physical impression could not have been achieved without a trespass unless the device was used”) (emphasis added) (amended 2016). See SEN. HANNAH-BETH JACKSON, S. JUDICIARY COMM. REP., Bill Analysis of Assemb. B. 2306 (Cal. 2014) (concluding that “newer technologies enable individuals to invade the privacy of others” using devices (such as drones) having the “potential to erode our sense of privacy”) (hereinafter Bill Analysis).

³²² Blitz et al., *supra* note 7, at 138 (“telephoto or other sense-enhancing capabilities”).

³²³ See Bill Analysis, *supra* note 321; *infra* text accompanying note 528.

flying camera is futile.³²⁴ Moreover, the authors appear to have assumed that images captured from adjacency (ground to 500 feet) or 300 feet over private land are essentially innocuous. That's very dubious. It is difficult to believe that anyone having an event, enjoying quiet relaxation, or sunbathing with friends or family in their enclosed yard would consider a camera drone *harmless*, just because it hovers above adjacent public land or 300 feet above private land. Maybe the authors assume that at such a height no one will ever know they are being surveilled due to drones' increasingly silent surveillance capabilities and that ignorance is privacy bliss, or that surveillance from adjacency is permissible. It is doubtful that most Americans generally feel that way. Furthermore, restrictions on camera or other sensory enhancements do not solve the problem if such only apply to the initial taking, which does not prevent post-capture zoom. Any imposition of prohibitions or restrictions on post-capture zoom or enhancement would be difficult, if not constitutionally impossible, to defend under *Bartnicki v. Vopper*.³²⁵

B. *The Authors' Proposal's Dubious Reliance on the Supreme Court's Highly Criticized "Flyover" Cases*

The authors' proposal is flawed based on its reliance on the Court's indefensible, much-pilloried, anti-civil liberties opinions of the 1970s-80s.³²⁶ Four notorious non-overflight decisions are worth

³²⁴ Privacy advocates, citizens generally, and legislatures should be, and apparently are, extremely wary of the creativity of drone uses and drone users.

³²⁵ *Bartnicki v. Vopper*, 532 U.S. 514 (2001). See Elder, Part I, *supra* note 1 text accompanying nn. 18–26, 60, 203, 235–40, 244, 286, 308–14.

³²⁶ See George C. Thomas, *Time Travel, Hovercrafts and the Framers: James Madison Sees the Future and Rewrites the Fourth Amendment*, 80 NOTRE DAME L. REV. 1451, 1454 (2005) (suggesting the liberal Court's 1960s cases endeavored "to stem the tide in favor of the police, but the moment passed, the barriers put in place were too weak, technology flourished, and privacy was lost"); Donald A. Dripps, *Perspectives on the Fourth Amendment Forty Years Later: Toward the Realization of an Inclusive Regulatory Model*, 100 MINN. L. REV. 1885, 1898–1901 (2016) (discussing how "[t]he *Katz* formula became the preface to the application of contemporary values by a conservative judiciary," with the increase in crimes of violence in the 70s and 80s playing a part, together with the sense that drug crimes were the moral equal of crimes of violence). The Court's recent technology-sensitive decisions have taken pains to dissociate the Court from the bend-over-backwards, pro-law-enforcement fetishism of the pre-digital era. In 2014, a unanimous Court adopted a "categorical rule" requiring a warrant to search cell phones incident to an arrest, despite acknowledging that such a requirement would clearly impact law enforcement's ability to combat crime. See *Riley v. California*, 573 U.S. 373, 401 (2014). The Court relied on the powerful colonial history of British use of general warrants and writs of assistance and the specter of government agents "rummag[ing] through homes in an unrestrained search for evidence of criminal activities."

examining for the insights they provide into the authors' proposals. In *California v. Greenwood*, the Court held that no warrant was required for trash in opaque containers left on the curb as mandated by local ordinance because there was no reasonable expectation of privacy once Mr. Greenwood put garbage at the curb.³²⁷ The Court relied on the "common knowledge that plastic bags left open on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public."³²⁸

In a scathing dissent, Justice Brennan rejected the Court's anecdotal reliance on "complete strangers minutely scrutin[izing] their bounty, undoubtedly dredging up intimate details of [the defendant's] private life and habits" and "the target's financial and professional status, political affiliations and inclinations, private thoughts, personal relationships, and romantic interests"—evidence "associated with the sanctity of a man's home and the privacies of life. . . ."³²⁹ Justice Gorsuch's sarcasm provides an unassailable critique: "But the habits of raccoons don't prove much about the habits of the country. I doubt . . . that most people spotting a neighbor rummaging through their garbage think they lacked reasonable grounds to confront the rummager."³³⁰

In *Oliver v. United States*, another dubious 1980s decision, the Court reaffirmed that no warrant was required to search "open fields" because there was no legitimate privacy interest despite the defendant's secluded location, fences, and no-trespassing signs, and over the dissenters' argument such areas were "bustling with private activity."³³¹ The most outrageous decisions involved the third-party doctrine. In *United States v. Miller*,³³² the Court rejected any Fourth Amendment privacy interest as to warrantless access to bank records involving information voluntarily provided to the banks in normal business dealings.³³³ The Court concluded the depositor assumed the

Id. at 403. In the words of the Court, "privacy comes at a cost." *Id.* at 401 (acknowledging its decision "will have an impact on the ability of law enforcement to combat crime" by denying access to information from "important tools" used in criminal enterprises).

³²⁷ 486 U.S. 35, 36–45 (1988).

³²⁸ *Id.* at 40. The Court repeated its voluntarily exposes *Katz* analysis. *Id.* at 39–45.

³²⁹ *Id.* at 46–50 (Brennan, J., dissenting) (quoting *Oliver v. U.S.*, 466 U.S. 170, 180 (1984)) (internal quotations omitted).

³³⁰ *Carpenter v. U.S.*, 585 U.S. 296, 395 (Gorsuch, J., dissenting).

³³¹ 466 U.S. 170, 176–83, n. 10 (1984).

³³² 425 U.S. 435 (1976).

³³³ *Id.* at 437–44.

risk that data would be conveyed by the recipient to the government, even where the depositor assumed that information disclosed would be used for restricted purposes and that the bank would not breach its duty of confidence.³³⁴

In *Smith v. Maryland*,³³⁵ the Court applied *Miller* and upheld the warrantless use of a pen register installed by a telephone company at the government's request, which tracked and recorded numbers dialed from the defendant's home. The Court held there was no search because the defendant had voluntarily conveyed/exposed such information to the telephone company that operated the equipment, so there was no legitimate expectation of privacy.³³⁶ Justice Marshall's jarring dissent argued that privacy is "not a discrete commodity, possessed absolutely or not at all" and concluded that patrons do not assume such data will be released to other third parties for other purposes.³³⁷ He savaged the majority's voluntary-choice argument, which allowed surveillance by the government unless the phone user was "prepared to forego use of . . . [a] professional necessity."³³⁸ Justice Marshall concluded that it is improper to consider anything a *voluntary* assumption of risk when "individuals have no realistic alternative."³³⁹

The authors' conclusions are primarily based on the Court's decisions building on the third-party doctrine, particularly the *Dow-Circaolo-Riley* tenuous trio.³⁴⁰ The authors' conclusions are difficult to defend, both in view of the cases' own indefensible reasoning and in light of the Court's newest cases then available to the authors:

³³⁴ *Id.* The black-letter common-law rule provides liability against banks for unprivileged disclosures of confidential information. See ELDER, *PRIVACY TORTS*, *supra* note 22, § 5:3.

³³⁵ 442 U.S. 735 (1979).

³³⁶ *Id.* at 739–46.

³³⁷ *Id.* at 749 (Marshall, J., dissenting).

³³⁸ *Id.* at 749–52.

³³⁹ *Id.* at 750.

³⁴⁰ Blitz et al., *supra* note 7, at 68 (analyzing the trio as interpreting "then-existing technology" and the cases' facts, as "leaving ample room for Fourth Amendment regulation of significant aerial surveillance").

United States v. Jones,³⁴¹ *Florida v. Jardines*,³⁴² and *Riley v. California*.³⁴³ A detailed examination of *Dow*, *Circaolo*, and *Riley* makes this clear, as these cases are the building blocks for their public-disclosure theory.³⁴⁴ In *Dow Chemical Co. v. United States*,³⁴⁵ the Court extended the “open fields” doctrine, allowing overflight surveillance of open areas of an industrial complex where no physical entry and no “intimate details” were involved. Chief Justice Burger’s 5-4 majority held there was no Fourth Amendment search and emphasized that the areas were “open to the view and observation of persons in aircraft lawfully in the public airspace immediate above or sufficiently near the area for the reach of cameras,” although such surveillance unquestionably resulted in more detailed data information than naked-eye observations—such as those involved in *Circaolo*, *infra*.³⁴⁶ The technology at issue was “conventional, albeit precise” and in common use by map-makers.³⁴⁷ Chief Justice Burger indicated the defendant had failed to take precautions against aerial observations.³⁴⁸

Chief Justice Burger authored another loosely reasoned 5-4 opinion the same day, *California v. Ciraolo*.³⁴⁹ The Court upheld a non-routine, purposeful search for evidence by police, who flew a plane 1000 feet over the defendant’s double-fenced backyard garden to observe marijuana production. The Court held that the defendant’s plants were clearly observable because the precautions did not stop the officer from seeing the plants from an aerial vantage point where the officer had the right to be.³⁵⁰ The opinion relied heavily on the Court’s “knowingly exposes” or “in plain view” doctrine under *Katz*, explaining the observation occurred within navigable airspace in a physically noninvasive manner

³⁴¹ *U.S. v. Jones*, 565 U.S. 400 (2012) (holding that attachment of a GPS to defendant’s car was a trespass to chattel and illegal search under the Court’s property rights “baseline”).

³⁴² *Florida v. Jardines*, 596 U.S. 1 (2013) (holding that violation of the implied-consent-to-enter curtilage under the common-law rule to seek evidence of crime by a trained drug-detecting dog constituted an unlawful search under the Court’s property-rights “baseline”).

³⁴³ *Riley v. California*, 573 U.S. 373 (2014) (holding that the warrantless accessing of cell-phone data violated the Fourth Amendment).

³⁴⁴ *Blitz et. al.*, *supra* note 7, at 49–50, 65, 72–80, 139–42. *U.S. v. Jones* through *U.S. v. Carpenter* are discussed in Elder, Part I and extensively throughout Elder, Part II.

³⁴⁵ 476 U.S. 227 (1986).

³⁴⁶ *Id.* at 229–39.

³⁴⁷ *Id.* at 238.

³⁴⁸ *Id.* at 237, n. 4.

³⁴⁹ 476 U.S. 207 (1986).

³⁵⁰ *See id.* at 213.

and that the plants could be identified as marijuana by the naked eye.³⁵¹ The majority found that no claim of privacy was objectively reasonable where any person flying in this particular airspace could have looked down and observed all that the police saw.³⁵²

Justice Powell's four-Justice dissent emphasized that the majority's core focus on the absence of physical penetration ignored *Katz*'s fundamental assumptions—that technological developments have aided police in observing activities and hearing people's conversations without being physically proximate, and that existing capacity permits law enforcement to engage in intrusive surveillance without physically penetrating walls of homes or other buildings within which people think they may protect their privacy. The majority deviated from *Katz*'s controlling principles and the Court's purported reaffirmation of curtilage protection.³⁵³ The *Ciraolo* dissenters found that the majority had not explained its sole justification – how passengers may look down during flyovers was either relevant or defensible, as the true risk from private or commercial aircraft was “virtually nonexistent” because passengers normally get “at most a fleeting, anonymous, and nondiscriminatory glimpse of the landscape” and structures they fly over. The “risk that a passenger on such a plane might observe private activities” and connect them with specific individuals was “simply too trivial to protect against.”³⁵⁴ Consequently, the Court's overflight-observation analogy was meritless, as was the Court's suggestion *Ciraolo* knowingly exposed himself by not roofing the garden.³⁵⁵

The *Ciraolo* dissenters rejected the analogy to law enforcement's right to observe comings-and-goings-on-public-streets in residence-curtilage-surveillance cases. The sole reason for equating the two cases was the Court's judgment that the risk to privacy from remote potentiality of airplane-passenger observation equated to the risk from ground-level police surveillance. The Court's reasoning ignored the qualitative distinction between official police surveillance and other uses of airspace. For example, the public uses airspace for pleasure, business, and travel and not to purposefully observe activities within an

³⁵¹ See *id.* at 213–14. Note the comparison with drones that physically invade the aerospace above private land. See *infra* text accompanying notes 372–73, 433–34, 614 and generally § VI.C.

³⁵² See *Ciraolo*, 476 U.S. at 213–14.

³⁵³ See *id.* at 222–24 (Powell, J., dissenting).

³⁵⁴ *Id.* at 223–24 (Powell, J., dissenting).

³⁵⁵ *California v. Ciraolo*, 476 U.S. 207, 223–26, n. 8 (1986) (Powell, J., dissenting).

individual's residential curtilage. By contrast, in this case, police engaged in a purposeful low-altitude flyover to discover evidence of criminality in a private area it was constitutionally barred from intruding on at ground level without a warrant.³⁵⁶ The dissenters concluded that it is difficult to believe that American society would force individuals to assume this risk of warrantless law-enforcement intrusion.

The *Ciraolo* dissenters found that neither of the Court's prior assumed-risk precedents—*Smith* and *Miller*—supported the Court's holding. They quoted Justice Marshall's *Smith* dissent about sensitivity to "the risks that a citizen 'should be forced to assume in a free society,'"³⁵⁷ and presciently foreshadowed the case's significant import for families' outdoor curtilage activities: "The feature of such activities that make them desirable to citizens living in a free society, namely, the fact that they occur in the open air and sunlight, is relied on by the Court as a justification for permitting police to conduct warrantless surveillance at will."³⁵⁸ Aerial surveillance is as invasive of a family's curtilage privacy as physical trespass. So, post-*Ciraolo* families can expect freedom from governmental surveillance *only* if they withdraw behind the walls of their residences.³⁵⁹

The Court's last overflight case, *Florida v. Riley*,³⁶⁰ is also incredibly flawed and has been brutally critiqued by Professor Morgan Cloud, among others. Professor Cloud views *Riley*'s fractured bench as issuing "an even more fractious and confusing set of opinions" than earlier precedents.³⁶¹ The *Riley* Court reversed a unanimous Florida Supreme Court decision³⁶² that involved an officer's fruitless attempt to observe the contents of Riley's greenhouse from a public road. After a failed attempt, the officer obtained a helicopter to investigate Riley's greenhouse, located behind a mobile home on a five-acre property in a rural area.³⁶³ From the helicopter, flying at 400 feet, the officer could

³⁵⁶ *Id.* at 223–26 (Powell, J., dissenting).

³⁵⁷ *Id.* at 225, n. 9 (Powell, J., dissenting) (quoting *Smith v. Maryland*, 442 U.S. 735, 750 (1979)) (Marshall, J., dissenting).

³⁵⁸ *Id.* at 225, n. 10 (Powell, J., dissenting).

³⁵⁹ *Id.* (Powell, J., dissenting).

³⁶⁰ 488 U.S. 445 (1989).

³⁶¹ See Morgan Cloud, *Rube Goldberg Meets the Constitution: The Supreme Court, Technology, and the Fourth Amendment*, 77 Miss. L.J. 5, 34–36 (2002) (wondering if the Court will continue "acting like a group of mad inventors adding bits and pieces to an already puzzling contraption").

³⁶² *Riley v. State*, 511 So.2d 282 (Fla. 1987).

³⁶³ See *id.* at 283.

peer through either an opening in the roof of the greenhouse, or one of the exposed sides.³⁶⁴

The Florida Supreme Court emphasized the distinction between the fixed-wing aircraft in *Ciraolo* and the “circling and hovering” helicopter observations over Riley’s curtilage at 400 feet.³⁶⁵ Helicopters were, by their very nature, particularly “likely to unreasonably intrude upon private activities” compared to ground-level surveillance.³⁶⁶ Applying *Ciraolo*, the court concluded that the possibility was extraordinarily remote that the details from the “circling and hovering” helicopter were as easily discernible³⁶⁷ by a casual passenger of a fixed-wing private or commercial aircraft.³⁶⁸ The court also emphasized that the residential property owner could do little to protect against the public or law enforcement engaging in such aerial observation. The court did not believe society was willing to forfeit privacy unless they implemented the extraordinary measures³⁶⁹ that would be required.³⁷⁰ The Florida Supreme Court found that the deputy’s act of “circling and descending” below public navigable airspace at 400 feet was a warrantless, unconstitutional search.³⁷¹

The U.S. Supreme Court reversed that holding in a its 5-4 decision.³⁷² A four-Justice plurality opinion by Justice White found *Ciraolo* controlling and concluded that Riley’s marijuana plants inside the greenhouse would be visible from a fixed-wing aircraft flying at 1000 feet or even 500 feet above—the lowest level for such aircraft.³⁷³ The state’s purposeful inspection by helicopter was indistinguishable, as helicopter flight is “routine” in America, and there was no evidence the

³⁶⁴ *Id.* at 283–84.

³⁶⁵ *Id.* at 287–89.

³⁶⁶ *Id.* at 287. The court quoted a California Supreme Court decision on point: “Purposeful surveillance from the air simply lays open everything and everyone below—whether marijuana plants, nude sunbathers, or family members relaxing in their lawn chairs—to minute inspection. The usual steps one may take to protect his privacy are useless. *Id.* (quoting *People v. Cook*, 710 P.2d 299, 305 (Cal. 1985)).

³⁶⁷ *Riley v. State*, 511 So.2d at 288. This was even more so that such could be connected to a specific individual. *Id.*

³⁶⁸ *Id.*

³⁶⁹ *Id.* at 288–89, n. 11 (observing that these steps that would be “akin to requiring people to install lead insulation to protect against x-ray surveillance of their homes”).

³⁷⁰ *Id.*

³⁷¹ *Id.* at 289.

³⁷² *Florida v. Riley*, 488 U.S. 445 (1989).

³⁷³ *Id.*

flight routine was unprecedented in Riley's home county.³⁷⁴ It did not persuade the plurality that helicopters were not bound by the 500-foot limitation on fixed-wing aircraft. In fact, the plurality noted anyone could lawfully have been flying over Riley's curtilage by helicopter at 400 feet and made the same observations. The officer's actions were constitutional because "the police officer did no more."³⁷⁵

The *Riley* plurality noted that a police helicopter flown at an altitude contrary to either law or regulation would have been a different situation. The plurality did not conclude that all inspections from an aircraft will always survive scrutiny simply because the plane flies in legally designated navigable airspace.³⁷⁶ Yet, the plurality expressed importance that the police helicopter was not operating in violation of the law.³⁷⁷ Moreover, nothing in the record indicated that helicopters at 400 feet were "sufficiently rare" to support Riley's expectation of privacy in his greenhouse from the helicopter's vantage point.³⁷⁸

In a narrower concurrence, Justice O'Connor stated that the plurality improperly relied on FAA regulations that only protect and facilitate air safety. Justice O'Connor stressed that did not reflect the privacy expectations of society. She highlighted that *Ciraolo*'s holding was not based on an aircraft operating where it had a legal right to be, but on "sufficiently routine" overhead flights that eliminated any reasonable expectation that the backyard would not be observed.³⁷⁹ Further, as helicopters are allowed to fly below the 500-foot minimum for airplanes, the plurality incorrectly assumed FAA compliance itself determined whether helicopter observation violated the Fourth Amendment as long as they did not pose a safety risk.³⁸⁰

Justice O'Connor held that the reasonableness of low-level helicopter flights was not comparable to ground-level police observations, even though police in both situations had a lawful right to be in the physical space from where the observations occurred.³⁸¹ Public roads are clearly defined and allow landowners/occupiers to protect private activities

³⁷⁴ *Id.* at 450–51.

³⁷⁵ *Id.* at 451.

³⁷⁶ *Id.*

³⁷⁷ *Id.*

³⁷⁸ *Florida v. Riley*, 488 U.S. 445, 451–52 (1989).

³⁷⁹ *Id.* at 452–53 (O'Connor, J., concurring in the judgment).

³⁸⁰ *Id.*

³⁸¹ *Id.* (O'Connor, J., concurring in the judgment).

from view by a high fence tailored to the road's location.³⁸² If landowners neglect to do so, they have no reasonable expectation of privacy from observation by the public.³⁸³ In contrast, even those who implement effective ground level measures cannot wall off aerial observations of their yards and patios without forfeiting the enjoyment of those areas. Indeed, "[t]o require individuals to completely cover and enclose their curtilage is to demand more than the 'precautions customarily taken by those seeking privacy.'"³⁸⁴

Most importantly, the mere possibility that a helicopter *could* view the residential curtilage (without violating FAA regulations) did not *per se* mean that an observed individual lacked a reasonable expectation of privacy.³⁸⁵ In other words, Justice O'Connor applied *Katz* and held that the pivotal question was not whether the helicopter was operating from a legal vantage point but instead, whether other private helicopters flew with "sufficient regularity" so that Riley's expectation of privacy from aerial observation was not reasonable.³⁸⁶ In her view, it was not determinative that law-enforcement helicopters fly at 400 feet if the public "rarely, if ever" flies overhead at that altitude, as such, was not a vantage point "generally used by the public."³⁸⁷ In the latter situation, a curtilage occupant like Riley had not knowingly exposed his greenhouse curtilage to public observation. In Justice O'Connor's view, Riley bore the burden of proving a reasonable expectation existed.³⁸⁸ As there was evidence of considerable air traffic by the public above the property and Riley had presented no contrary evidence, she found his expectation of non-observation by the naked eye unreasonable.³⁸⁹ Justice O'Connor limited her concurrence to the 400 feet altitude before the Court.³⁹⁰ Even if compliant with FAA regulations, public use of altitudes below 400 feet—particularly from helicopters circling above a home's curtilage—"may be sufficiently rare" that police surveillance

³⁸² *See id.*

³⁸³ *Id.*

³⁸⁴ *Florida v. Riley*, 488 U.S. 445, 454 (1989) (quoting *Rakas v. Illinois*, 439 U.S. 128, 152 (1978) (Powell, J., concurring)).

³⁸⁵ *See id.*

³⁸⁶ *Id.*

³⁸⁷ *Id.* at 455.

³⁸⁸ *See id.*

³⁸⁹ *See id.* (O'Connor, J., concurring).

³⁹⁰ *See Florida v. Riley*, 488 U.S. 445, 455 (1989).

from such altitudes would violate the occupant's reasonable expectation of privacy under *Katz* despite compliance with FAA regulations.³⁹¹

Three *Riley* dissenters blistered the plurality's maltreatment of *Katz* in favor of its any-member-of-the-public-could-theoretically-see-Riley's-backyard analysis that focused exclusively on compliance with the helicopter's flying at a height—400 feet—consistent with FAA flight rules for helicopters. However, this analysis ignored *Katz*'s mandate that, ultimately, a particular surveillance practice's constitutionality is dictated by whether “the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society.”³⁹² *Katz*'s voluntary-exposes-to-the-public criterion was not met solely by the fact the helicopter could legally fly above Riley's curtilage. Indeed, the plurality's “exceedingly grudging” theory of Fourth Amendment protection barred an expectation of privacy any time a single member of the body politic could conceivably place himself or herself in a vantage point to observe the area at issue without acting illegally, whatever the difficulty and infrequency of anyone engaging in such positioning.³⁹³ Moreover, *Katz* was founded on the minimal diminution in privacy occurring where police observe something readily observable by any passerby at ground level, otherwise known as the knowingly- exposed-to-the-public aspect. To equate the *Katz* doctrine with helicopter surveillance “is, at best, disingenuous.”³⁹⁴

The three dissenters questioned whether it could be seriously doubted that Riley enjoyed almost complete privacy in his backyard greenhouse and that his privacy was invaded solely by police surveillance from a helicopter.³⁹⁵ Justice Brennan then retorted with a pointedly rhetorical question whether the “theoretical possibility” that any member of the body politic with sufficient assets could have rented a helicopter to look over the fence into Riley's curtilage was relevant in any way in deciding whether Riley had suffered a serious deprivation of personal security and privacy by law-enforcement action.³⁹⁶ Unlike a

³⁹¹ *Id.* The “sufficient regularity”—“generally used by the public” limitation should be juxtaposed to the “not-in-general-public-use” dictum-caveat in *Kyllo v. U.S.*, 533 U.S. 27, 34 (2002). See *supra* text accompanying note 19; *infra* text accompanying notes 435–55, 514.

³⁹² *Florida v. Riley*, 488 U.S. 445, 456–57 (1989) (Brennan, J., dissenting) (quoting Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 403 (1974)).

³⁹³ *Florida v. Riley*, 488 U.S. 445, 457 (1989) (Brennan, J., dissenting).

³⁹⁴ *Id.*

³⁹⁵ *Id.*

³⁹⁶ *Id.* at 457–58, 460.

public road, the police-helicopter vantage point was not readily shareable by any citizen, as the vantage point was conditioned on the use of an exceptionally expensive, sophisticated vehicle to which few ordinary members of the body politic have access.³⁹⁷ The plurality's limited inquiry into the officer's right-to-be-there was wholly inadequate, as the Court plurality could not assume that Riley's backyard curtilage was so open to passerby observation from the skies that he had little personal security or privacy to lose from law enforcement.³⁹⁸

Thus, for the three dissenters, the question before the Court was not one of a legal vantage point but whether public viewing of Riley's curtilage was "so commonplace" that his privacy expectation was unreasonable.³⁹⁹ In sum, the plurality took a large step in moving from fixed-wing surveillance in *Ciraolo* at 1000 feet to helicopter surveillance at 400 feet with little or no analysis other than compliance with FAA regulations.⁴⁰⁰ The dissenters found equally frustrating the absence of any meaningful restriction in the Court plurality's holding, as the FAA regulations provided no minimum altitude for helicopters. Accordingly, it was difficult to determine what helicopter surveillance, if any, would violate the rule that there is no expectation of privacy from helicopter surveillance as long as the helicopter has a legal-vantage-point right-to-be-there.⁴⁰¹ And, if the Fourth Amendment was intended to secure the security and privacy of individuals, the dissenters found the Court plurality's caveat as to "noise, wind, and dust" to be "puzzling."⁴⁰²

Justice Brennan then provided the famous hypothetical about a helicopter with the capability to hover just over an enclosed courtyard without any of the above hazards: "Suppose the police employed *this miraculous tool* to discover not only what crops people were growing in their greenhouses, but also what books they were reading and who their dinner guests were."⁴⁰³ And assume the FAA regulations remained unchanged. Would the plurality retain its position that no Fourth Amendment violation occurs in such a situation? The dissenters viewed the above scenario as the logical concomitant of the plurality's opinion

³⁹⁷ *Id.* at 460.

³⁹⁸ *Id.*

³⁹⁹ *Florida v. Riley*, 488 U.S. 445, 460 (1989) (Brennan, J., dissenting).

⁴⁰⁰ *Id.* at 460–61.

⁴⁰¹ *See id.* at 461.

⁴⁰² *Id.* at 462.

⁴⁰³ *Id.* (emphasis supplied).

if a Fourth Amendment violation occurs *only* if aerial surveillance interferes with the use of curtilage backyard as a garden area.⁴⁰⁴ Moreover, nothing in that opinion suggested any different result if law-enforcement officers were using a helicopter to look through an open window visible only from an aerial vantage point.⁴⁰⁵ The dissenters disparaged as “[p]erhaps the most remarkable passage” Justice White’s intimation of a different result in cases of “intimate details” and wondered where he had found such justification in the Fourth Amendment’s language, history, or the Court’s jurisprudence.⁴⁰⁶

Justice Brennan criticized the plurality’s opinion as reflecting its strong antipathy to drug-trafficking as a powerful motivating factor, a posture which forgot that the Fourth Amendment’s purpose and scope were not determined by whether the search victim’s conduct was unlawful or innocent. Quoting Justice Frankfurter’s oft-quoted statement, he reminded the Court that “safeguards of liberty have frequently been forged in controversies involving not very nice people,” which was particularly true in Fourth Amendment cases, where suppression of evidence of a crime had largely defined its meaning and content.⁴⁰⁷ In essence, the principle at issue before the Court would decide the limits the Fourth Amendment superimposes on law-enforcement surveillance of any person and for any conceivable reason. If the Fourth Amendment did not protect Riley from surveillance of his marijuana garden, it was difficult to conceive of how the Constitution bars the government from “aerial spying” on *all* activities of law-abiding members of the body politic in their walled patios.⁴⁰⁸

The three dissenters largely agreed with Justice O’Connor’s concurrence, emphasizing that a five-Justice majority (the four dissenters plus Justice O’Connor) rejected the right-to-be-there analysis under FAA regulations.⁴⁰⁹ Justice Brennan also agreed with Justice O’Connor that the extent of law enforcement overflight could not be used to “bootstrap” such into controlling privacy expectations as to overflight in the airspace in question.⁴¹⁰ Justice Brennan disagreed

⁴⁰⁴ See *id.* at 463.

⁴⁰⁵ See *Riley*, 488 U.S. at 461–63.

⁴⁰⁶ *Id.* at 463.

⁴⁰⁷ *Id.* at 463–64, n. 6 (quoting *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950)) (Frankfurter, J., dissenting); see also § VI, *supra* (discussing the Fourth Amendment cases).

⁴⁰⁸ *Florida v. Riley*, 488 U.S. 445, 464 (1989).

⁴⁰⁹ See *id.* at 464–65.

⁴¹⁰ *Id.* at 465.

with Justice O'Connor only as to what he viewed as basically an empirical issue regarding the extent of public usage and how to resolve that issue.⁴¹¹ He found Justice O'Connor's conclusions inadequate and took judicial notice of occasional use by private helicopters flying over populated areas but those private helicopters were almost exclusively limited to departures from airports or reporting traffic congestion near major thoroughfares.⁴¹² If judicial notice were inappropriate, the government should have the burden of proof on point because of its greater information access regarding customary helicopter flight patterns and because the government's "coercive power . . . ought not to be brought to bear" where it was unclear whether prosecution may be attributable to an unconstitutional, warrantless search.⁴¹³

Although Justice Brennan had reason to hope Justice O'Connor's concurrence might cap at 400 feet the lowest permissible altitude for a permissible search, he had reasonable cause for concern the four-Justice plurality would abrogate all constitutional limits to helicopter overflights. He reminded his colleagues that what they sanctioned in *Riley* was the 1984 horror George Orwell envisioned: "The black-mustachio'd face gazed down from every commanding corner. There was one in the house front immediately opposite. BIG BROTHER IS WATCHING YOU, the caption said... In the far distance a helicopter skimmed down between the roofs, *hovered for an instant like a blue bottle*, and darted away with a curving flight. *It was the Police Patrol snooping into people's windows.*"⁴¹⁴ Justice Brennan added a sharply pointed warning: "Who can read this passage without a shudder, and without the instinctive reaction that it depicts a life in some country other than ours?"⁴¹⁵ Or, it doesn't, as he suggests under *Riley*.

A fourth dissenter, Justice Blackmun, likewise agreed with Justices O'Connor's and Brennan's opinions as providing a five-Justice majority on two points: *Katz*'s reasonable expectation of privacy criteria was not dependent on the fact the helicopter was operating at lawful altitude under FAA regulations; objective reasonableness depended on how frequently non-police helicopter flights were at

⁴¹¹ See *id.*

⁴¹² See *id.*

⁴¹³ *Id.* at 465–66.

⁴¹⁴ *Florida v. Riley*, 488 U.S. 445, 465–66 (1989) (emphases added) (quoting GEORGE ORWELL, 1984 (1949)).

⁴¹⁵ *Riley*, 488 U.S. at 466–67.

400 feet.⁴¹⁶ Justice Blackmun also agreed that Justice Brennan's dissent was correct in suspecting that helicopter overflight of curtilage at 400 feet was rare but not a *per se* limitation based on "judicial suspicion." Like Justice Brennan, he would have imposed that burden on the state.⁴¹⁷ Importantly, the Court later rejected unanimously the state's argument that the search victim has the burden of proving a Fourth Amendment violation in the case of a mandated life-long wearing of an ankle bracelet by a convicted recidivist sex offender.⁴¹⁸

In conclusion, much of what the four scholars say about the Court's "flyover" trio at first glance makes sense – these cases were "mired" in the Court's technologically limited jurisprudence of the 1960s-80s, and no one had provided a persuasive retort to the dissenters' argument that no one expects aircraft and helicopter pilots to purposefully focus on our domestic and commercial actions.⁴¹⁹ All Court decisions would have dealt differently with a case involving "intimate details," at least the five concurrers in *U.S. v. Jones* in 2012 could be viewed as evidencing more privacy-and-security restrictive Fourth Amendment drone rules.⁴²⁰ Yet, the authors hone in on and adopt the "routineness" and "sufficient regularity" analysis of *Florida v. Riley*'s modest majority of five (Justice White's plurality of four and Justice O'Connor's concurrence).⁴²¹ That test allegedly "critically interconnect[s] the First and Fourth Amendments."⁴²² The authors' conclusion favoring a strong public-disclosure doctrine reflects their emphasis that not a single Justice in *Jones* indicated that the *Katz* approach be replaced.⁴²³ Yet, it is undeniable that the constitutional terrain has since "[a]ll changed, changed utterly."⁴²⁴

⁴¹⁶ See *id.* at 467 (Blackmun, J., dissenting).

⁴¹⁷ *Id.* at 467–68.

⁴¹⁸ See *Grady v. North Carolina*, 575 U.S. 306, 307–11 (2015).

⁴¹⁹ Blitz et al., *supra* note 7, at 66.

⁴²⁰ *Id.* at 49, 60, 65–70.

⁴²¹ See *supra* text accompanying notes 378–95.

⁴²² Blitz et al., *supra* note 7, at 141.

⁴²³ *Id.* at 68–80, 139–41.

⁴²⁴ William Butler Yeats, *Easter 1916*, line 15. This is particularly so after *U.S. v. Carpenter* in 2018. Yet, even in *U.S. v. Jones*, Justice Sotomayor indicated the Court's need to reconsider the third-party doctrine. *U.S. v. Jones*, 565 U.S. 400, 417–419 (2012) (Sotomayor, J., concurring). The authors also ignore the property-rights analysis of the five-Justice *Jones* majority—Justice Scalia's opinion for the Court and Justice Sotomayor's concurrence. *Id.* at 404–13; *id.* at 413–19 (Sotomayor, J., concurring). Chief Justice Roberts quoted and adopted Justice Sotomayor's property and privacy analyses in *Carpenter v. U.S.*, 585 U.S. 296, 306–07, 309–11, 314–16 (2018). States can legitimately

C. *An Exemplar for Why the Scholars are Wrong—The Michigan Court of Appeals and its Rejection of the “Flyover” Cases as Controlling in Drone Searches—Long Lake Township v. Maxon*

As a backdrop for further analyzing the authors’ public-disclosure approach, compare the Michigan Court of Appeals decision in *Long Lake Township v. Maxon*,⁴²⁵ where the majority, in an opinion by Presiding Judge Jansen, held inadmissible drone footage of defendants’ carjunk yard in which it deemed a quasi-criminal proceeding, concluding that the Fourth Amendment barred warrantless governmental use of a drone for an overhead search.⁴²⁶ The court viewed drones as qualitatively distinguishable from both helicopters and planes because they are “vastly smaller and operate within little more than a football field’s distance from the ground.”⁴²⁷ A drone is consequently inherently more invasive into an individual’s private spaces than an airplane.⁴²⁸ Unlike the latter, which regularly fly overhead for reasons unconnected to purposeful, targeted surveillance, by nature, drone overflights are “not as commonplace, as inadvertent, or as costly.”⁴²⁹ In other words, drones are “intrinsically more targeted in nature” than airplanes and are “intrinsically much easier to deploy.”⁴³⁰ Moreover, unmanned drones’ qualities—stealth, speed, and maneuverability—give them,

rely on *Jones* in framing substantial protection for regulation of drone overflights in protecting landowners’ property and privacy rights, with the Court’s property-rights baseline emphatically reemphasized the following year in *Florida v. Jardines*, 569 U.S. 1, 10–11 (2013), where the Court affirmed the Florida Supreme Court’s decision finding a warrantless search of plaintiff’s curtilage, including the front porch. This Fourth Amendment-protected area was violated by government’s unauthorized physical incursion to “trawl for evidence with impunity.” *Id.* The Court distinguished the Court’s overflight cases as involving public navigable airspace in a “physically nonintrusive manner.” *Id.* at 7–8 (emphasis supplied). Justice Scalia found that the purposeful investigation using the drug-trained canine exceeded any implied-consent the police may have had as licensees under the “knock and talk” rule. *Id.* at 6–12.

⁴²⁵ 970 N.W.2d 893 (Mich. Ct. App. 2021) (vacated and remanded in *Long Lake Township v. Maxon*, No. 164948 (Mich., May 3, 2024)) (slip opinion) (*en banc*). Plaintiff had not seriously disputed the issue that the property in question was within the curtilage. *See id.* at 899. So, the court did not resolve such but focused on whether the defendants had “an actual and reasonable expectation of privacy.” *Id.* at 899.

⁴²⁶ *Id.* at 897–906.

⁴²⁷ *Id.* at 904.

⁴²⁸ *See id.*

⁴²⁹ *Id.*

⁴³⁰ *Id.* (They were different from airplanes that “routinely fly overhead for purposes unrelated to intentionally targeted surveillance.”).

like the thermal-imaging devices involved in *Kyllo v. United States*,⁴³¹ the capacity to drastically exceed the type of human limitations the Framers would have contemplated, not merely in degree but in kind.⁴³²

Following *United States v. Causby*,⁴³³ Presiding Judge Jansen found that violations of the airspace above property where owners have some level of ownership rights involved a trespass indistinguishable from an incursion upon the land surface and focused on the defendants' reasonable privacy expectations—critical to which is that any person would have reasonably expected low-altitude drone overflight to be “trespassory and exceptional, whether the drone flew as high as a football-field length or flew directly up to an open bathroom window.”⁴³⁴ The court relied on *Kyllo* in interpreting the Court's binding precedent, concluding that technology's creative ways to violate individual privacy do not define whether that person has a reasonable privacy expectation society should continue to acknowledge.⁴³⁵ *Kyllo*'s implicit conclusion was that a Fourth Amendment violation occurs when “there would have historically been an expectation of privacy that becomes called into question solely by a change in the available technology”—the case before the court.⁴³⁶ The court cited *Carpenter v. United States*⁴³⁷ as directly on point.⁴³⁸ The majority believed it “unworkable and futile” to attempt to devise a specific-altitude rule, concluded that people have a reasonable privacy expectation against drone surveillance of their property, and that any government actor needed either a warrant or to meet the requirements of a traditional exception thereto.⁴³⁹ The court found *Kyllo* controlling, rejected its not-in-general-use dictum and distinguished *Riley*.⁴⁴⁰

⁴³¹ 533 U.S. 27 (2001). *See supra* text accompanying notes 19, 391; *infra* text accompanying notes 432–37, 568.

⁴³² *See* Long Lake Township v. Maxon, 970 N.W.2d 893, 904 (Mich. Ct. App. 2021).

⁴³³ 328 U.S. 256 (1946). *See supra* text accompanying notes 143, 283–84; *infra* text accompanying notes 434, 614.

⁴³⁴ *Long Lake Twp.*, 970 N.W.2d at 904–05 (noting drones “fly below what is usually considered public or navigable airspace”).

⁴³⁵ *See id.*

⁴³⁶ *Id.* at 905.

⁴³⁷ 585 U.S. 296 (2018).

⁴³⁸ Long Lake Township v. Maxon, 970 N.W.2d 893, 905 (Mich. Ct. App. 2021) (citing *Carpenter*).

⁴³⁹ *Id.*

⁴⁴⁰ *See id.* at 898–906.

The dissenter, Judge Fort Hood, agreed as to drones' inherently enhanced intrusiveness vis-a-vis manned aircraft but concluded that *Ciraolo-Riley* could not be categorically swept aside and “so sweepingly distinguished.”⁴⁴¹ Equally important was *Kyllo*'s “not in general public use” limitation and the fundamental thrust of *Ciraolo-Riley-Kyllo*.⁴⁴² Where a defendant used drone technology that the public had a right to use in public airspace that permits observation of what is visible to the naked eye—as shown by the record before it—no Fourth Amendment search occurred.⁴⁴³ The dissenter found no evidence that the photographs taken were different in kind from observations and photographs available from an airplane or helicopter vantage point.⁴⁴⁴ Judge Fort Hood also found no evidence that the drone used was “particularly invasive” to altitude, manner of operation, or technology used.⁴⁴⁵ She cited evidence of common public flight of drones at 400 feet and below⁴⁴⁶ and noted that not every such drone used for recreational purposes was covered by mandatory FAA registration.⁴⁴⁷

The dissenter emphasized that the fundamental thrust of *Kyllo* was the use of intrusive technology not reasonably anticipated—in that case thermal-imaging.⁴⁴⁸ Thus, *Kyllo* did not authorize the court to circumvent *Ciraolo-Riley* where a drone was used to see that which was plainly observable by the naked eye. If the Michigan legislature wished to adopt a contrary rule, it could do so.⁴⁴⁹ But, in the case before it, no evidence suggested illegal drone use or that the drone employed technology not readily accessible to or not in general use.⁴⁵⁰ Thus,

⁴⁴¹ *Id.* at 906–07 (Fort Hood, J., dissenting).

⁴⁴² *See id.*

⁴⁴³ *See id.* at 907–09.

⁴⁴⁴ *See* Long Lake Township v. Maxon, 970 N.W.2d 893, 907 (Mich. Ct. App. 2021).

⁴⁴⁵ *Id.* at 908.

⁴⁴⁶ *Id.* (noting that, like *Ciraolo-Riley*, there was “reason to believe that any member of the public could have used their own drone and plainly viewed the property” in question), n. 4 (citing FAA Fact Sheet—Small Unmanned Aircraft Systems (UAS) Regulations (Part 107) (Oct. 6, 2020) < https://www.faa.gov/news/fact_sheets/news_story.cfm?newsId=22615 > [<https://perma.cc/C4LK-DKCE>] (FAA’s statement that 873,144 drones were registered with it as of February 2021, and were “rapidly becoming a party of our everyday lives”)).

⁴⁴⁷ *See id.* at 908, n. 4 (citing FAA Fact Sheet, *supra* note 446).

⁴⁴⁸ *Id.* at 908–09.

⁴⁴⁹ *See id.* at 909.

⁴⁵⁰ Long Lake Township v. Maxon, 970 N.W.2d 893, 907–09 (Mich. Ct. App. 2021).

Ciraolo-Riley's readily-observable-by-naked-eye-from-commercial-and-other-public-aircraft-in-publicly-navigable-airspace doctrine defined a landowner's reasonable expectation of privacy.⁴⁵¹

The Supreme Court of Michigan vacated and remanded to determine whether the exclusionary rule applied.⁴⁵² The Michigan Court of Appeals, in a divided opinion, found that it did not,⁴⁵³ with a dissent by the judge authoring the earlier opinion.⁴⁵⁴ The Michigan Supreme Court granted the appeal and listed two issues for briefing and argument—whether the drone aerial photography violated the Fourth Amendment and whether the exclusionary rule applies.⁴⁵⁵ The Michigan Supreme Court affirmed the latest decision of the appellate court, finding that a civil-ordinance infraction involving only future injunctive relief did not involve criminal, quasi-criminal, or a comparable proceeding warranting application of the prophylactic exclusionary rule under controlling precedent.⁴⁵⁶

Fundamentally, however, the initial *Long Lake Township* opinions, featuring a joust between Presiding Judge Jansen and Judge Fort Hood, focused on the pivotal issue of whether *Kyllo*—shorn of its not-in-general-public-use dictum-caveat—or *Ciraolo-Riley* controls.⁴⁵⁷ This vigorous Michigan debate illuminates this article's fundamental problem with the authors' analysis. Their routineness-sufficient-regularity focus ignores the compelling arguments to the contrary for protecting civil liberties and privacy,⁴⁵⁸ and particularly to drones. They rely heavily on *Ciraolo-Riley*'s flawed analysis of whether a theoretical commercial plane or helicopter and its passengers could theoretically see and record⁴⁵⁹ – as did the dissenting Judge Fort Hood in the 2021 *Long Lake Township* decision. Many scholars view *Ciraolo-Riley*

⁴⁵¹ *See id.*

⁴⁵² *Long Lake Township v. Maxon*, 973 N.W.2d 615, 616 (Mich. 2022).

⁴⁵³ *Long Lake Township v. Maxon*, 997 N.W.2d 250, 252 (Mich. Ct. App. 2022).

⁴⁵⁴ *Id.* at 259–67 (Jansen, P.J., dissenting) (based on the Michigan Constitution).

⁴⁵⁵ *Long Lake Township v. Maxon*, 989 N.W.2d 810, 810 (2023).

⁴⁵⁶ *Long Lake Township v. Maxon*, No. 164948 (Mich. May 3, 2024).

⁴⁵⁷ *See Long Lake Township v. Maxon*, 970 N.W.2d 893, 897–906 (Mich. Ct. App. 2021); *id.* at 906–09 (Fort Hood, J., dissenting).

⁴⁵⁸ These are found in Justice Brennan's unanswered, even unanswerable, three-justice dissent. *See supra* text accompanying notes 392–415. Compare Blitz et al., *supra* note 7.

⁴⁵⁹ *See supra* text accompanying notes 326–424. Blitz et al., *supra* note 7, at 49–50, 65–72, 72–80, 139–42.

as intellectually dishonest rubbish.⁴⁶⁰ Justice Gorsuch has provided a withering critique of what the Court's *Katz* jurisprudence wrought in general—"an often unpredictable—and sometimes unbelievable—jurisprudence"—that included the Court's *Smith-Miller* third-party assumed-risk decisions.⁴⁶¹ Justice Gorsuch ridiculed *Riley*'s holding: "... [A] police helicopter hovering 400 feet above a person's property invades no reasonable expectation of privacy. Try that one out on your neighbors."⁴⁶²

The article authors cling to their public-disclosure theory despite recognizing that at least the five concurring Justices in *Jones* likely would have viewed drone-type technology's "force multiplier" as making them much more intrusive than GPS in their potential for invading privacy⁴⁶³—a matter of extraordinarily heightened concern in the Court's later post-*Jones-Jardines* ground-breaking precedent.⁴⁶⁴ The Court's post-*Jardines* cases compellingly demonstrate this precedent. In *Carpenter v. U.S.*,⁴⁶⁵ Chief Justice Roberts' majority opinion reaffirmed the Court's commitment to preserving the degree of privacy contemplated by the Founding Fathers, emphasizing the Fourth Amendment's historic features, "to secure 'the privacies of life' against 'arbitrary power'" and "'to place obstacles in the way of too permeating police surveillance,'"⁴⁶⁶ as a preface to and limitation on the third-party doctrine of *Smith-Miller*. *Carpenter* involved subpoenaed cell-phone

⁴⁶⁰ See, e.g., the citations in note 326 *supra* the *Riley* dissenters; see *supra* text accompanying notes 392–415; Sherry F. Colb, *What is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119, 146–47 (2002) (Critiquing *Riley*'s knowing-exposure/invitation analysis, Professor Colb states that an "[i]nnocent[]—uninterested in using privacy for criminal enterprises—could be chilled from legitimately utilizing their private spaces, both literal and figurative, for fear of police wrongdoing and betrayal," concluding that "the innocent person who seeks privacy should not have to assume that 'Big Brother Is Watching,'" (quoting GEORGE ORWELL, 1984 (1949)). And see *infra* text accompanying notes 507–08.

⁴⁶¹ *Carpenter v. U.S.*, 585 U.S. 296, 394 (2018) (Gorsuch, J., dissenting).

⁴⁶² *Id.*

⁴⁶³ Blitz et al., *supra* note 7, at 70–71 ("[D]rone surveillance can gather more information from a person's backyard than the aerial surveillance of [the 1980s] . . . both in terms of detail and quantity, thereby learning of 'intimate associations, objects or activities' and 'intimate details' then even the earlier Court cases suggested should remain constitutionally off-limits to suspicionless surveillance from the air.") (quoting *California v. Ciraolo*, 476 U.S. 207, 215, n.3 (1986); *Dow Chem. Co. v. U.S.*, 476 U.S. 227, 238 (1986)).

⁴⁶⁴ See *Carpenter*, 585 U.S. at 320–24.

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.* at 305 (quoting *Boyd v. United States* 116 U.S. 616, 630 (1886); *United States v. Di Re*, 332 U.S. 581, 595 (1948)).

data comprehensively chronicled from cell towers and other elevated locations that “generate increasingly vast amounts of increasingly precise” data made accessible by digital technology’s “seismic shifts” that enabled tracking not only of Carpenter’s data but also “everyone else’s, not for a short period but for years and years.”⁴⁶⁷

As in *Jones*,⁴⁶⁸ the information acquired was “detailed, encyclopedic, and effortlessly compiled” and “remarkably easy, cheap, and efficient compared to traditional investigative tools,” and presented even greater concerns than GPS-tracking. Cell-phone users compulsively take their phones with them beyond public streets into a wide variety of buildings, including residences, and other revealing locations, like political headquarters and physicians’ offices, thereby “achiev[ing] near perfect surveillance” equivalent to an ankle monitor.⁴⁶⁹ Unlike *Jones*, law enforcement need not even know or suspect in advance who they want to surveil—that person has “effectively been tailed every moment of every day” for the entire five years that carriers kept such information, which government could summon easily by subpoena.⁴⁷⁰ This new and unique cell-phone-tracking information differed dramatically from the pre-digital era, where society’s expectations were law-enforcement officers and other persons “would not—and indeed, in the main, simply could not—secretly monitor and catalog every movement of an individual’s car [or person] for a very long period.”⁴⁷¹

Whether the government used its own devices, as in *Jones*, or influenced a wireless carrier as in *Carpenter*, the use of cell-phone records violates that privacy expectation and “provides an intimate window into a person’s life, revealing not only his particular movements, but through them his ‘familial, political, professional, religious, and sexual associations.’”⁴⁷² The Court emphasized its constitutional responsibility to “ensure that ‘the progress of science’ does not erode Fourth Amendment protection,”⁴⁷³ and to follow its recent posture to not “uncritically extend” precedents to new controversies precipitated

⁴⁶⁷ *Carpenter v. U.S.*, 585 U.S. 296, 301, 313 (2018).

⁴⁶⁸ *U.S. v. Jones*, 565 U.S. 400 (2012).

⁴⁶⁹ *Carpenter*, 585 U.S. at 309, 311.

⁴⁷⁰ *Id.* at 312.

⁴⁷¹ *Id.* at 310 (quoting *Jones*, 565 U.S. at 430).

⁴⁷² *Id.* at 311 (quoting *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring)).

⁴⁷³ *Carpenter v. U.S.*, 585 U.S. 296, 320 (2018) (quoting *Olmstead v. U.S.*, 277 U.S. 438, 473–74 (1928) (Brandeis, J., dissenting)).

by digital technology.⁴⁷⁴ The Court declined to accord the government unfettered access to the carrier's inventory of highly revealing physical-location and movement data in light of the deep, broad and automatic nature of its compilation.⁴⁷⁵ The fact that a third-party entity collected such information did not make it any less worthy of protection under Fourth Amendment protection.⁴⁷⁶

In a unanimous *per curiam* opinion in *Grady v. North Carolina*,⁴⁷⁷ the Court logically applied the *Jones-Jardines* physical-intrusion doctrine and found a Fourth Amendment search in a civil statutory mandate that a convicted recidivist sex offender wear a continuous, life-long, time-correlated, satellite-based, nonconsensual GPS tracking device—an ankle bracelet physically intruding upon his person, a type of statutorily mandated battery—after he had served his sentence. The Court rejected the state's argument that Grady had the burden of and had not demonstrated a Fourth Amendment violation and he had not demonstrated the scheme collected any information, citing the title to and text of the statute as indicating it was clearly calculated to gather information.⁴⁷⁸ *Grady* has strong implications for the burden of proof issue pivotal to *Florida v. Riley*⁴⁷⁹ and destabilizes the fragile, fractionated majority in that opinion.

In *Riley v. California*,⁴⁸⁰ Chief Justice Roberts's opinion for a unanimous Court found that cell-phone searches incident to arrest were subject to the warrant requirement under the “papers” or “effects” language of the Fourth Amendment. The Court emphasized how cell phones had become “such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important part of human anatomy” and how they “place vast quantities of personal information literally in the hands of individuals” of both a quantitative and qualitative nature,⁴⁸¹ reflecting a deep chasm between digital capability and practical physical limitations that will only further widen in the future.⁴⁸² The Court emphasized that cell phones

⁴⁷⁴ *Id.* at 318.

⁴⁷⁵ *Id.* at 320.

⁴⁷⁶ *See id.*

⁴⁷⁷ 575 U.S. 306 (2015).

⁴⁷⁸ *Id.* at 307–09.

⁴⁷⁹ *See supra* text accompanying notes 388–89, 411–13, 417–18.

⁴⁸⁰ 573 U.S. 373 (2014).

⁴⁸¹ *Id.* at 385, 386.

⁴⁸² *Id.* at 393–95.

provide a detailed digital history “of nearly every aspect of [peoples’] lives—from the mundane to the intimate” and “reveal an individual’s private interests or concerns,” such as disease symptoms, and allow a third party to “reconstruct . . . specific movements down to the minute” within specific buildings and around the municipality.⁴⁸³

Chief Justice Roberts incorporated Justice Sotomayor’s powerful *Jones* concurrence that GPS surveillance “generates a precise, comprehensive record of a person’s public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.”⁴⁸⁴ The *Riley* Court ultimately concluded that a “categorical rule” was required, as cell phones were “not just another technological convenience,” but, “[w]ith all they contain and all they may reveal, they hold for many Americans ‘the privacies of life.’”⁴⁸⁵ In conclusion, it is difficult to overestimate the radical and bipartisan consensus the Court has reached in aggressively responding to technological intrusions. As one commentator concludes post-*Riley*, pre-*Carpenter*, “[w]hen it comes to technology . . . the [C]ourt seems free of ideological baggage and is trying hard, collectively, to get it right.”⁴⁸⁶ Professor Jeffrey Rosen describes *Riley v. California* glowingly as “an occasion for defenders of the Fourth Amendment to dance in the streets.”⁴⁸⁷

⁴⁸³ *Id.* at 395–96.

⁴⁸⁴ *Id.* (quoting *U.S. v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring)).

⁴⁸⁵ *Id.* at 386, 403 (quoting *Boyd v. U.S.*, 115 U.S. 616, 630 (1886)). The Court’s emphasis on a black-letter rule is a well-documented part of this article’s thesis. See *infra* § VI.

⁴⁸⁶ Linda Greenhouse, *The Supreme Court Justices Have Cellphones, Too*, N.Y. TIMES, June 25, 2014, <https://www.nytimes.com/2014/06/26/opinion/linda-greenhouse-the-supreme-court-justices-have-cellphones-too.html>.

⁴⁸⁷ Jeffrey Rosen, *The Supreme Court’s Cell Phone Case Went Even Further than Privacy Advocates Had Hoped*, NEW REPUBLIC, June 26, 2014, <https://newrepublic.com/article/118396/supreme-court-cellphone-case-went-further-privacy-advocates-hoped>. Professor Morgan Cloud definitively analyzes the Court’s modern property-rights and privacy jurisprudence from *Jones* to *Riley* as affirming “foundational values”—a “unifying principle” of protection a person’s ideas against intrusion. Morgan Cloud, *Property Is Privacy: Locke and Brandeis in the Twenty-First Century*, 55 AM. CRIM. L. REV., 37, 39, 73 (2018). This reflects the Founders’ broad definition of property as not limited to “external objects” but as also including “all of those human rights, liberties, powers, and immunities that are important for human well-being, including: freedom of expression, freedom of conscience, freedom from bodily harm, and free and equal opportunities to use personal faculties.” Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L. J. 127, 128–29 (1990). This 17th-century Lockean view was found in the jurisprudence of James Madison, of the Court in *Boyd*, and Justice Brandeis’s famous dissent in *Olmstead*. See generally Cloud, *supra* note 487. Professor Cloud’s pre-*Carpenter* analysis is dramatically reinforced by *Carpenter*’s majority, plus the dissents of Justices Thomas and Gorsuch. The implications of the Court’s precedents for

Yet, the authors explicitly or implicitly ignore all the concerns raised by the Court—even after the issuance of *Riley v. California*’s black-letter Fourth Amendment rule—in favor of their doctrine of public disclosure—that that law enforcement “typically need not ‘shield their eyes’ from what other citizens in fact freely and lawfully observe.”⁴⁸⁸ In other words, when technology is “in ‘general public use’ for a particular purpose,” the Fourth Amendment does not prohibit its law-enforcement use.⁴⁸⁹ And, what law enforcement is allowed to do is symbiotically, if not incestuously, linked to what private persons do, which requires an understanding of “how the First Amendment limits government restraint on speech-relevant private [drone] flight.”⁴⁹⁰

The authors state this supposed inextricable linkage: “if the First Amendment keeps open a certain avenue of aerial observation to private citizens, it may also—at least as a default matter—keep that open to law enforcement.”⁴⁹¹ And Fourth Amendment expectations of privacy are “powerfully shaped by what people expect is routine and acceptable in private surveillance—which, in part, is determined by First Amendment limits on what private parties can be prevented from seeing in public and then sharing with others.”⁴⁹² The authors acknowledge that First Amendment protection under a broad right to record⁴⁹³ presents uncertainties,⁴⁹⁴ as does their limited-public-forum

the First Amendment and newsgathering are clear. Why have the recording-police-in-public cases all but ignored them? See Elder, Part I, *supra* note 1, Introduction, § I–III, Conclusion.

⁴⁸⁸ Blitz et al., *supra* note 7, at 71 (quoting *California v. Ciraolo*, 476 U.S. 207, 213 (1986)), 139–40 (suggesting the interpretation of Court precedent “strikes [the authors] as sound.”). This public-disclosure doctrine, together with the private-search doctrine and the third-party doctrine, “means that as private drone recording increases, so does law enforcement access to such recording.” *Id.* at 139.

⁴⁸⁹ Blitz et al., *supra* note 7, at 71 (quoting *Kyllo v. U.S.* 533 U.S. 27, 34 (2001)).

⁴⁹⁰ *Id.* at 49–50 (Abstract), 70–80, 139–41.

⁴⁹¹ *Id.* at 71.

⁴⁹² *Id.* at 74–75 (“It is a powerful default intuition that police generally be allowed to use tools available to, and routinely and lawfully used by, others.”).

⁴⁹³ *Id.* at 74–76 (“If a free society can survive constant use of Google Street View by anyone who wishes to use it (including one’s business rivals or political enemies), why should it not be able to survive use of Google Street View by police?”). This fallacious analogy is a favorite of the media and the drone industry. See *infra* text accompanying note 525–28.

⁴⁹⁴ Blitz et al., *supra* note 7, at 80–109, 141 (but noting as part of the possible “First Amendment shield” “an increasingly recognized right to record”). See the critical discussion in Elder, Part I, *supra* note 1. The authors concede that if this right has an “essential role” in controlling government conduct, it “arguably would not support” the government’s claims to surveil the rest of us. Blitz et al., *supra* note 7, at 139. The result might be to the contrary if the public-disclosure doctrine is based

proposal,⁴⁹⁵ which accords law enforcement broad Fourth Amendment rights—unless and until limited legislatively by Congress or states—“if” such “ultimately permits an ‘eye zone’” and “if private persons take to routinely flying and recording.”⁴⁹⁶ In such a scenario, a world would exist where citizens “expect—and have adapted to—being subject to drone surveillance by everyone else.”⁴⁹⁷

The authors did not have pre-publication access to the Court’s decisions after *Riley v. California*,⁴⁹⁸ particularly the Court’s pivotal decision in *Carpenter v. United States*.⁴⁹⁹ The authors correctly note that the third-party doctrine has “fallen on harder times,” “engendered withering criticism,” and is “already showing signs of decay.”⁵⁰⁰ The Court’s *Carpenter* decision⁵⁰¹ decimated the third-party doctrine, although it did not specifically overrule it. In *Carpenter*, the parties did not seek reconsideration of *Katz* and the third-party doctrine.⁵⁰² Justice Gorsuch, in his dissent, endorsed the Court majority’s “implicit but unmistakable conclusion” that the third-party doctrine is unfounded and wrong.⁵⁰³ He viewed the doctrine as on “life support.”⁵⁰⁴

in “the foundational default that if in fact private persons are routinely doing ‘x,’ there is little good reason to prevent law enforcement from doing the same.” *Id.* at 139–40.

⁴⁹⁵ *Id.* at 110–40.

⁴⁹⁶ *Id.* at 141 (emphasis added). The authors state that to have an impact on the Fourth Amendment, it does not suffice that First Amendment doctrine permits such information-gathering/recording: “it is only if that behavior becomes commonplace that it is unreasonable as a default matter to expect privacy against the government doing the same.” *Id.* at 140.

⁴⁹⁷ *Id.* at 76.

⁴⁹⁸ See *supra* text accompanying notes 343, 480–88; *infra* text accompanying notes 505, 509, 515–19.

⁴⁹⁹ For *Carpenter*, see *supra* text accompanying notes 20, 330, 424, 461–62, 464–76; *infra* text accompanying notes 505, 576. For *Collins v. Virginia*, see *supra* note 39. For *Grady v. N.C.*, see *supra* text accompanying notes 418, 477–79.

⁵⁰⁰ Blitz et al., *supra* note 7, at 66, 78. The authors note the third-party doctrine/assumption-of-risk doctrine “misunderstands privacy” and “begs the question.” If retained in some form, it provides “yet another manner in which private information-gathering affects government access.” *Id.* at 78.

⁵⁰¹ *Carpenter v. U.S.*, 585 U.S. 296 (2018).

⁵⁰² *Id.* at 304, n. 1.

⁵⁰³ *Id.* at 405 (Gorsuch, J., dissenting).

⁵⁰⁴ *Id.* Justice Gorsuch provided a detailed critique of the *Smith-Miller* rule. *Id.* at 387–97. Other dissenters appear to concur its “life-support” status. *Id.* at 322, 332–37 (Kennedy, J., dissenting) (The “troves of intimate information that government can and does obtain using financial records and telephone records [under the third party doctrine]” technically retained by the majority “dwarf[]” the information gatherable from cell-phone-location records and turn the doctrine “into an unprincipled and unworkable doctrine.”); *id.* at 377, n. 2 (Alito, J., dissenting) (The majority “ends up sounding a lot like a tacit admission that it is overruling our precedents.”);

The authors' article largely ignores the fact that the policy arguments that underlay their public-disclosure doctrine are the same as those that have been compellingly questioned by *Jones*—and eviscerated first by *Riley v. California* and again by *Carpenter*—that the citizenry has largely accepted (or assumed the risk of) drone overflight incursions on privacy.⁵⁰⁵ The *Carpenter* majority opinion rejected the *Smith v. Maryland* rationale—that there was a reduced privacy expectation in business-record information knowingly provided to another—as distinguishable from the situation before it, where there were no comparable restrictions on cell-site location information that provided “a detailed chronicle of a person’s physical presence compiled every day, every moment, over several years.”⁵⁰⁶ This went far beyond the privacy concerns in *Smith-Miller*.⁵⁰⁷

The *Carpenter* Court also rejected the other third-party doctrine rationale—voluntary exposure-assumed risk.⁵⁰⁸ Following *Riley*, the Court concluded that cell-phone information is “not truly shared” since cell phones are “such a pervasive and insistent part of daily life” and “indispensable to participation in modern society,”⁵⁰⁹ and where the tracking involved no affirmative cell-phone-user action. Other than disconnecting from the cellular network, one cannot avoid leaving a path of location information.⁵¹⁰ As a consequence, “in no meaningful sense does the user ‘voluntarily assume the risk’ of turning over such a comprehensive dossier” of his or her “physical movements.”⁵¹¹ The Court refused to stretch *Smith-Miller* to the case before it.⁵¹² Justice Gorsuch’s dissent was even more devastating in criticizing what *Katz* had wrought—“an often unpredictable and sometimes

id. at 343, 357, 361 (Thomas, J., dissenting) (*Katz* lacks a basis in either the history or language of the Fourth Amendment, “invites courts to make judgments about policy, not law,” “will continue to distort” the Court’s Fourth Amendment precedents, “has proved unworkable in practice”—listing the scholarly critiques thereof—and characterized it as a “failed experiment” the Court is “dutybound to reconsider.”). The *Carpenter* majority, together with Justices Thomas and Gorsuch in dissent, appear to bode very favorably for an ultimate overriding of *Katz* and, more particularly its overflight cases, and its least defensible off-spring like *Florida v. Riley*.

⁵⁰⁵ See *supra* text accompanying notes 480–87; *infra* text accompanying notes 506–21.

⁵⁰⁶ *Carpenter v. U.S.*, 585 U.S. 296, 315 (2018).

⁵⁰⁷ See *id.* at 301–16.

⁵⁰⁸ See *id.*

⁵⁰⁹ *Id.* at 315 (quoting *Riley v. California*, 573 U.S. 373, 385 (2014)).

⁵¹⁰ See *id.*

⁵¹¹ *Id.* (quoting *Smith v. Maryland*, 442 U.S. 735, 745 (1979)).

⁵¹² See *id.*

unbelievable jurisprudence.”⁵¹³ He specifically identified the Court’s third-party-assumed-risk doctrine.⁵¹⁴

The Court’s unanimous opinion in *Riley v. California*⁵¹⁵ perfunctorily rejected *Smith-Miller* in favor of a “categorical rule” providing clear direction.⁵¹⁶ It is worth repeating Chief Justice Roberts’s emphasis on how cell phones are “a pervasive and insistent part of daily life,”⁵¹⁷ on how “all they may reveal, they hold for many Americans ‘the privacies of life,’”⁵¹⁸ and how cell-phone searches “typically expose to the government *more* than the most exhaustive search of a house.”⁵¹⁹ Justice Sotomayor’s concurrence in *Jones* argued that the *Smith-Miller* duet was “ill suited [sic] to the digital age” in which individuals provide a large amount of information to third parties while performing daily tasks.⁵²⁰ She would “not assume that all information voluntarily disclosed to some member of the public for a limited purpose” forfeits Fourth Amendment protection.⁵²¹

In any event, the citizen-acceptance assumption argument is flawed. Yet, if the First Amendment constitutionalizes such drone use via a limited public forum or maybe even by the right to record in public (if adopted), such trumps, in the authors’ view, the “equally important norm” of privacy.⁵²² The authors do not explain why such trumping is justified or constitutionally compelled, and, as indicated herein, their conclusion lacks persuasiveness.⁵²³ Indeed, the authors’ carefully nuanced, qualified proposal discussed above makes a compelling case in favor of states intervening to protect their citizens from a type of First Amendment-based “herd immunity” for drone surveillants, both those governmental in nature and non-governmental in nature, as reflected

⁵¹³ *Id.* at 394 (Gorsuch, J., dissenting).

⁵¹⁴ *Id.*

⁵¹⁵ *Riley*, 573 U.S. 373.

⁵¹⁶ *Id.* at 401–03.

⁵¹⁷ *Id.* at 385.

⁵¹⁸ *Id.* at 403 (quoting *Boyd v. U.S.*, 116 U.S. 616, 630 (1886)).

⁵¹⁹ *Id.* at 396 (emphasis in original).

⁵²⁰ *U.S. v. Jones*, 565 U.S. 400, 417 (2021) (Sotomayor, J., concurring).

⁵²¹ *Id.* at 418 (citing *Smith v. Maryland*, 442 U.S. 735, 749 (1979) (Marshall, J., dissenting)).

⁵²² Blitz et al., *supra* note 7, at 139–42. Compare Justice Breyer’s important concurrence in *Bartnicki v. Vopper*, where he espoused a different rule, providing more deference to legislatures where constitutional interests of equal stature are in question. *Bartnicki v. Vopper*, 532 U.S. 514, 535–41 (2001). See Elder, Part I, *supra* note 1, text accompanying n. 309.

⁵²³ See Elder, Part I, *supra* note 1, Introduction, §§ II–III, Conclusion; *supra* §§ III, VI.B.1–4.

in the near tsunami of recent state legislative activity.⁵²⁴ As indicated above, the authors place substantial reliance on the ability of Google Street View to view particulars in our curtilage as comparable to the data achieved in *Ciraolo* and maybe in our interiors.⁵²⁵ They then come to an if-it's-good-for-the-geese-it's-good-for-the-gander conclusion and suggest that if a democracy can survive constant surveillance by Google, including by political enemies and business competitors, what's the big deal vis-à-vis police?⁵²⁶

Google Street View is a false and unpersuasive analogy of the detailed particularity of what can be viewed, as compared to drones. If they are indeed coterminous, then the authors have made a persuasive argument for limiting the intrusiveness and use of Google Street View's collection of information rather than a proverbial throwing up of one's hands and concluding there is no alternative to surveillance from all quarters, governmental and private. If Google Street View can presently, or could in the future, record and make available to all the identity of a person sun-bathing in fenced-in curtilage—maybe using facial-recognition technology—or what he is reading or saying—via video-synchronized lip-reading technology—or with whom he is socializing, these are compelling reasons to impose controls on Google Street View.

⁵²⁴ See *supra* text accompanying notes 14–15, § V.B.1–4; *infra* text accompanying note 531. Indeed, the authors seem to almost invite legislative intervention. See Blitz et al., *supra* note 7, at 141.

⁵²⁵ Blitz et al., *supra* note 7, at 74–76.

⁵²⁶ *Id.* And see Letter from Droneport Texas LLC to the NCCLS 3 (Mar. 26, 2019) (“ . . . [T]hanks to *Google Earth*, everyone's backyard is now available to public view. So, does one have a reasonable expectation when satellites equipped with high-resolution cameras are constantly taking photographs of the Earth? No. Perhaps the aerial intrusion of family picnics and backyard barbecues is limited to the superpowers? Not really.”). Google View is a false analogy that, if adopted, would negate any expectation of privacy from surveillance from the skies. One stakeholder retorted unanswerably to this analogy in the 2020 GAO report: “Of course, drones are different: they are *not* simply better [Google] Street View cameras. They *do* raise new concerns: unlike Street View cameras, which merely automate, systematize, and preserve what anyone could already see from public streets, drones can observe us from completely new angles—and potentially, from much closer distance, depending on how low they are allowed to fly. Certainly, drones can observe us in a level of detail that is far more granular than what satellites can do—and probably also more than what manned aerial systems could do. How private actors use such [drones] creates legitimate grounds for concern—above and beyond what government might do with them.” GAO Report, 2020, *supra* note 44, app. III, at 33, n. 179 (comments of Tech Freedom).

The controls could include, for example, creative interpretation of § 652B's intrusion-upon-seclusion tort,⁵²⁷ a California-style constructive-invasion statutory claim,⁵²⁸ other legislative means, or myriad other tort theories of liability. After all, for tort purposes, there is no legally justified distinction between a laser weapon operated from a great distance that harms a person physically and a constructive invasion that strips him or her of privacy, dignity, autonomy, free-expression interests, and maybe—in some cases—his or her intellectual property. For instance, no drone operator-paparazzi or other hunter-gatherers should be able to take detailed photos of a celebrity or non-celebrity on private property and place them for sale on the Internet with impunity.

More importantly, the authors appear to bestow almost exclusive authority for regulating drones on the FAA, severely understating co-existing, complementary sovereign rights of states to define and enforce crimes, torts, and related matters.⁵²⁹ Under this constitutional-federalism-based federal-state dichotomy, all reasonable and necessary rules related to the federal government's right to regulate and control air transit through navigable airspace coexist with but do not preempt, as the FAA has repeatedly acknowledged, contravene, or impinge upon states' sovereign prerogatives to define what constitutes an aerial trespass to land, constructive or physical invasion of privacy, nuisance, harassment, stalking, and the like.⁵³⁰ As indicated above, states have

⁵²⁷ See Elder, Part I, *supra* note 1, text accompanying nn. 148, 163, 253, 314, 348–54; see also *supra* text accompanying notes 46, 49.

⁵²⁸ See *supra* text accompanying note 320–24. The statute reflects the view of many scholars. As one suggests, “[u]se of a telephoto lens could be analogized to a physical intrusion, because the necessity of such a lens to obtain a photo would tend to suggest a reasonable expectation of seclusion.” James E. Nordhaus, *Celebrities Rights to Privacy: How Far Should the Paparazzi be Allowed to Go?*, 18 REV. LIT. 285, 301, n. 88 (1999).

⁵²⁹ See Laura K. Donohue, *A Tale of Two Sovereigns: Federal and State Use and Regulation of Unmanned Aircraft Systems*, in HANDBOOK OF UNMANNED AERIAL VEHICLES (Kimon P. Valavanis & George J. Vachsevanos eds., Springer Int. Publ'g AG) (2018) (Professor Donohue makes a powerful argument based on the structure of the federal Constitution and reflected in the Tenth Amendment for state sovereignty up to 500 feet and views as “remarkable” the FAA’s asserted jurisdiction from the ground up—“A strong constitutional argument can be brought to bear that below 500 ft., it is the *states*, and not the federal government, that have the authority to regulate [drones]”—navigable airspace “does not extend down to the ground—nor could it without violating state sovereignty.”); Rule, *Age of Drones*, *supra* note 10, at 198–99 (arguing the Tenth Amendment “explicitly reserves broad powers;” state and local authorities “tend to have a better sense of the particular needs and preferences of citizens.” Professor Rule suggests it is “reasonable and logical” for federal jurisdiction via the FAA to end at 500 feet.).

⁵³⁰ See *supra* text accompanying note 282. And see GAO Report, 2020, *supra* note 44, at 3 (“These reserved state powers [addressed by the Tenth Amendment, part of the Bill of Rights]

done so and will no doubt continue to do so,⁵³¹ reflecting impressive creativity and diversity of states in protecting privacy and property in our famed “laboratories of democracy.”⁵³²

The authors’ very cautious attempt to help federalize this torts/criminal/other-wrongful-act regime under the First Amendment through limited-public-forum doctrine⁵³³ is highly unlikely to succeed in a *Jones-Carpenter*-privacy-revitalized era,⁵³⁴ and would itself raise huge concerns about the relative rights of the federal and state governments in our federal system, including major constitutional issues under a revitalized Takings Clause.⁵³⁵ If the open-ended, standard-free nature of First Amendment “rights” promoted by the media, the drone industry, and others discussed in Part I are or become the law of the land, it brings to mind a recent poetic reformulation of Charles Dickens’ famous line from *Oliver Twist*:⁵³⁶ “The law is an ass that loves to hear itself bray.”⁵³⁷

include traditional police powers to protect public, health, and welfare on matters such as property rights, privacy, land use and zoning, and law enforcement.”); *id.* at app. I, at 12, nn. 62–63, 13, 15–16, 35, app. III, at 10, 12, n. 69 (detailing the statements of the FAA, including the 2019 Privacy Act Assessment in the Federal Register, in the FAA’s Fact Sheets through Sept. 2020, and statements of the FAA Office of General Counsel stating—regarding the police power of the states over zoning, trespass, privacy, law enforcement, and so on—that the FAA lacks rule-making authority to either issue or enforce any regulations directed at privacy interests as between private parties, concluding: “According to the FAA, such state and local privacy protections generally would not be subject to federal regulation and would not be federally preempted.”); Letter from Reginald C. Govan, FAA Chief Counsel, to NCCSL (July 24, 2018), at 1–6 (providing a detailed, compelling refutation of the arguments that the FAA has authority over all drone overflights and that state governments do not have lawful authority through their police powers to legislate privacy and private-property rights affecting low-altitude drone operations).

⁵³¹ See *Drone Laws For Every Country in the World, U.S.A. States and Major Cities*, DRONE LAWS (Nov. 12, 2024, 8:20 PM), <https://drone-laws.com>. (As of Nov. 12, 2024, only three states—Alabama, Missouri, Nebraska—have no drone laws at the state level).

⁵³² *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory” to “try novel social and economic experiments without risk to the rest of the country.”).

⁵³³ Blitz et al., *supra* note 7, at 110–38, 141–42. See *supra* the text supported by notes 268–532.

⁵³⁴ See the extensive references herein.

⁵³⁵ See *supra* text accompanying notes 248, 283–84; *infra* text accompanying 609–14.

⁵³⁶ CHARLES DICKENS, *OLIVER TWIST*, ch. 51 (1838) (“If the law supposes that,” said Mr. Bumble, squeezing his hat in both hands, “the law is an ass—a idiot. If that’s the eye of the law, the law is a bachelor, and the worst I wish the law is that his eye may be opened by experience—by experience.”).

⁵³⁷ Paul Muldoon, *Position Paper*, THE NEW YORKER, Sept. 9, 2019, at 50–51.

VI. THE COMPELLING CASE FOR A BLACK-LETTER RULE
BASED ON THE SUPREME COURT'S CONDUCT-VERSUS-
PURE-EXPRESSION DICHOTOMY AND APPLICATION
OF THE RATIONAL-BASIS STANDARD

As indicated in Part I, the Supreme Court and many decisions across the expansive common-law and statutory crime/tort/other wrongful acts realm⁵³⁸ have concluded that the media, the high-tech industry, and others cannot “play[] tyrant to the people”⁵³⁹ and engage in newsgathering conduct that violates rules of general applicability. The Court’s precedents are based on a dichotomy between wrongful conduct in acquisition and pure expression with the dissemination of information otherwise lawfully acquired.⁵⁴⁰ This distinction is deeply ensconced in the law of civil liability, criminal liability, civil liability for other wrongful acts, and the First Amendment.⁵⁴¹

As indicated above, the dichotomy has resulted in an extraordinarily circumscribed realm for newsgatherers of all kinds—amateurs, paparazzi, ordinary citizens, media mainstream reporters, other newsgatherers, information-hunter-gatherers—and extensive case law supporting liability against miscreants.⁵⁴² Modern technology has, however, created huge opportunities to corrupt and collapse the conduct-versus-expression dichotomy by providing all these information-gathering actors with devices that collect information by what is undeniably *conduct* that enables publication. But this occurs only if courts and legislatures—and, ultimately, the Court⁵⁴³—allow that to happen by treating the

⁵³⁸ See Elder, Part I, *supra* note 1, text accompanying nn. 11–26, 143, 148, 163, 253, 257, 289, 291, 348–51, 428; Elder, *Tyrant to the People*, *supra* note 53.

⁵³⁹ Shulman v. Group W Productions, Inc., 955 P.2d 469, 497 (Cal. 1998) (The court viewed this case as the “media play[ing] tyrant to the people by unlawfully spying on them in the name of newsgathering” and followed *Cohen v. Cowles Media Co.*—see Elder, Part I, *supra* note 1—in concluding “the press has *no* recognized constitutional privilege to violate generally applicable laws in pursuit of material.”).

⁵⁴⁰ See *supra* text accompanying note 538.

⁵⁴¹ *Id.*

⁵⁴² See *supra* text accompanying note 538; ELDER, *PRIVACY TORTS*, *supra* note 22, § 2:18.B.

⁵⁴³ Christopher Scalia says “originalism” is not “hyper-literalism” but requires that “[g]ood judges must determine how rights apply to new technologies and circumstances that didn’t exist at the time of ratification” and allows legislators within our federal system to resolve “hot button issues,” rather than “shutting down democratic deliberation.” Christopher Scalia, *Get Ready for a Flood of Falsehood About Originalism*, WALL ST. J., Oct. 12, 2020, at A17. And see Justice Kavanaugh’s concurrence in *U.S. v. Rahimi* synthesized *supra* note 203.

use of mechanical apparatuses and recording devices—audio, video, photographs, drones—as speech-creating-producing-enabling acts.

Under this dubious view, any statutory criminal limitation, common-law tort, statutory tort, constitutional tort, or civil liability for any other wrongful act is vulnerable to attack if it restricts access to the “stock of information” that might be used, such as in making sense of the functioning of government at all levels or society in general. This is the broad and onerous lesson of the purported “growing consensus” of the recording-police-in-public cases discussed in Part I, which collectively evoke—as to police and likely well beyond—a Chicken Little “the sky is falling” mentality. This is yet another example of our “frighteningly orthodox media culture” and its progressive/liberal bias that reflects a “one-party control of the press and media [that] is a threat to a viable democracy.”⁵⁴⁴

In light of these cases and their clear implications discussed in detail above and in Part I, one must consider whether restrictions on recording persons visible to or voices audible by or to strangers will ever survive a First Amendment attack—as to police, all public officials, public figures, and to all persons involved in matters of public interest or concern—the latter an open-ended, privacy-consuming non-standard—both at ground level, then from eyes-in-the-sky and drones.⁵⁴⁵ Where does this all go if the courts follow the natural progression of this rule-annihilating approach to its inevitable conclusions—even to extension to secret recording, as the First Circuit has now stunningly and ill-advisedly decided?⁵⁴⁶ The “right of access [to a] . . . stock of information” approach and comparable media mantras⁵⁴⁷ are essentially boundary-less. Media and high-tech companies are deeply enthralled with these courts’ conclusions, aggressively promote them, and endeavor to squelch all attempts to impose effective limitations on drone surveillance and

⁵⁴⁴ *Tah v. Glob. Witness Publ’g Co.*, 991 F.3d 231, 255, 256 (D.C. Cir. 2021) (Silberman, J., dissenting in part), *cert. denied*, 142 S. Ct. 427 (2021) (mem.).

⁵⁴⁵ See Elder, Part I, *supra* note 1, at 55–58.

⁵⁴⁶ See Elder, Part I, *supra* note 1, text accompanying nn. 202–87. More recently, the First Circuit declined to extend the police-recording-in-public cases to the setting of an IEP in a public school, concluding its cases had been limited to “indisputably public spaces in full view of the public”—here, however, there was no such right of public access and the setting was one for “promoting candor and protecting sensitive conversations.” *Pitta v. Medeiros*, 90 F.4th 11, 16–25 (1st Cir. 2024).

⁵⁴⁷ See *Fields v. City of Philadelphia*, 862 F.3d 353, 359 (3d Cir. 2017) and the detailed critique in Elder, Part I, *supra* note 1, at 82–86.

trespass, as clearly evidenced by the demise of the NCCSL's draft tort-law-relating-to-drones project, discussed in detail herein.⁵⁴⁸

Maybe the Court will ultimately adopt the recording-police-in-public rule and strictly circumscribe it to that setting. But that is unlikely and would require drawing difficult-to-justify lines. The *Kyllo-Jones-Jardines-Riley-Carpenter* courts' deep-seated concerns about the awesome power of technology to "shrink" privacy are unlikely to countenance a view that all police can be recorded in public with impunity and that all acts, statements, gestures, body movements, laughs, facial expressions, jokes, sarcasm, and so on, that may reflect upon a person's fitness or competence are free game for anyone that sees them or hears them record at whim and disseminate with impunity.⁵⁴⁹ "Police accountability" is a general positive good. So, are the needs of police officers to be allowed to do their difficult and dangerous jobs competently, efficiently, independently, courageously, and safely, without the need to be unduly and exceedingly cautious or fearful that something done, said, or implied by them or to them will be caught by omnipresent cell-phone information-hunter-gatherers and media newsgatherers and publicly disseminated for Internet eternity.⁵⁵⁰

Future federal courts confronting recording-police-in-public issues would be wise to carefully assess the Supreme Court's important 2019 decision in *Nieves v. Bartlett*,⁵⁵¹ where the Court rejected a subjective-intent test, adopted an objective-reasonableness criterion, and mandated in most cases that a plaintiff prove lack-of-probable-cause-for-arrest as a threshold element in order to sustain a § 1983-based claim against police for retaliatory arrests of those claiming to exercise free-expression rights. The crux of the Court's concerns is worth quoting at length, as it has clear implications for recording-police-in-public litigation:

Because a state of mind is 'easy to allege and hard to disprove,' a subjective inquiry would threaten to set off 'broad-ranging discovery' in which 'there often is no clear end to relevant evidence. . . .' As

⁵⁴⁸ See *supra* text accompanying notes 43, 45, 47, 52, 64, 115, 268–69, 282–84; *infra* text accompanying notes 612–14.

⁵⁴⁹ See *supra* text accompanying notes 18–21, 40, 330, 341–44, 391, 418, 424–52, 457–537, 549–50, 570–773, 575.

⁵⁵⁰ See Elder, Part I, *supra* note 1, § III.

⁵⁵¹ See 587 U.S. 391 (2019); Note, *First Amendment—Freedom of Speech—Retaliatory Arrest—Nieves v. Bartlett*, 133 HARV. L. REV. 272 (2019) [hereinafter Note, *Nieves*]; John S. Clayton, *Policing the Press: Retaliatory Arrests of Newsgatherers After Nieves v. Bartlett*, 120 COLUM. L. REV. 2275 (2020) [hereinafter Clayton].

a result, policing certain events like an unruly protest would pose overwhelming litigation risks. Any inartful turn of phrase or perceived slight during a legitimate arrest could land an officer in years of litigation. Bartlett’s [proposed] standard would thus ‘dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. . . .’ It would also compromise evenhanded application of the law by making the constitutionality of an arrest ‘vary from place to place and from time to time’ depending on the personal motives of individual officers. . . . Yet another ‘predictable consequence’ of such a rule is that officers would simply minimize their communication during arrests to avoid having their words scrutinized for hints of improper motive—a result that would leave everyone worse off.⁵⁵²

The *Nieves* Court seems to have the police-recording-in-public scenario in mind by references to the ubiquitous nature of cell phones and police body cameras⁵⁵³ and to the Amicus Brief For National Press Photographers Association,⁵⁵⁴ which was signed by 30 media and free-speech entities.⁵⁵⁵ More recently, in *Egbert v. Boule*,⁵⁵⁶ the Court declined to extend a *Bivens* claim to a First Amendment retaliation claim, noting such “would pose an acute risk of increasing” costs by “unduly inhibit[ing] officials in the discharge of their duties” because plaintiffs “can turn practically any adverse action into grounds for a retaliation claim.”⁵⁵⁷ Needless to say, Court critics have identified *Nieves*’ clear potential to “[make] it easier for police to arrest you for filming them.”⁵⁵⁸

⁵⁵² *Nieves v. Bartlett*, 587 U.S. 391, 403–04 (2019) (internal citations omitted). The Court noted that police make 29,000 arrests daily — “a dangerous task that requires making quick decisions in ‘circumstances that are tense, uncertain, and rapidly evolving’” *Id.* at 403 (internal citation omitted). Justice Ginsburg would not have used “this thin case to state a rule that will leave press members . . . with little protection against police suppression of their speech.” *Id.* at 421 (Ginsburg, J., concurring in part and dissenting in part).

⁵⁵³ See *Nieves*, 587 U.S. at 429, n. 5 (Sotomayor, J., dissenting) (“Smartphones that become video cameras with the flick of a thumb are ubiquitous, creating still more potential records”—quoting Jocelyn Simonson, *Beyond Body Cameras: Defending a Robust Right to Record the Police*, 104 GEO. L.J. 1559 (2016); Kreimer, *supra* note 49).

⁵⁵⁴ See *Nieves*, 587 U.S. at 431 (Sotomayor, J., dissenting) (citing the Amicus Brief).

⁵⁵⁵ See Brief for National Press Photographers and 30 Media and Free Speech Organizations as Amici Curiae in Support of Respondent, *Nieves v. Bartlett*, 587 U.S. 391 (2019) (No. 17-1174), 2018 WL 4929876, at app. A1-10.

⁵⁵⁶ 596 U.S. 482 (2022).

⁵⁵⁷ *Id.* at 499 (quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)).

⁵⁵⁸ Bryan Frazelle, *Jurisprudence: The Supreme Court Just Made It Easier for Police to Arrest You for Filming Them*, SLATE, May 31, 2019 (The Court was “surprisingly frank about its rationale: The Justices simply don’t want police officers to have to defend themselves in court

Yes, American society needs people who witness the Walter Scotts and George Floyds of the world killed or injured by lawless police officers to help bring them to justice. But the everyone-can-record-police-in-public-and-instantaneously-and-publicly-disseminate-such-widely-or-on-the-Internet rule is an overly broad, wholly disproportionate, and exceptionally risky way to fulfill that need and will likely if not inevitably, discourage a broad array of people witnessing criminal or anti-social acts in public from coming forward to assist in the investigation or testify in court. Many witnesses who cooperate with police and prosecutors will be viewed by a powerful and brutal subset of the community as “snitches,”- “touts,”-“traitors” and be hugely vulnerable to retribution, as will their families—the dire threat that “snitches get stitches.” And extending that rule to drones? It’s difficult to imagine the Roberts Court authorizing drone-chaos-in-the-skies over all public spaces—and even less so over private property—for the reasons given above.

To First Amendment quasi-absolutists of the open-ended “stockpile-of-information” persuasion, all such technology speech-creating-producing-enabling mechanical devices are no different from the draft of an unpublished manuscript or a work-of-art-in-progress. Under the “growing consensus” approach strongly critiqued in Part I, anyone could indiscriminately record in any public area as much as his or her camera or cell phone can accommodate, using a scatter-gun or AR-15-camera-equivalent technique and later sift carefully through data for amusing or embarrassing items of supposed public interest or police concern, other public officials, or all of us—with impunity. It’s difficult to believe this is what the First Amendment protects. Under the “growing consensus,” such camera or cell-phone use is the same as constructing a paragraph, a chapter, or sketching the outline of a painting. Most lay people exercising a modicum of common sense would

against these types of allegations”—“. . . *Nieves* may have devastating effects on demonstrators, press photographers, and anyone who wants to exercise their speech rights in public, like the right to film the police or verbally challenge officer conduct.”). See also Peter Jacobs, *Protests, the Press, and First Amendment Rights Before and After the ‘Floyd Caselaw’*, 24 U.P.A. J. CONST. L. 591, 593 (2022) (*Nieves* established a “fairly high bar” and “significant barrier” for journalists and others in bringing retaliatory-arrest claims.); Clay Calvert, *Dissent Disagreement and Doctrinal Disarray: Free Expression and the Roberts Court in 2020*, 28 WM. & MARY BILL RTS. J. 865, 892, 902–03 (2020) (Seven of the nine Justices “did not directly mention the impact of the *Nieves* rule on either journalists or the press;” *Nieves* “likely leaves First Amendment advocates satisfied with neither the rule it creates nor the tepid defense of a free press that it uptakes.”); Note, *Nieves, supra* note 551; Clayton, *supra* note 551.

recognize the difference and view this argument as thinly reasoned, if not hilarious and intensely self-serving—the equivalent of a claim that flipping on a light switch to allow one to read in an otherwise dim environment is expressive activity.⁵⁵⁹

Federal courts would be wise to address the inexplicably absent case, *Rumsfeld v. Forum for Academic and Institutional Rights*.⁵⁶⁰ In a unanimous opinion with eight Justices participating, Chief Justice Roberts found the Solomon Amendment conditioning federal funds on allowing equal access to military recruiters was regulated conduct and “not what [law schools] may or may not say.”⁵⁶¹ Moreover, the *conduct* therein was—

not inherently expressive. . . . The expressive component of a law school’s actions is not created by the conduct itself but by the conduct that accompanies it. The fact that such *explanatory speech is necessary* is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection under *O’Brien*. If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into speech simply by talking about it.⁵⁶²

The Court’s analysis is directly on point in the recording-police-in-public scenarios on the “inherently expressive” argument.⁵⁶³ Under the “growing consensus” rule, conduct in recording is “bootstrapped” into protected expression by publishing the fruits thereof under this line of cases.⁵⁶⁴ Yet, none of the federal appellate cases analyzed in Part I have discussed *Rumsfeld*.⁵⁶⁵

As indicated in Part I, some scholars and courts have recognized that photography is not a *per se* protected First Amendment freedom.⁵⁶⁶ Polls invariably indicate that Americans recognize modern technology’s threats to privacy—at least as to drones, and perhaps well beyond.⁵⁶⁷

⁵⁵⁹ See Elder, Part I, *supra* note 1, § II–III, Conclusion.

⁵⁶⁰ 547 U.S. 47 (2006).

⁵⁶¹ *Id.* at 60.

⁵⁶² *Id.* at 64, 66 (emphasis added).

⁵⁶³ See *id.* And see the extended discussion in Elder, Part I, *supra* note 1, §§ II–III, Conclusion.

⁵⁶⁴ See the extended discussion in Elder, Part I, *supra* note 1, Introduction, §§ II–III, Conclusion. Compare the criticism of Court “bootstrapping” in the “flyover” context. See *supra* text accompanying note 410.

⁵⁶⁵ See Elder, Part I, *supra* note 1, § II–III, Conclusion.

⁵⁶⁶ See Elder, Part I, *supra* note 1, text accompanying notes 10, 45–51, 110, 140, 314, 352–59.

⁵⁶⁷ See Elder, Part I, *supra* note 1, at 63–65.

There is a growing concern about the diminution of privacy and the debilitating effects of such on the American psyche—privacy, private speech, autonomy,⁵⁶⁸ dignity, civility, community, neighborliness, security, and other civic virtues. Legislatures—and maybe even occasional, courageous judges interpreting the common law—need to draw bright-line rules⁵⁶⁹ between acceptable and unacceptable privacy-invading behavior in public, whether at ground-level or from

⁵⁶⁸ See RICHARD M. THOMPSON, CONG. RSCH. SERV., R43965, DOMESTIC DRONES AND PRIVACY: A PRIMER 7, n. 55 (May 2015) (citing scholarly concerns that “surveillance represents a form of social control, mandating conformity in society, hindering independent thinking, and recording and notating people who stray from acceptable norms”); Julie Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1426 (2000) (“[U]nder conditions of no-privacy . . . [people] will learn differently, and that the experience of being watched will constrain, ex ante, the acceptable spectrum of belief and behavior. Pervasive monitoring of every first move or false start will, at the margin, include choices toward the bland and the mainstream. The result will be a subtle yet fundamental shift in the content of character, a blunting and a blurring of rough edges and sharp lines.”).

⁵⁶⁹ Alan Kato Ku, *Talk Is Cheap, but a Picture Is Worth a Thousand Words: Privacy Rights in the Era of Camera Phone Technology*, 45 SANTA CLARA L. REV. 679, 702–03 (2005) (A reasonable-expectations approach for torts and crimes might be ultimately “ill suited” in our technological age; “citizens may be better served” by bright line rules, as in *Kyllo*). For an excellent example of a bright-line rule, see *Hill v. Colorado*, 530 U.S. 703 (2000), where the Court authorized a “bright-line prophylactic rule” of an eight-foot privacy buffer zone protecting abortion-clinic patrons as “unwilling listeners” from approach by counselors, relying on Justice Brandeis’s “right to be let alone.” *Id.* at 716–29 (internal citation omitted). This privacy rule applied not only to the home and curtilage but also to other “confrontational settings” and “the enduring importance of a ‘right to be free’ from persistent ‘importunity, following and dogging,’ after an offer to communicate had been declined.” *Id.* at 717–18. The state had implemented its “substantial and legitimate interest” in protecting clinic patrons “from unwanted encounters, confrontations, and even assaults” through a reasonable, tailored statute incorporating “an exceedingly modest restriction” on the speaker’s right to approach persons, many of whom might be feeling physical or emotional anxiety or distress. *Id.* at 728–30. This “bright-line prophylactic” avoided the need for the “often difficult . . . individualized characterization of each individual movement” and “offer[ed] clear guidance and avoid[ed] subjectivity, to protect speech itself.” *Id.* at 729. Justice Scalia’s dissent found that the “narrow-tailoring objection” could be circumvented only by “posit[ing] a state-created, First-Amendment-trumping ‘right to be let alone’ as broad and undefined as Brandeis’s *Olmstead* dictum, which may well (why not, if the Court wishes it?) embrace a right not to be spoken to without permission from a distance closer than eight feet. Nothing stands in the way of *that* solution to the narrow-tailoring problem—except, of course, its utter absurdity, which is no obstacle in abortion cases.” *Id.* at 754 (Scalia, J., dissenting). Compare *McCullen v. Coakley*, where the Court upheld a state’s right to maintain safety and preserve unobstructed access to healthcare facilities as neither content- nor viewpoint-based but found that the 35 feet buffer zone “burden[ed] substantially more speech than necessary,” with the resulting “extreme step of closing a substantial portion of a traditional public forum to all speakers.” 573 U.S. 464, 486, 497 (2014) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)). Three Justices concluded that *Hill* “should be overruled” and that the Court had done so *sub silentio*. *Id.* at 505 (Scalia, J., concurring).

eyes-in-the-sky, over public land, and private land, emulating the Court's pivotal, ground-breaking technological-trespass decision in *Kyllo v. United States*.⁵⁷⁰

As indicated above, the Court has probably tacitly abandoned the rationale for the “not-in-general-use” dictum-caveat in its privacy-protective analyses of recent digital technology and its oft-stated need to draw bright-line rules to deal with existing and emerging developments.⁵⁷¹ This tacit desuetude of the “not-in-general use” dictum-caveat is best illustrated by the Court's decision in *Carpenter v. United States*, where Chief Justice Roberts made repeated references to *Kyllo* but neither reaffirmed nor even alluded to *Kyllo*'s privacy-eviscerating-by-new-technology dictum-caveat.⁵⁷² Retaining such a privacy-debilitating criterion would be at odds with the Court's calculated, bipartisan attempts to avoid the “shrink[ing]” of privacy by new technology.⁵⁷³

With their well-resourced and aggressive lawyers, and supportive first Amendment scholars, the media and the drone industry will continue to promote multi-factor tests and balancing a coterie of supposedly relevant factors.⁵⁷⁴ Yet, the Supreme Court has recognized repeatedly the rights of sovereigns to adopt bright-line rules, as

⁵⁷⁰ Spelman, *supra* note 27, at 377, 417–18 (Noting the popularity of drones and the diminution of privacy therefrom, the author concludes that, absent abandonment by the Court of *Kyllo*'s “not in general use” dicta—see *supra* notes 19, 391, 431–51—legislatures should act to “effectively prevent members of the public spying on each other” and ensure the effective implementation thereof.). Compare the Michigan appellate court decision, reversed on other grounds by the Michigan Supreme Court. See § V.G.

⁵⁷¹ See § V.B.D, *supra*.

⁵⁷² See 585 U.S. 296, 305–06, 311–14 (2018).

⁵⁷³ *Kyllo v. U.S.*, 533 U.S. 27, 34 (2001). See *supra* text accompanying note 549, the extensive discussions herein and the Court's earlier FOIA decisions dealt with briefly *supra* in the text accompanying notes 23–38.

⁵⁷⁴ See, e.g., the stacked-against-private-property-owner/occupants-privacy-advocates' multi-factor test proposed by media and the drone industry for approval by the NCCSL on May 30, 2019. It's difficult to imagine a more one-sided approach. See *supra* text accompanying notes 43, 45, 47, 52, 64, 115, 268–69, 282–84, 549; *infra* text accompanying notes 612–14. Professor Emeritus Steven J. Eagle disparages the approach of the latter draft: “The coupling of a long, but not exclusive, list of factors to be judged ‘holistically’ with ‘clarity’ is oxymoronic.” Emphasizing the Court's concern “that regulation without clear standards gives officials unchecked discretion,” Professor Eagle suggests that both regulators and judges “would be tempted to substitute for traditional property law concepts their own personal values, since ‘the act of balancing remains obscure,’ and an analysis based on the totality of the circumstances, as the Act requires, ‘masks intellectual bankruptcy.’” Memorandum from Steven J. Eagle, Professor Emeritus of Law, Antonin Scalia Law School at George Mason University, to NCCSL 4 (June 6, 2019) (internal citations omitted).

exemplified by *Kyllo*,⁵⁷⁵ so that privacy and linked free-expression⁵⁷⁶ and autonomy interests⁵⁷⁷ receive the protection that the *Bartnicki v. Vopper* Court found to be co-equal interests of “the highest order” equivalent in value to free expression.⁵⁷⁸ As Justice Scalia memorably stated in *Florida v. Jardines*,⁵⁷⁹ “the Fourth Amendment’s property-rights baseline . . . keeps easy cases easy.”⁵⁸⁰ Three concurring members of the Court would alternatively have that same violated curtilage baseline to be a privacy invasion.⁵⁸¹

As the Second Circuit concluded in *Westmoreland v. CBS*,⁵⁸² sovereigns controlling sovereign space—or dual sovereigns exercising shared control within their respective spheres, as discussed above—are allowed discretion to create such “across the board” *per se*-bright-line rules. Otherwise, balancing becomes a *per se* rule always favoring free expression and always disfavoring privacy, property, and related interests.⁵⁸³ This bright-line rule is the view taken, quite spectacularly

⁵⁷⁵ See *supra* text accompanying notes 19, 391, 431–51, 570. For other examples, see Elder, Part I, *supra* note 1, text accompanying nn. 11–26, 176, 203, 235–40, 244, 253, 285–86, 305, 308–14 (*Cohen v. Cowles Media Co.* and *Bartnicki v. Vopper*); Elder, Part I, *supra* note 1, text accompanying nn. 295–301 (analyzing the Court’s libel jurisprudence); see *supra* text accompanying notes 23–38 (analyzing the Court’s FOIA decisions that upheld state statutes denying or limiting access to the states’ “proprietary” information); see *supra* § V.B. (detailing the Court’s digital-era Fourth Amendment cases); see *supra* notes 19, 391, 431–51, 570 (discussing *Kyllo*); Elder, Part I, *supra* note 1 and *infra* text accompanying notes 582–83, 597 (applying the Court’s standards on access to legal proceedings and the recording/televising restrictions thereon); *infra* text accompanying notes 584–86 (explicitly and unequivocally rejecting a balancing approach in *Cohen v. Cowles Media Co.*); *supra* text accompanying notes 609–14 (rejecting a multi-factor balancing analysis and adopting a *per se* Takings rule in cases of government-authorized access to land).

⁵⁷⁶ Professor Richards reminds us that Brandeis’s views about privacy in democracy “forces us to consider how privacy is not always in tension with our First Amendment values, but instead can be an essential precondition for meaningful expressive liberty.” Neil M. Richards, *The Puzzle of Brandeis, Privacy and Speech*, 63 VAND. L. REV. 1295, 1351–52 (2020). See Elder, *Tyrant to the People*, *supra* note 53; Elder, Part I, *supra* note 1, Introduction, §§ II–III, Conclusion.

⁵⁷⁷ See, e.g., Richards, *supra* note 576, at 1338–50.

⁵⁷⁸ See *Bartnicki v. Vopper*, 532 U.S. 514, 518 (2001); Elder, Part I, *supra* note 1, Introduction, §§ II–III, Conclusion.

⁵⁷⁹ 569 U.S. 1 (2013).

⁵⁸⁰ *Id.* at 11.

⁵⁸¹ *Id.* at 12–16 (Kagan, J., concurring).

⁵⁸² See *Westmoreland v. CBS, Inc.*, 752 F.2d 16, 23–24 (2d Cir. 1986) (rejecting the “long leap” from access to trial proceedings to the media’s broadcasting of them).

⁵⁸³ *Id.* at 26, n. 3 (Winters, J., concurring) (Ad hoc balancing might result in “a *de jure* rule allowing television in every case where demonstrable reasons for individual privacy do not exist;” Judge Winters stated that “[t]elecasting of ongoing proceedings is only one of many methods of reporting to the public” about judicial proceedings and is “arguably no better than others so far as conveying that information”—with the claimed right to televise, including video, necessarily came

and over two vigorous dissents, in *Cohen v. Cowles Media Co.*⁵⁸⁴ As noted above, *Cohen* rejected First Amendment protection where defendants violated state-law source-anonymity obligations under the doctrine of promissory estoppel.⁵⁸⁵ The same is true of *Bartnicki v. Vopper* and its passive-receipt doctrine—accorded First Amendment protection—versus its illegal-acquisition-and-resulting-distribution-by-wrongful-acquirer juxtaposition—denied First Amendment protection—in the wiretap setting.⁵⁸⁶

The *Cohen-Bartnicki-Snyder* triumvirate’s compelling analysis should control in public spaces and above public spaces, as it does in and

the corollary right to televise “when it chooses to do so and to broadcast as much or as little as it chooses.”).

⁵⁸⁴ The *Cohen* majority refuted what it deemed the dissenters’ view—that the press “should not be subject to any law, including copyright law for example, which in any fashion or to any degree limits or restricts the press’ right to report truthful information.” The First Amendment does not accord the media “such limitless protection.” *Cohen v. Cowles Media Co.*, 501 U.S. 663, 671 (1990). Justice Blackmun would have followed the *Daily Mail* principle—discussed further in Elder, *Tyrant to the People*, *supra* note 53—as to all true matter and applied the Court’s pure-expression decision in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988) (invalidating liability under the IIED-“outrage” tort on First Amendment grounds regarding an ad parody about a prominent public figure), as a generally applicable law and rejected any distinction between pure expression and factual matter based on unlawful manner of acquisition. *Cohen*, 501 U.S. at 674–76 (Blackmun, J., dissenting). Justice Souter issued a dissent espousing an *ad hoc* balancing totality-of-the-circumstances test on a case-by-case basis, under which violation of a rule of general applicability was not determinative and where the public’s right was paramount—providing information relevant to supporters of the opposing political party’s candidate. That information was “integral to the balance” and “quintessentially subject” to strict scrutiny. *Id.* at 678 (Souter, J., dissenting). The four dissenters declined to treat source-anonymity agreements or promises as *per se* unenforceable—where a private person’s identity was of lower public concern, the First Amendment might not bar enforcement. *See id.* The dissenters refused to “imply that the circumstances of acquisition are irrelevant.” *Id.* at 678–79. It is difficult to imagine a more standard-less and media-and-others-manipulable standard. *See Elder, Tyrant to the People*, *supra* note 53. Professor Campbell provides a devastating critique of *ad hoc* balancing in “conduct-based approaches.” *See Wesley J. Campbell, Speech Facilitating Conduct*, 52 STAN. L. REV. 1, 55 (2016). “As these decisions move to higher and higher levels of abstraction—as they surely would once judges confront these impossibly difficult line-drawing problems—the relevant test would start to look more and more like questions of public policy rather than constitutional law, forcing judges to weight specific cases against speculative benefits . . . requiring judges to make a wide range of content-based policy judgments.” *Id.* at 55–62. *Compare* Justice Kavanaugh’s recent concurrence in *U.S. v. Rahimi*, 144 S. Ct. 1889 (2024). *See supra* note 203.

⁵⁸⁵ *See Elder, Part I, supra* note 1, text accompanying nn. 11–17, 60, 176, 203, 253, 285, 305, 313–14, 346.

⁵⁸⁶ *Bartnicki v. Vopper*, 532 U.S. 514 (2001). *Accord Elder, Part I, supra* note 1, text accompanying nn. 12–26, 60, 203, 235–40, 244, 286, 292, 308–14.

over private spaces.⁵⁸⁷ Any court-imposed First Amendment limitations on state prohibitions on recording police-in-public and its-logical-extension-to-the-skies-above-public-and-maybe-even-private-land would be catastrophic for privacy, free expression, autonomy, and American democracy in the digital age, particularly in light of the domino effects thereof, with its likely extension to all matters of public interest.⁵⁸⁸ As stated in Part I, but worth repeating, Americans do not want, do not need, and do not deserve everybody-watches-everyone-else radical reformulation of American society.

The importance of an early, well-reasoned but inexcusably ignored 1977 Florida Supreme Court case of *Shevin v. Sunbeam Television Corp.*⁵⁸⁹ should be emphasized in the recording-of-police-in-public context. The U.S. Supreme Court denied review of this pivotal case “for want of a substantial federal question”⁵⁹⁰ during the pendency of a leading newsgathering case, *Landmark Communications, Inc. v. Virginia*⁵⁹¹ over the objections of Justices Brennan, White, and

⁵⁸⁷ See text accompanying notes 585–86; discussion of *Snyder v. Phelps* in Elder, Part I, *supra* note 1, text accompanying notes 315–16, 347 (demonstrating how *Snyder* was narrowly limited to its facts as a pure-expression case and the court gave strong indications that *conduct* interfering with a funeral would be unprotected by the First Amendment); Elder, *Tyrant to the People*, *supra* note 53.

⁵⁸⁸ See Elder, Part I, *supra* note 1, at 1–2, 51–58, 83–84. The injuries to privacy victims from social-media dissemination are magnified immeasurably by § 230 of the Communications Decency Act of 1996, which exempts from all tort liability all Internet service providers. Although the original posters are not exempt, many are not identified or identifiable. A whole jurisprudence has evolved as to such conduit non-liability and the means by which major Internet service providers frustrate or attempt to bottleneck disclosure of posters’ identities or contact information. See ELDER, DEFAMATION, *supra* note 211, §§ 1.28-1.28.1. Even if the source is identified, posters may well be “a poor source of deterrence,” as they may be very difficult to find and judgment-proof. Citron, *supra* note 51, at 1838, n. 263. Section 230’s net effect is that these supposed conduit-service providers have no duty to screen or remove otherwise actionable matter from continuing republication even if provided a compelling, non-controversial factual case for its abject falsity, acquisition of true matter of public interest or concern via unquestionably tortious, criminal, or otherwise actionable means, or where the true matter is purely private. This is no way for a democracy to function. As Justice Brennan concluded in *Garrison v. Louisiana*, “calculated falsehood” is unprotected, as “the use of the known lie as a tool is at once at odds with the premises of democratic government.” 379 U.S. 64, 73–75 (1964). It would be unwise, unpersuasive, and antithetical to the needs of democracy to limit *Garrison*’s democracy concerns to the defamation context and not extend it to breaking into a politician’s home, tapping a phone, hacking a computer, or engaging in drone surveillance of home or curtilage for true information—all are no less a threat to democracy than a “calculated falsehood.” See ELDER, PRIVACY TORTS, *supra* note 22, § 2:18.20 (analyzing the British “hacking” scandal and the ensuing Leveson investigation and report).

⁵⁸⁹ 351 So.2d 723 (Fla. 1977).

⁵⁹⁰ 435 U.S. 920 (1978).

⁵⁹¹ 435 U.S. 829 (1978).

Blackmun.⁵⁹² The Florida two-party-consent-to-recording-wiretapping statute was upheld despite briefs emphasizing that the statute had no spatial restriction such as home or office, no content limitation, and applied to all conversations everywhere.⁵⁹³ The appellants argued vigorously that it was now unlawful in Florida for a reporter to record an interview with a public official about official business because the politician ““should not be required to take the risk that what is heard . . . will be transmitted by hifi to the public at large.””⁵⁹⁴

Justice James C. Adkins’ powerful opinion in *Shevin* rejected arguments that privacy rights of the recorded victim were subordinate to media interests in protecting accuracy, candidness, and corroboration, that this purported right entitled newsgatherers to engage in surreptitious or concealed recordings, and that the statute and its felony penalty substantially undermined media newsgathering activities.⁵⁹⁵ Justice Adkins emphasized that appellees had *not* asserted “any impairment of their freedom to publish . . . they rely on their right to gather news without governmental interference.”⁵⁹⁶ Justice Adkins relied on the Court’s denial of a purported newsgathering right of access to in-person interviews with prison inmates as indispensable to productive interviews,⁵⁹⁷ and quoted from *Branzburg v. Hayes*’ rejection of a First Amendment privilege that would provide “a virtually impermeable shield” for media newsgatherers.⁵⁹⁸

⁵⁹² *Shevin*, 435 U.S. at 920.

⁵⁹³ Brief of Appellant at 16, *Sunbeam Television Corp. v. Shevin*, No. 377-1056 (11th Cir. 1977) [hereinafter “Appellant’s Brief”].

⁵⁹⁴ *Id.* at 20 (quoting in part *Dietemann v. Times, Inc.*—see *infra* notes 603–04, 629–30). The briefs repeatedly discussed the alleged need for surreptitious recording of police and official corruption. Appellant’s Brief, *supra* note 593, at 7–12.

⁵⁹⁵ See *Shevin v. Sunbeam Television Corp.*, 351 So.2d 723, 725 (Fla. 1977).

⁵⁹⁶ *Id.*

⁵⁹⁷ *Id.* (discussing *Saxbe v. Washington Post Co.*, 417 U.S. 843, 844–50 (1974) (upholding a federal prison rule against allowing access to particularly identified prisoners because of the disciplinary issues created and applying its First Amendment doctrine that the media are entitled to no greater access than the general public)).

⁵⁹⁸ *Id.* at 726–27 (After quoting the famous case of *Branzburg v. Hayes*, 408 U.S. 665, 691, 697–98 (1972) about theft of documents and wiretapping, Justice Adkins quoted further from *Branzburg*: “Neither are we persuaded that a virtually impenetrable constitutional shield beyond legislative or judicial control should be forged to protect a private system of informers operated by the press to report on criminal conduct, a system that would be unaccountable to the public, would pose a threat to the citizen’s justifiable expectation of privacy, and would equally protect well-intentioned informants and those who for pay or otherwise betray their trust in their employer or associates. The public through its elected and appointed officers utilizes informers, and in proper circumstances may assert a privilege against disclosing the identity of these informers.”).

Justice Adkins synthesized *Dietemann v. Time, Inc.*⁵⁹⁹ and concluded that “hidden mechanical devices are not indispensable means of newsgathering” and cited *Dietemann*’s famous conclusion that the First Amendment “is not a license to trespass or intrude by electronic means into the sanctity of another’s home or office” just because the intruded-on person is reasonably suspected of criminality.⁶⁰⁰

Justice Adkins repulsed any suggestion that the Florida statute would unconstitutionally chill First Amendment rights.⁶⁰¹ *Shevin* presents a compelling prototype for a black-letter rule, with its deferential standard of review of state legislative prerogatives,⁶⁰² for applying the same deferential standards discussed above in *Cohen-Bartnicki-Snyder*.⁶⁰³ *Shevin* epitomizes the approach stated above—that generally applicable conduct, whether criminal, tortious, or otherwise wrongful—in acquiring newsworthy information has no First Amendment protection.⁶⁰⁴ The *Shevin* Court decisively rejected attempts to circumvent limitations on the “ancient art of investigative reporting”⁶⁰⁵ and to thereby engage in newsgathering on the cheap. The U.S. Supreme Court agreed with the Florida Supreme Court. The federal appellate courts have ignored *Shevin* in the recording-police-in-public cases. They should take heed. Maybe First Amendment interests so involved in the “growing consensus” should address in detail *Shevin*’s facts and implications, those of the Court’s later precedents,⁶⁰⁶ and the Court’s extremely limited right of protected newsgathering⁶⁰⁷ in a straightforward, honest way. The results may be revealing.

As repeatedly indicated above, *Shevin*, the *Cohen-Bartnicki-Snyder* trio, and a slew of Court precedents gut any claim to a broad

⁵⁹⁹ 449 F.2d 245 (9th Cir. 1971).

⁶⁰⁰ *Shevin*, 351 So.2d at 725–27.

⁶⁰¹ See *Shevin v. Sunbeam Television Corp.*, 351 So.2d 723, 725–27 (Fla. 1977).

⁶⁰² See *id.* at 726–27 (The strong legislative policy giving each party to a conversation an expectation of privacy from another party to the conversation did “not exclude any source from the press, intrude upon the activities of the news media in contacting sources, prevent the parties to the conversation from consenting to the recording, or restrict the publication of any information gained from the communication.”).

⁶⁰³ See *supra* note 587.

⁶⁰⁴ See *id.*

⁶⁰⁵ *Shevin*, 351 So.2d at 727 (following *Dietemann v. Times, Inc.*, 449 F.2d 245 (9th Cir. 1971)). Compare the Fifth Circuit’s conclusions as to drones. See *supra* § IV.B.2.

⁶⁰⁶ See Elder, Part I, *supra* note 1, Introduction, §§ II–III, Conclusion; Elder, *Tyrant to the People*, *supra* note 53; *supra* notes 587, 589–604.

⁶⁰⁷ *Id.*

newsgathering privilege based on the First Amendment.⁶⁰⁸ At first glance, the Court's recent decision in *Knick v. Township of Scott*⁶⁰⁹ seems irrelevant. Yet, it underlines the nature of the quagmire posed by claims of "First Amendment Exceptionalism." Although the facts in *Knick* are not developed in detail, the local ordinance at issue mandated general public access to the family cemetery located on plaintiffs' ninety-acre rural land.⁶¹⁰ Repudiating an earlier state-law-exhaustion precondition to a § 1983 Takings Clause-Fifth Amendment claim—whether based on physical invasion, regulation, or other means—the Court rejected any treatment of such claims as a "poor relation" and "restor[ed]" such claims to the "full-fledged constitutional status the Framers envisioned" by including such claims in the Bill of Rights.⁶¹¹

Worth emphasizing is how effectively opponents of the pro-media and drone-industry NCCSL May 30, 2019 Draft⁶¹² used the drafters' failure to consider *Knick*'s ramifications in producing the stacked-against-property-owners' final draft that provided virtual immunity from liability from overflights above private land and surveillance thereof⁶¹³ by vigorous and persuasive arguments that states enacting

⁶⁰⁸ See *supra* notes 606–07.

⁶⁰⁹ 588 U.S. 180 (2019). And see *New York State Rifle and Pistol Ass'n v. Bruen*, 597 U.S. 1, 17, 24, 70 (2022) (The Second Amendment was "not 'a second class-right'" and was to be treated the same as other provisions such as the First Amendment; accordingly, where the Constitution's "plain text covers an individual's conduct, the Constitution presumably protects that conduct," with the Government having the burden of "justify[ing] its regulation by demonstrating that it is consistent with the Nation's history," and without any application of strict or intermediate scrutiny means-ends scrutiny and "any 'judge-empowering 'interest-balancing inquiry'" based thereon.). And see Justice Kavanaugh's recent concurrence in *U.S. v. Rahimi*, 144 S. Ct. 1889, 1910–26 (2024).

⁶¹⁰ *Knick*, 588 U.S. at 184–89.

⁶¹¹ *Id.* at 188–89. Donald Joe Willis suggested how *Knick* would apply: "What *Knick* says about a property owner's right to Just Compensation as equal to all other Bill of Rights protections is not just a presumption. It is to be treated the same as the First Amendment or the Fourth and all the others. The Act has a presumption that there is no trespass if the drone flyer is engaged in First Amendment activity. How can that be after *Knick*?" Letter from Donald Joe Willis, to the NCCSL 5–6 (July 10, 2019).

⁶¹² See *supra* text accompanying notes 43, 45, 52, 64, 115, 268–69, 282–84, 549; *infra* text accompanying note 614.

⁶¹³ If adopted by a state, the Act would "create a permanent physical easement over the property for drone access" in violation of the Court's decisions holding that "requiring a private property owner to allow an uncompensated public access easement violates" the Fifth Amendment Takings Clause. Letter from Pacific Legal Foundation, to NCCLS 5–6 (July 10, 2019). In addition to *Knick*, the letter quoted from *Nollan v. California Coastal Comm'n*: "We think a 'permanent physical occupation' has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may

the draft would be subject to Takings Clause liability.⁶¹⁴ There is no basis for distinguishing government-imposed pathways on the land's surface or an elevated railway with no terrestrial supports on land as qualitatively indistinguishable for Takings Clause purposes from a permanent easement for hordes of drones within the immediate reaches of land, as defined by state law.

continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.” 483 U.S. 825, 831 (1987)). And see Letter from Donald Joe Willis, to NCCLS 4–6 (July 10, 2019) (providing a detailed analysis of *Knick*, criticizing the drafters for failing to consider such, and offering to take such Takings Clause cases against states passing the Act); *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 147–59 (2021) (The Court found a Taking where the state authorized union organizers to enter plaintiff’s property for three hours a day, 120 days a year to engage in organizational activity, holding that any regulation resulting in a “physical appropriation of property” constitutes a *per se* Taking, even though not intermittent and not continuous; the Court rejected any suggestion “the right to exclude is an empty formality, subject to modification at the government’s pleasure” and can be “balanced away”—it emphasized that its decisions found any such “government-authorized taking of property—whether by plane, boat, cable, or beachcomber”—required payment of compensation: “[T]he complexities of modern society . . . only reinforce the importance of safeguarding the basic property rights that help preserve individual liberty, as the Framers explained.”); *U.S. v. Causby*, 328 U.S. 256, 264–65 (1946) (“We would not doubt that if the United States erected an elevated railway over respondents’ land at the precise altitude where its planes now fly, there would be a partial taking, even though none of the supports of the structure rested on the land.”). The *Knick* issue raised by opponents of the last draft could not have taken its supporters by surprise. See the advice by the Chair and Associate Reporter on October 19, 2018, cautioning committee drafters on Takings Clause issues: “. . . [T]hat it is within the states’ authority to independently set the height to which a landowner’s rights extended is buttressed by the Supreme Court’s takings jurisprudence since *Causby* . . .” They distinguished regulatory-Takings cases from drone intrusions: “Drone intrusions into the airspace appurtenant to land, however, would be *physical invasions of the airspace*, and as such fall into the only category of intrusions that are automatically takings. Where state rules required apartment owners to allow the installation of cable television wires in their buildings, the Court found a taking, even though the intrusion was minimal, in no way affected the use and enjoyment of the land and was for the benefits of the tenants of the land. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1983). Likewise, where a regulation required that a landowner provide a public footpath in exchange for development approval, the Court held that the regulation authorized a physical invasion (and would be a taking unless it was sufficiently related to the impacts of the project, a requirement not likely to be relevant in the drones and trespass setting). *Dolan v. City of Tigard*, 512 U.S. 374 (1994). It is within the takings context that the Supreme Court has recognized that state law determines the boundaries of property rights. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).” See Memorandum from Paul Kurtz, Chair and Robert Heverly, Associate Reporter on Tort Law Relating to Drones Act, to Uniform Law Commission, Drafting Committee 4–5 (Oct. 19, 2018); accord Skorup, *Drones*, *supra* note 103 at 160, 172–75 (Both constitutional and property precedents “will pose daunting legal impediments to broad claims of federal authority over low-altitude airspace and to drone operations above private land.”). Note that the physical invasions inherent in drone overflights distinguish them, among other factors, from the *Dow-Ciraolo-Riley* “flyover” cases discussed in § VI.B.

⁶¹⁴ See Elder, Part I, *supra* note 1.

CONCLUSION

In concluding Parts I and II of this article, assume the following scenario. A police officer, other public official, a candidate for public office, or a citizen-activist—all of which would likely be public persons under the Court’s extant defamation-First Amendment jurisprudence⁶¹⁵—is an active proponent of alternatives to public education—whether charter schools, vouchers for private, including religious, schools, home-schooling, and so on. Alternatively, a parent is merely a user-consumer of one of these options. Activist opponents of these alternatives to public schools, including elements of the media, suspect that some local advocates and/or consumer-users in a particular community are not in compliance with state-law attendance mandates and have an intense interest in outing them to motivate like-minded opponents and help undermine the national trend toward adoption of these options. Opponents decide to target these local persons on both public and private property by videotaping and audiotaping such advocates and their children, both at eye level and from eyes-in-the-sky drones, to provide evidence of non-compliance—that their children are allowed to be out and about by their parents in public and on private property while public-school attendees are in class.

As to police-officer parents, other public-official parents, and public-figure parents, such allegations and evidence of non-compliance with state law would likely be relevant to public-person status.⁶¹⁶ As to the consumer-user, such allegations and evidence of non-compliance would presumably be a matter of public interest.⁶¹⁷ Alternatively, assume that some of the above officials/activists/consumer-users correctly believe parents have a fundamental right protected by the Constitution⁶¹⁸ to make decisions about supervision of their children, whether on public land or in their own homes and backyards. Consider the specter of a host of self-appointed “helicopter parent”

⁶¹⁵ See ELDER, DEFAMATION, *supra* note 211, §§ 5:1, 5:3, 5:9, 5:25.

⁶¹⁶ *Id.*

⁶¹⁷ *Id.* at §§ 6:1, 6:2, 6:9–6:11.

⁶¹⁸ See *Ginsburg v. New York*, 390 U.S. 629, 639 (1968) (“[C]onstitutional interpretation has consistently recognized that the parents’ claims to authority in their own household to direct their own children is basic in the structure of society. ‘It is cardinal . . . that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.’”).

information-hunter-gatherers engaged in surveillance of public areas or private land from either ground level or from the skies trying to videotape or audiotape “gotcha” moments to demonstrate that parents are neglecting or abusing their children. Utah intervened by statute because of such heavy-handedness.⁶¹⁹ Does American society want to incentivize such hovering behavior because, after all, aren’t we *all* villagers collectively raising children with a concomitant right, indeed *duty*, to protect them and society from such perceived harms?

The author thinks not. But that is where the recording-police-in-public cases may ultimately lead us. This cannot be justified by a theory of purported free-expression interests to record and publicize indiscriminately that is viewed as trumping the panoply of equally important constitutional interests on the other side of the equation—the rights of privacy, free-expression as to private conversations, freedom of association, personal and parental autonomy and liberty, free exercise of religion. If this surveillance occurs on private property—home, curtilage, and beyond—the “restored” right to a Takings-Clause claim is added to the equation in cases where the government superimposes a right-of-drone-surveillance zone on private property.⁶²⁰ That’s where the citizen-journalist drone industry takes us—to Justice Brennan’s concern about “this miraculous tool . . . bluebottle . . . Police Patrol” by overflights.⁶²¹

The author doubts the Roberts Court will condone such Orwellianism at ground level by cell phone or via drones-eyes-in-the-sky. Consistent with the Court’s detailed attempts to stop the “shrink[ing]” of privacy at the hands of governmental entities—and its strong deference to legislatures in defining and protecting the right privacy and related interests—it is likely the Court will disavow the

⁶¹⁹ See Andrea Peterson, *The Overprotected American Child*, WALL ST. J., June 1, 2018 (discussing the need to inculcate independence in children and criticizing overprotective parenting and “bombarded by hyperventilating social media posts” and a “neurotic cultural tide” and referencing Utah’s recent “free-range” parenting law); Libby Copeland, *The Criminalization of Parenthood: These Days If You Let Your Kid Walk to School Alone or Play in the Park Unsupervised, You Risk Arrest—Especially If You’re a Mother*, N.Y. TIMES, Apr. 22, 2018 (reviewing KIM BROOKS, *SMALL ANIMALS: PARENTHOOD IN THE AGE OF FEAR* (2018)); Andrew Dorn, *More States are Embracing “Free Range Laws that Let Kids be Kids,”* NEWSNATION, Aug. 19, 2023 (noting that eight states had passed such legislation, including Montana, Connecticut, Virginia, and Illinois).

⁶²⁰ See *Knick v. Township of Scott*, 588 U.S. 180 (2019); *supra* text accompanying notes 609–14.

⁶²¹ *Florida v. Riley*, 488 U.S. 445, 462, 465–66 (1989) (Brennan, J., dissenting) (quoting GEORGE ORWELL, 1984 (1949)). See *supra* text accompanying note 403–15.

recording-of-police-in-public cases and the corollary domino effects on privacy and free-expression sketched above resulting from the appellate courts' treatment of all cell-phone operators as protected-by-First-Amendment information-hunter-gatherers.⁶²² Judge Posner's excellent dissent in *ACLU of Ill. v. Alvarez* outlined a strong case in favor of upholding state statutes that circumscribe such recordings in public and provided ample reasons why the Court should sustain such under the First Amendment.⁶²³ This two-part article has fleshed out some of Justice Posner's concerns in more detail as to why there is a fundamental and game-changing difference between repetition by words, verbatim notes, or artistic sketches and an audio and/or video record potentially available—and instantaneously so, for Internet eternity.

Professor Richard Epstein makes the trenchant observation that “[t]he short and simple truth is that the ordinary sense of right and wrong sees a hard and fast line between what is seen and reported and what is seen and recorded. The law should follow that instinct.”⁶²⁴ Other eminent scholars have come to parallel bright-line conclusions.⁶²⁵ The Court

⁶²² See Elder, Part I, *supra* note 1, Introduction, §§ I–III, Conclusion.

⁶²³ See *Am. Civ. Liberties Union of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012). See also Elder, Part I, *supra* note 1, text accompanying nn. 151–96.

⁶²⁴ See Richard Epstein, *Privacy Publication and the First Amendment: The Danger of First Amendment Exceptionalism*, 52 STAN. L. REV. 1003, 1019 (2000).

⁶²⁵ See Lidsky, *supra* note 46, at 212 (“[M]ost people find it more objectionable to be surreptitiously filmed or to have to a conversation recorded than to have their private conversations repeated by one of the participants.”); *id.* at 237 (Photography is “more intrusive than merely observing because it creates the potential that the subject’s image can be transmitted at any time to an unlimited audience” and “creates the potential that the subject’s actions will be exposed to a completely different audience than the one she intended or expected. Individuals typically tailor their behavior to the expected audience, and by denying individuals this opportunity, the defendant violates both their expectations of anonymity and their autonomy in selecting to whom they will reveal part of themselves.”). Professor Kaminski discusses in detail the use of prohibitions on recording “to alter the ephemerality of interactions” as a variation on “boundary management law” based on the fact that “ephemerality is a feature of the environment that individuals rely on when calculating their ideal degree of disclosure.” Margot E. Kaminski, *Regulating Real-World Surveillance*, 90 WASH. L. REV. 1113, 1142 (2015). Indeed, “[i]mpermanence over time is . . . a barrier people rely on in social interactions in the real world. When recording technologies make interactions more permanent, an individual’s calculation of optional distance within an interaction and over time will change.” *Id.* In such a non-recording world, “people forget interactions, or fail to aggregate them and make connections or inferences.” *Id.* at 1151. Some statutes, like eavesdropping statutes, protect management of physical areas. But others protect individual conversations based on “the assumption that one’s conversations, even outside privately owned spaces, will not have staying power.” *Id.* at 1152. Professor Kaminski references Judge Posner’s analysis in *Alvarez* and suggests that “internalization of First Amendment rights within a privacy law could help

should follow the extensive precedent that has found that recording and subsequent republication “denies the speaker” who is recorded “an important aspect of communication”—“the right control the nature and extent of the second-hand dissemination of his statements”⁶²⁶—and treat such as violations of generally applicable statutes under the deferential standard of review adopted in *Cohen v. Cowles Media Co.* and *Bartnicki v. Vopper*,⁶²⁷ thereby allowing legislatures to protect their

such laws better understand First Amendment scrutiny.” *Id.* at 1157–58. Professor Kaminski relies on *Dietemann v. Time, Inc.*, as “appear[ing] to recognize that legal protection of boundary management can encourage free speech within a protected conversation.” *Id.* at 1157–58 (citing 449 F.2d 245 (9th Cir. 1971)). Compare her views of *Dietemann* the following year in the recording-police-in-public context where she treats *Dietemann*’s analysis of wiretapping as involving a rule of general applicability “invisible to the First Amendment” but as concededly consistent with *Bartnicki v. Vopper*. See Margot E. Kaminski, *Privacy and the Right to Record*, 97 B.U. L. REV. 167, 178–79 (2017). *Dietemann* did not involve “laws targeted at speech or particular speakers.” *Id.* at 178. In any event, it “began to break down” even before the right to record decisions. She cites as on point the minority view reflected in *Desnick v. ABC*. *Id.* Professor Kaminski concludes such recording laws are “now at least partially visible to First Amendment analysis [which] suggests that they are moving out of the box of laws that include trespass and into the box that includes laws that target speech.” See *id.* at 178–79; see also Elder, Part I, *supra* note 1, n. 163; *supra* text accompanying note 46.

⁶²⁶ *Shulman v. Group W Productions, Inc.*, 955 P.2d 469, 492 (Cal. 1998) (quoting *Ribas v. Clark*, 696 P.2d 637 (Cal. 1985)). For a further sampling, see *Dickerson v. Raphael*, 564 N.W.2d 85, 91–92 (Mich. Ct. App. 1997) (The court cited *Cohen v. Cowles Media Co.*’s generally applicable law-incidental effects doctrine and rejected any First Amendment protection for a third-party’s wiring a conversation participant and divulging the conversation in violation of the two-party consent statute—such was different from the repetition by the party to the conversation.), *rev’d othor grds.*, 601 N.W.2d 109 (Mich. 1999); *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971) (“One who invites another to his home or office takes a risk that . . . the visitor may repeat all he hears and observes when he leaves. But he does not and should not be required to take the risk that what is heard and seen will be transmitted by photography or recording, or in our modern world, in full living color and hi-fi to the public at large or to any segment of it that the visitor may select.”). For further discussion, see Judge Posner’s analysis in Elder, Part I, *supra* note 1, text accompanying notes 72–78. Compare the strict recording limitations permitted by the First Amendment on journalists and other attendees at judicial proceedings. See the detailed analysis in Elder, *Tyrant to the People*, *supra* note 53; Elder, Part I, *supra* note 1, text accompanying notes 69, 162, 253, 294, 336; *supra* text accompanying notes 582–83.

⁶²⁷ See *supra* text accompanying notes 585–597. Nothing in this two-part article should be taken to suggest that enhanced education and training of police, better funding of police—including pay—enhanced supervision of police, processes for expedited but fair disciplining and removal of police bad actors, and investigations of suspected constitutional-rights violations—federal, state, and local—are unimportant or inappropriate. All are important elements of lawful and effective policing. The point of the article is that the approach identified by the reporting-police-in-public decisions that collectively defames and disparages police generally as potential, if not presumptively likely bad-actors, and racists, is unfounded, counterproductive, unnecessary, un-American, essentially boundary-less, and not required by the First Amendment.

citizens against the awesome specter analyzed above. Perhaps such a rule will enhance the likelihood of states, cities, and even courageous judges protecting a broader right of privacy in public from ubiquitous cell phones for recording and disseminating violations of the “right to be let alone”—a topic for another day.

