2018

Interpreting Constitutional Provisions in Tandem

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ESSAY

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INTRODUCTION

It is common, in both academic and judicial discussion, to hear participants draw reference to First Amendment values when crafting Fourth Amendment arguments. In 2014, for example, Chief Justice Roberts – writing for a unanimous Court – extolled the importance of robust protections for smart phone searches, given that phones today contain records of our most intimate "interests [and] concerns,"[1] as well as comprehensive data about location and movement.[2] Similarly, in 2012, Justice Sotomayor spoke (in concurrence) of the "familial, political, professional, religious, and sexual associations" revealed by GPS tracking, an observation that became the factual linchpin of her

* Kiel would like to thank the editors of Volume 61 of the *Howard Law Journal* for inviting him to participate in this wonderful symposium and helping to get the resulting article into publishable shape.

1. Riley v. California, 134 S. Ct. 2473, 2490 (2014).

2. *See id.* ("Historic location information is a standard feature on many smart phones and can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building.").

view that prolonged GPS surveillance amounts to a Fourth Amendment "search."[3]

These types of statements echo decades of scholarly commentary,[4] and they find support among lower courts. With an eye toward the First Amendment, trial and appellate judges have pushed back against bulk metadata collection,[5] as well as warrantless seizures of communication and location records.[6] Furthermore, holdings like these hearken back to foundational Supreme Court cases from the pre-digital age, such as *Berger v. New York*,[7] which invalidated a wiretapping statute that permitted warrants to issue without probable cause; *NAACP v. Alabama*,[8] which forbade the compulsory publication of membership lists; and *DOJ v. Reporters' Committee for Freedom of Press*,[9] which limited the permissible scope of disclosure of

3. United States v. Jones, 132 S. Ct. 945, 955 (2012) (Sotomayor, J., concurring). For another example of work drawing the same connection between *Riley* and *Jones*, *see* Margot Kaminski & Shane Witnov, *The Conforming Effect: First Amendment Implications of Surveillance, Beyond Chilling Speech*, 49 U. RICH. L. REV. 465, 479 (2015).

4. For especially lucid statements of this normative position – which thoroughly canvass the past literature – see Katherine J. Strandburg, *Home, Home on the Web and Other Fourth Amendment Implications of Technosocial Change*, 70 MD. L. REV. 614 (2009); Neil Richards, Intellectual Privacy, 87 TEX. L. REV. 387, 400 (2008) (lamenting the fact that "government access to records and private papers" has historically been conceptualized as an exclusively "Fourth rather than [ ] First Amendment [problem]" – and calling for greater conceptual unity between the two); Stephen E. Henderson, *Nothing New Under the Sun? A Technologically Rational Doctrine of Fourth Amendment Search*, 56 MERCER L. REV. 507, 524–28 (2005). For background on the historical connection between the First and Fourth Amendments, *see* Part I of Kiel Brennan-Marquez, *The Constitutional Limits of Private Surveillance*, KAN. L. REV. (forthcoming 2018).

5. *See* ACLU v. Clapper, 785 F.3d 787, 824 (2d Cir. 2015) (expounding the "weighty constitutional issues" that new technological developments raise in the surveillance area). *See also* Klayman v. Obama, 957 F. Supp. 2d 1, 30–32 (D.D.C. 2013) (arguing that technological advances – allowing the government glean First Amendment-sensitive information via bulk metadata collection and analysis – requires limiting the reach of *Smith v. Maryland*).

6. *See* United States v. Warshak, 631 F.3d 266 (6th Cir. 2010) (holding that warrantless seizures of user email subvert reasonable expectations of privacy and violate the Fourth Amendment), *vacated on other grounds*; United States v. DiTomasso, 56 F. Supp. 3d 584, 591–92 (S.D.N.Y. 2014) (same); United States v. Maynard, 615 F.3d 544, 562–63 (D.C. Cir. 2010) (holding that people have a reasonable expectation of privacy in location data, because it "can reveal preferences, alignments, associations, personal ails, and foibles") (internal citations omitted). *See also* Tattered Cover, Inc. v. City of Thorton, 44 P.3d 1044 (Colo. 2002) (holding that warrants for the seizure of bookstore records are subject to heightened scrutiny due to their First Amendment implications); *In re* Search of www.disruptj20.org, 2017 WL 4569548 (D.C. Super. Ct. Oct. 10, 2017) (limiting the scope of webhost provider's obligation under a warrant for IP addresses and other information – sought and received by the Department of Justice – on the grounds that the warrant, as written, could allow the government to "rummage through the information contained on [the target's] website and discover the identity of, or access communications by, individuals not participating in alleged criminal activity, particularly those persons who were engaging in protected First Amendment activities.").

7. Berger v. New York, 388 U.S. 41 (1967).

8. NAACP v. Alabama, 357 U.S. 449 (1958).

9. *DOJ v. Reporters' Comm. for Freedom of Press*, 489 U.S. 749 (1989).

criminal records. While these cases concerned distinct legal questions, all three drew a link between privacy interests, on one hand, and individual expression and political participation, on the other.

At some level, the impulse to conceptualize Fourth Amendment rules in tandem with First Amendment values is so familiar that it hardly even registers as distinctive. That constraints on law enforcement power – and surveillance power, in particular – should take their cues from expressive, associational, and democratic principles verges on self-evident. Yet the practice remains curiously undertheorized. What does it mean to interpret discrete constitutional provisions "in tandem"? It comes as little surprise, of course, that discrete constitutional provisions sometimes come into contact, and when that happens, that harmonization becomes necessary. That dynamic is true (at least potentially) of every legal text. But to say that courts should avoid sowing *conflict* between discrete constitutional provisions tells us little, if anything, about the proper approach.[10] Intra-textual harmony takes different forms. What kind of analytic relationship – what sort of harmony – should courts be aiming for?

I. TWO APPROACHES TO INTRA-CONSTITUTIONAL HARMONY

On this front, I see two options,[11] and they pull in opposite directions. The first option, which I will call "jurisdictional approach," is to taxonomize grievance-types and assign them to separate constitutional domains. A good example is the relationship between the Fourth Amendment and the Equal Protection Clause. In *United States v. Whren*,[12] the Court held that the question of when police may perform searches and seizures – the Fourth Amendment issue – is orthogonal to the question of "intentional[ ] discriminat[ion]" by individual officers.[13] In short, if the police lacked cause to search as they searched

10. A good example is the relationship between the Establishment Clause and the Free Exercise Clause. When the state takes steps to ensure that laws do not disadvantage religion, thereby complying with its Free Exercise obligations, there is always a risk of unduly *favoring* religious groups. *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2024 (2017) (explaining that the state is simultaneously obligated (1) to avoid religious establishment and (2) not to hamper religious exercise, but also that the two aims "limit[ ]" one another).

11. In fact, there may be *more* than two options, but for present purposes, I leave at two; both for simplicity's sake, given the limited room for analysis, and because I suspect – without having thought it through exhaustively, so don't quote me here – that other options, to the extent they exist, can ultimately be transposed into versions of these two.

12. Whren v. United States, 517 U.S. 806 (1996).

13. *Id.* at 813.

or to seize what they seized, you have a Fourth Amendment claim. And if the police targeted you based on a protected trait, you have a Fourteenth Amendment claim (and depending on the facts, of course, you may have both). But the two claims are conceptually distinct, and they run perpendicular.

The second option, which I will call the "gestalt approach," is to incorporate values endogenous to one constitutional domain into the interpretation of another. Here, unlike with the jurisdictional approach, the point is not analytic purity, but normative pluralism – to arrive at an integrated view of constitutional value. This is the approach on display in the interpreting-the-Fourth-Amendment-through-the-First logic above. When judges fashion limits on police power with an eye toward expressive, associational, and democratic values, the idea is that First Amendment principles should *influence* Fourth Amendment doctrine. The vision, in other words, is one of overlap rather than flush edges; a porous boundary, not a rigid one.

My goal here is not to decry the use of the gestalt approach in the context of First and Fourth Amendment values. Like many others, I believe the assemblage of questions raised by law enforcement activity generally, and by surveillance in particular, lends itself to the infusion of criminal procedure with First Amendment values.

The question is why. Given that two approaches to intra-constitutional harmonization are available – in theory, certainly, but also in practice – what justifies the adoption of one over the other? By what *criteria* should a court choose the gestalt approach over the jurisdictional approach, or vice versa? After all, one can easily imagine a world in which courts respond to the fact that surveillance can imperil expressive, associational, and democratic values by requiring litigants to raise actual First Amendment grievances, and concluding – as in *Whren* – that such grievances, even if meritorious, should have no bearing on the distinctively *Fourth* Amendment question of when police need to secure warrants. Likewise, one can imagine a version of *Whren* that comes out the other way, holding that intentional discrimination should matter in assessing the reasonableness of a search or seizure under the Fourth Amendment, even if it could also form the (potential) basis of an Equal Protection claim.[14]

14. In fact, this is exactly what commentators critical of the *Whren* decision have called for. *See, e.g.*, Kevin R. Johnson, Essay, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebel-*

In short, nothing *requires* the use of either the jurisdictional approach or the gestalt approach. It is an interpretive choice – and one with important consequences. So, how to choose? Are there interpretive principles that courts might use to navigate the decision, quite apart from either the particular values at play or the policy preferences of specific judges?

II. THREE PRINCIPLES FOR DECIDING BETWEEN THEM

In the rest of this Essay, I explore three possible answers to this question. The first is that courts should adopt the rights-maximizing approach; the second is that courts should adopt the most efficient approach; and the third is that courts should adopt the approach that renders constitutional adjudication, as an enterprise, more majestic than technocratic.

The first two answers, I conclude, are appealing but somewhat unstable: they supply no reason to favor one approach over the other in principle. Instead, they offer metrics that could help courts assess the decision case by case, domain by domain. The third answer, by contrast, *does* supply a reason to favor one approach over the other in principle – namely, the gestalt approach. I close by suggesting that (1) this may be a virtue of the third answer, (2) the "anti-technocratic" view of constitutional law may have implications beyond the specific question of intra-textual harmonization, and (3) further work on this front is warranted.[15]

A. Rights-Maximization

One means of distinguishing the jurisdictional approach from the gestalt approach would be to ask: which approach tends, in practice, to vindicate the largest number of meritorious grievances? Take *Whren*. One of the reasons that case continues to inspire such widespread revulsion is that it seems, in practice, to shut down colorable accusations of racial profiling.[16] It's all well and good, one might say, for the Court to announce that *in theory*, victims of racial profiling can

lious Lawyering, 98 GEO. L.J. 1005 (2010); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425 (1997).

15. In fact – to the point of further work being warranted – I don't even mean to imply that these three answers are exhaustive. There could be others. But given the limited space, I thought these most merited exploration.

16. *See, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 67–72, 108–09 (2010).

always bring Equal Protection suits against particular officers, but realistically, the likelihood of those suits coming to fruition is vanishingly small – because of the evidentiary hurdles involved; because challenges against the police disproportionately come in the form of suppression hearings that leave no room for Equal Protection claims; etc. Thus (the reasoning goes), the Court's rigid bifurcation of Fourth and Fourteenth Amendments operates in practice to shield unconstitutional conduct from redress.

For someone – and I confess to being such a person – who views *Whren* this way, it might be tempting to conclude that courts should adopt the gestalt approach on the grounds of rights-maximization. The idea would be, by allowing the values of one domain (here, those of Equal Protection) to influence the doctrinal texture of another domain (here, the Fourth Amendment's "reasonableness" requirement), courts would multiply opportunities for the enforcement of rights. And this provides a reason, ceteris paribus, to favor the gestalt approach over the jurisdictional one.

Appealing, sure – but there's a wrinkle. Put simply, allowing the values of one constitutional domain to influence the operation of another does *not* always tend to maximize rights. One clear counterexample is the Court's treatment of Free Exercise vis-à-vis Equal Protection. In *Employment Division v. Smith* the Court held – in a controversial opinion that inspired public outrage and resulted in the passage of the Religious Freedom Restoration Act – that generally-applicable laws, even when they frustrate religious exercise, are not susceptible to a Free Exercise challenge unless they are specifically *aimed* at hampering religion.[17] In reaching this conclusion, Justice Scalia (writing for the majority) argued that his analysis explicitly drew strength from Equal Protection principles, which have long insulated "race-neutral laws that [merely] have the effect of disproportionately disadvantaging a particular racial group" from heightened scrutiny.[18] Whether the *Smith* Court was *right* to so read the Free Exercise and Equal Protection Clauses – in tandem, subject to the gestalt approach – is a matter of fierce and ongoing dispute.[19] For our purposes, the point is simply that (1) *Smith* plainly is an instance of

17. Emp't Div. v. Smith, 494 U.S. 872 (1990).

18. *Id.* at 886 n.3.

19. For background on this debate, *see* Bernadette Meyler, *The Equal Protection of Free Exercise: Two Approaches and Their History*, 47 B. C. L. REV. 275, 283–84, nn. 36–40 (2006) (compiling arguments and sources).

gestalt interpretation, but also (2) one that constricts rights rather than expanding them.[20]

B. Adjudicative Efficiency

Another means of distinguishing the jurisdictional approach from the gestalt approach would be to focus on which one is more efficient at identifying and resolving constitutional problems. When it comes, say, to assessing the First Amendment implications of police surveillance, it just seems *easier* to allow that question to infiltrate and inform the Fourth Amendment analysis, considering that the remedies available in a hypothetical First Amendment suit – limiting police surveillance capabilities – would likely be similar, in substance, to the probable cause and warrant requirement. In other words, imagine if, contra the growing trend, courts decided to strip all First Amendment-style reasoning out of Fourth Amendment jurisprudence, and instead require plaintiffs to raise First Amendment challenges to law enforcement surveillance directly. Would such challenges, when successful, have meaningfully different practical effects than successful Fourth Amendment challenges to the same police practices? If not, then perhaps it makes little sense to bifurcate the two instead of consolidating them.

Put slightly differently, the gestalt approach can be imagined as a species of joinder. Sure – one might think – if courts had infinite resources and cared about splitting conceptual hairs, they should, in theory, require litigants to bring Fourth Amendment and First Amendment challenges separately. But in the real world, why bother? At a practical level, this kind of wooden bifurcation – as required by the jurisdictional approach – serves only to confuse the issues and to deter important litigation from getting off the ground. Hence, the gestalt approach should win the day.

As with the first answer, there is something undeniably appealing about this logic – but also a caveat. The premise here, of course, is

20. Indeed, for many critics of *Smith*, the whole point is that the Court should have adopted the jurisdictional approach *on rights-maximizing grounds*. The idea, in other words, is that equality grievances and Free Exercise grievances should be afforded their own domains, so as to increase constitutional protection for people of religious faith. On this view, when laws target religion, that poses an equal protection problem (because religion is a protected class), but even laws that implicate religious exercise incidentally would also be suspect, under certain circumstances, on Free Exercise grounds. When the *See, e.g.*, Jesse Choper, *The Rise and the Decline of the Constitutional Protection of Religious Liberty*, 70 NEB. L. REV. 651 (1991) (arguing, along these lines, for a view of Free Exercise that overflows the requirements of equality).

that adjudicating an issue through Vehicle One will be functionally similar, if not identical, to adjudicating the same issue through Vehicle Two. Yet that premise easily comes under strain. Imagine, for example, a hypothetical First Amendment challenge to the NYPD's patrol patterns in certain areas of Brooklyn. The theory is that by patrolling intensively during the day, the NYPD is chilling association – and all of its concomitant democratic values – in places like parks. Under existing First Amendment doctrine, this challenge would face a tough road. But its fate would ultimately depend on the facts. Are police targeting particular areas *because of* the impact of association? Are the parks and other public places subject to targeting those that play host to a disproportionately large share of political activity? Is there any evidence about the origins, or the official purpose, of the program? And so forth.

The point, however, is not about the viability of this hypothetical First Amendment suit. The point is that if the same claim were raised in the context of a Fourth Amendment challenge, there is no way it would prevail. If a defendant, facing prosecution based on evidence in a public space like a park, were to argue that police should be constrained from patrolling in public spaces – given the practice's clear First Amendment implications – the claim would be dismissed out of hand. For Fourth Amendment purposes, the police are allowed to patrol as much (or little) as they like in public – full stop. Of course, this does not mean the First Amendment challenge, qua First Amendment challenge, is doomed. What it *does* mean, however, is that presenting the First Amendment question through the vehicle of a Fourth Amendment suit may well distort, rather than clarify, the constitutional inquiry. And if did, the overall landscape of constitutional adjudication would be less efficient for it.

C. Anti-Technocracy

A final means of distinguishing the jurisdictional approach from the gestalt approach would be to focus on the theory of constitutionalism each instantiates. The jurisdictional approach imagines the Constitution as a checklist of requirements and prohibitions, each to be enforced in its own province, without spillover. The gestalt approach, by contrast, imagines the Constitution as an integrated vision of public value – a pattern of interwoven norms that breathes practical life to the ideal of limited government and self-rule.

Both conceptions of the Constitution ring familiar. The document *is* a checklist of requirements and prohibitions, and it also codifies an integrated vision of public value. In closing, however, I want to suggest that the integrated view has a performative aspect that the checklist view lacks. The gestalt approach renders constitutional law a grander enterprise than other, more quotidian forms of legal dispute-resolution. It casts the interpretive practice as one in which all of us, as observer-participants in the project of popular sovereignty, can share – rather than a technical undertaking to be understood and pursued exclusively by lawyers and judges.[21]

Perhaps the point, like many legal arguments, is best conveyed by analogy. In a short per curium opinion in 2014, the Supreme Court reversed a decision by the Fifth Circuit dismissing, without leave to amend, a retaliation suit against a police department solely because the plaintiffs – ex-employees of the department – failed to explicitly invoke § 1983 in their complaint.[22] To so penalize this omission, the Court held, would elevate form over substance. It would confuse an "imperfect statement of the legal theory supporting the claim" with a genuine legal deficiency.[23]

This holding is far from remarkable; if anything, the remarkable thing is that the Fifth Circuit, like the district court before it, managed to view the issue differently.[24] But in spite of its modesty, the holding reflects an important and enduring principle: that constitutional law – the adjudication of basic rights – is not some kind of lawyer's parlor game, buttressed by technicality. It is not a frivolity. It is not a conceit. It is not an effort, as Christopher Schmidt recently put it, that can be reduced to "craft[ing] elegant, clean doctrine," if doing so comes at the expense of our "share[d] . . . project of giving meaning to the Constitution."[25]

Working out exactly what this principle means, let alone exactly how it applies to the distinction between jurisdictional v. gestalt approaches to intra-constitutional harmony, lies beyond the scope of this

21. *See generally* Kiel Brennan-Marquez & Paul Kahn, *Statutes and Democratic Self-Authorship*, 56 WM. & MARY L. REV. 115 (2014) (arguing, with regard to both statutory and constitutional interpretation, that popular sovereignty depends on the ability of the we, the people to see legal outcomes as the product of our collective will).

22. *See* Johnson v. City of Shelby, 135 S. Ct. 346, 346 (2014).

23. *Id.* at 346.

24. *See* Johnson v. City of Shelby, 743 F.3d 59 (5th Cir. 2013).

25. Christopher W. Schmidt, *On Doctrinal Confusion: The Case of the State Action Doctrine*, 2016 BYU L. REV. 575, 625 (2016).

brief essay. More work lies in store. For now, the point is simply that if doctrinal pristineness is a virtue, it is an exclusively instrumental one; it is a virtue to the extent it renders constitutional law relatable to the observer-participants who are, after all, its subjects and its authors.[26] And the risk – in general, but here specifically instantiated in the jurisdictional approach – is that pristineness will be mistaken for an end in itself. That the law will be clear, perhaps painstakingly so; but it will no longer be our own.

26. *See* Brennan-Marquez & Kahn, *supra* note 21, at 173–77 (2014) (explaining that popular sovereignty – rule by the people – requires us, as a polity, to be able to see legal outcomes as the product of our own will).