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## Dystopian Constitutionalism

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## DYSTOPIAN CONSTITUTIONALISM

Thomas P. Crocker\*

### TABLE OF CONTENTS

INTRODUCTION.....	593
I. WHAT IS DYSTOPIAN CONSTITUTIONALISM? .....	603
A. <i>Elements of Dystopian Analysis</i> .....	606
B. <i>Sliding Towards Dystopia: The Slippery Slope</i> .....	609
C. <i>Negative Exemplars and Legal Archetypes</i> .....	612
II. DYSTOPIAN CONSTITUTIONALISM IN PRACTICE.....	618
A. <i>Democracy and Individual Freedom</i> .....	618
B. <i>Criminal Procedure</i> .....	624
III. WHY DYSTOPIAN CONSTITUTIONALISM? .....	634
A. <i>How One Justice’s Modus Tollens Can Be Another Justice’s         Modus Ponens</i> .....	635
B. <i>Particularism and Holism in Legal Analysis</i> .....	639
C. <i>Dystopian Constitutional Theory</i> .....	648
CONCLUSION.....	654

### INTRODUCTION

American constitutional practice embeds a principle that “the right to be let alone”<sup>1</sup> be secured against pervasive government intrusion. This principle of constitutional privacy invites further inquiry concerning what the right to be let alone entails, or when a prohibited intrusion occurs. Different answers to these questions can pro-

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\* Distinguished Professor of Law, University of South Carolina School of Law. I owe much gratitude for helpful discussion to Scott Aikin, Bob Barsky, Josh Eagle, Michael Hodges and the Law & Literature Discussion Group at Vanderbilt University.

<sup>1</sup> *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (“The protection guaranteed by the Amendments . . . conferred, as against the Government, the right to be let alone . . .”).

duce very different constitutional practices. According to executive branch arguments, bulk collection of telephony metadata—a National Security Agency (“NSA”) practice revealed in summer 2013—is consistent with these constitutional ideals.<sup>2</sup> The Obama Administration justified NSA practices as consistent with constitutional principles, emphasizing both their Fourth Amendment “reasonableness” and the weight that should be afforded to the “strong public interest in the prevention of terrorist attacks.”<sup>3</sup> By contrast, privacy scholars and advocates assert that the sheer magnitude of the program, combined with its secretive implementation, invades the constitutionally protected privacy “right to be let alone” that Justice Louis Brandeis so pithily described.<sup>4</sup> An additional analytic element erupts in this debate: comparisons to dystopian states. Charges that the NSA surveillance program constitutes an Orwellian police state contrast with counter-claims that national necessity requires ever greater and ever more sophisticated electronic surveillance.<sup>5</sup> Alan Rusbridger, the editor of *The Guardian*, one of the leading newspapers to publish material about the NSA surveillance program leaked by Edward Snowden, claimed that “[t]he potential of the surveillance state goes way beyond anything in George Orwell’s *1984*.”<sup>6</sup> By contrast, Director of National Intelligence James R. Clapper, Jr. told a Senate committee that the leaks were “extremely damaging” to national security because “[t]hese disclosures are threatening our ability to collect intelligence and keep our country safe.”<sup>7</sup>

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2 ADMINISTRATION WHITE PAPER: BULK COLLECTION OF TELEPHONY METADATA UNDER SECTION 215 OF THE USA PATRIOT ACT 19 (2013).

3 *Id.* at 15, 21.

4 *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting); see also David Gray & Danielle Citron, *The Right to Quantitative Privacy*, 98 MINN. L. REV. 62, 73, 84, 112, 119, 122 (2013) (discussing the Fourth Amendment privacy concerns implicated by the surveillance state).

5 President Barack Obama described the situation regarding the necessity of more powerful surveillance tools as follows: “It is hard to overstate the transformation America’s intelligence community had to go through after 9/11. Our agencies suddenly needed to do far more than the traditional mission of monitoring hostile powers and gathering information for policy makers. Instead, they were now asked to identify and target plotters in some of the most remote parts of the world and to anticipate the actions of networks that, by their very nature, cannot be easily penetrated with spies or informants.” Barack Obama, President, United States of America, Remarks on United States Signals Intelligence and Electronic Surveillance Programs (Jan. 17, 2014), <https://www.gpo.gov/fdsys/pkg/DCPD-201400030/pdf/DCPD-201400030.pdf>.

6 Dominic Rusche, *NSA Surveillance Goes Beyond Orwell’s Imagination—Alan Rusbridger*, THE GUARDIAN (Sept. 23, 2013) <http://www.theguardian.com/world/2013/sep/23/orwell-nsa-surveillance-alan-rusbridger>.

7 Ellen Nakashima, *Officials Dodge Questions About Surveillance*, WASH. POST, Sept. 27, 2013, at A3.

Orwellian analogies or “police state” comparisons are not mere rhetorical fashion. During oral arguments in *United States v. Jones*, a case that featured sustained electronic monitoring of an individual’s movements, Orwell’s novel *1984* was mentioned six times, helping to frame argument and hypotheticals.<sup>8</sup> The prevalence of references to the novel suggests that there is something distinctive about dystopian discourse in constitutional reasoning. Why in a case asking whether the Fourth Amendment regulates government use of electronic monitoring are Justices making reference to plot features of a mid-twentieth century novel? As this Article argues, dystopian constitutionalism is a distinctive and important aspect of the American constitutional tradition. Dystopian analysis provides a method through which constitutional values are articulated and applied in contrast to values and practices the American polity agrees it wishes to avoid even when there remains disagreement over those to which it might aspire. In addition, dystopian constitutionalism looks holistically at the effects of doctrinal rules, avoiding the pitfalls of doctrinal particularism that attempts to craft rules blind to the wider social and political contexts in which they apply. Referring to Orwell in oral arguments allowed the Court to explore the systemic effects of the rule they might adopt regarding unwarranted Global Positional System (“GPS”) monitoring. The conflict between such systemic police surveillance and the right to be let alone invites dystopian contrasts.

Beyond these references in *Jones*, there is a rich tradition of using contrastive dystopian states in constitutional argument.<sup>9</sup> As constitutional tradition going back to the founding, constitutional analysis was replete with arguments about what practices would lead to an

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8 Transcript of Oral Argument at 5, 9, 10, 13, 14, 23, *United States v. Jones*, 132 S. Ct. 945 (2012) (No. 10-1259). Justice Breyer, for example, comments:

And no one, at least very rarely, sends human beings to follow people 24 hours a day. That occasionally happens. But with the machines, you can. So if you win, you suddenly produce what sounds like 1984 from their brief. I understand they have an interest in perhaps dramatizing that, but—but maybe overly. But it still sounds like it.

*Id.* at 4–5.

9 Earlier scholarship to address the use of totalitarian thinking in both judicial opinions and in constitutional theory include Kim Lane Scheppelle, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 INT’L J. CONST. L. 296, 313 (2003) (noting the use of totalitarian thinking in the dominant cross-constitutional influences); Margaret Raymond, *Rejecting Totalitarianism: Translating the Guarantees of Constitutional Criminal Procedure*, 76 N.C. L. REV. 1193, 1220–25 & nn.101–14 (1998) (examining the courts’ use of totalitarian comparisons); Richard Primus, *A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought*, 106 YALE L. J. 423, 424–26 (1996) (exploring the influence of anti-totalitarianism on modern constitutional scholarship and the Supreme Court).

undesirable state of tyranny. To cite only one example, James Madison argued in Federalist No. 47 that “the accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”<sup>10</sup> In more recent constitutional history, the use of contrasting examples of the “police state,” totalitarianism, or Orwellian references have been prevalent in Supreme Court opinions across doctrinal domains. Extending from the post World War II-era through the Warren Court’s criminal procedure revolution, in majority opinions and in dissents, the threat of a “police state” or other forms of totalitarian or tyrannical governments motivated the Court to articulate constitutional constraints on government actors, and often more particularly on policing practices. During the period in which the Supreme Court constitutionalized criminal procedure, the Second World War was fresh in the minds of Americans, while the Cold War dominated foreign policy and inflected everyday life.<sup>11</sup> Even as American politics decried the abuses of its competitor regimes and ideologies, the Court had before it evidence that policing practices regularly failed to satisfy constitutional standards.<sup>12</sup> Justice John Paul Stevens observed in a later case considering the scope of police authority to conduct warrantless searches of automobiles, that “[o]ver the years—particularly in the period immediately after World War II and particularly in the opinions authored by Justice Robert Jackson after his service as a special prosecutor at the Nuremburg Trials—the Court has recognized the importance of this restraint as a bulwark against police practices that prevail in totalitarian regimes.”<sup>13</sup> Interactions between citizens and police, when they become abusive or perceived

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10 THE FEDERALIST NO. 47 (James Madison).

11 See, e.g., MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 12 (2000) (noting that civil rights reform was in part a product of the Cold War); STEPHEN M. GRIFFIN, *LONG WARS AND THE CONSTITUTION* 4 (2013) (“The Cold War featured new ways of war making in addition to conventional war.”).

12 See, e.g., *Ashcraft v. Tennessee*, 322 U.S. 143, 154–55 (1944) (finding that incommunicado interrogation for thirty-six hours violated due process). The Court also contrasted the fact that

[t]here have been, and are now, certain foreign nations with governments dedicated to an opposite policy: governments which convict individuals with testimony obtained by police organizations possessed of an unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental torture.

*Id.* at 155; see also *Watts v. Indiana*, 338 U.S. 25, 31 (1949) (extended interrogations); *Wolf v. Colorado*, 338 U.S. 25, 31 (1949) (improper search); *Brown v. Mississippi*, 297 U.S. 278, 285–86 (1936) (confessions obtained through torture).

13 *California v. Acevedo*, 500 U.S. 565, 586 (1991) (Stevens, J., dissenting).

as illegitimate, are ripe for dystopian contrasts.<sup>14</sup> Legal resistance to the prospect of a “police state” established a clear contrast not only between the arbitrary authority associated with totalitarian regimes and the freedom protected by the Fourth Amendment in particular, but by other constitutional provisions as well. Writing in dissent from the Supreme Court’s initial failure to apply Fourth Amendment exclusionary rule to the states, Justice William Douglas declared: “The search and seizure conducted in this case smack[s] [sic] of the police state, not the free America the Bill of Rights envisaged.”<sup>15</sup> In other similar Fourth Amendment cases, the Court imposed constitutional constraints on police practice, with an eye towards steps, as Justice Douglas again phrased the issue in concurrence, “that would take us closer to the ideological group we profess to despise. Until the amending process ushers us into that kind of totalitarian regime, I would adhere to the protection of privacy which the Fourth Amendment . . . was designed to afford the individual.”<sup>16</sup> This method of analysis employs dystopian contrasts to clarify and construct constitutional meaning.

Such comparisons continue to serve. Even when defending the American public a program of pervasive surveillance under the NSA telephony metadata program, President Barack Obama recognized that “totalitarian states like East Germany offered a cautionary tale of what could happen when vast, unchecked surveillance turned citizens into informers and persecuted people for what they said in the privacy of their own homes.”<sup>17</sup> Referencing the findings of the Church

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14 They are ripe for such contrasts because humankind has experience with the abuses of the police state. See, e.g., HANNAH ARENDT, *ORIGINS OF TOTALITARIANISM* (1951) (discussing the police state in China and Russia); HANNAH ARENDT, *ON VIOLENCE* 77 (1970) (warning that in pursuit of order, violence and riots may disappear from the streets and be transformed into “the invisible terror of a police state”). For the personal and political implications of a police state, see also Letter from Václav Havel to Dr. Gustáv Husák, General Secretary, Czechoslovak Communist Party (Apr. 8, 1985), in *LIVING IN TRUTH* 3, 6–8 (Jan Vladislav ed., 1986) (“Thus, the very fact that the state police are in a position to intervene at any time in a man’s life, without his having any chance of resisting, suffices to rob his life of some of its naturalness and authenticity and to turn it into a kind of endless dissimulation.”).

15 *Irvine v. California*, 347 U.S. 128, 134, 149 (1954) (Douglas, J., dissenting). Writing in dissent in the same case, Justice Frankfurter wrote, concerning the illegal police action in the case, “[a] crime of this nature, if subtly encouraged by failure to condemn and punish, certainly leads down the road to totalitarianism.” *Id.* (Frankfurter, J., dissenting). The majority opinion, written by Justice Jackson, did not dispute the common law and constitutional illegality of the police actions under review, but followed *Wolf v. Colorado*. See *Wolf*, 338 U.S. at 27 (refusing to apply the exclusionary rule to the states).

16 *Berger v. New York*, 388 U.S. 41, 67–68 (1967) (Douglas, J., concurring).

17 Obama, *supra* note 5, at 1.

Committee from the 1970s,<sup>18</sup> President Obama also acknowledged that, “the United States proved not to be immune to the abuse of surveillance.”<sup>19</sup> In this way, the totalitarian state provides a method of comparison—a way to judge the legitimacy and legality of government action. The conclusions that follow from the comparison, however, are not mechanical. In declaring that the surveillance program likely violates the Fourth Amendment, District Court Judge Richard Leon described the very program President Obama defends in his public speech as implementing “almost-Orwellian technology that enables the Government to store and analyze the phone metadata of every telephone user in the United States . . . .”<sup>20</sup> Orwellian references therefore help structure a debate around a common negative exemplar, but do not determine the conclusions that will follow.

No doubt, dramatic contrasts can be hyperbolic and rhetorical. Perhaps there is something excessive about calling forth George Orwell’s *1984*, or decrying tyranny, or invoking totalitarian government when police behave badly, or when presidents take actions in the name of national security that have questionable legality.<sup>21</sup> Despite what might sometimes seem like overwrought rhetoric, I maintain that there is an important constitutional method to such analysis that warrants further inquiry. Examining this method, and what is lost when it no longer forms part of constitutional analysis, sheds light on important problems of constitutional doctrine, with particular emphasis on free speech and Fourth Amendment doctrine.<sup>22</sup>

What makes the method of dystopian constitutional analysis distinctive? Dystopian constitutionalism analyzes American constitutional principles in opposition to undesirable legal and political

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18 The FBI engaged in a Counter Intelligence Program (“COINTELPRO”) beginning in the 1950s, in which it conducted covert surveillance of anti-war and civil rights groups, among others, leading to an eventual Senate investigation led by Senator Church. See S. REP. NO. 94-755, bk. II, at 22 (1976) (recognizing three periods of growth for domestic intelligence).

19 Obama, *supra* note 5, at 1.

20 Klayman v. Obama, 957 F. Supp. 2d 1, 33 (D.D.C. 2013).

21 See, e.g., David Alan Sklansky, *Too Much Information: How Not to Think About Privacy and the Fourth Amendment*, 102 CAL. L. REV. 1069, 1076 (2014) (“[I]t became common, even ubiquitous, to cite Orwell’s *1984* for what life would look like if attacks on privacy were not resisted.”); Michael M. Moynihan, *Sorry, It’s Not 1984*, NEWSWEEK, June 19, 2013 (declaring that “[t]he idea that Orwell’s super weapon applies to Obama’s America is ubiquitous and bipartisan”).

22 For example, technological developments combined with new forms of social interaction challenge search and seizure doctrines developed for different contexts. In addition, governing priorities—including preventative order-maintenance policing and national security surveillance—pressure existing doctrinal rules. These problems have led to calls to reconsider the third-party doctrine.

states. In contrast to liberal constitutional orders, these undesirable governing states commit systemic human rights abuses and violate rule of law ideals, forming totalitarian or tyrannical regimes. When employed in processes of constitutional decision-making, dystopian analysis constructs consequence avoidance arguments taking the following form: If American constitutional practice is to avoid either these bad practices or becoming like these bad governments, then we should adopt contrary constitutional principles. Dystopian constitutionalism is not confined to criminal procedure. Dystopian references can even be oblique, as for example when Justice Felix Frankfurter warned:

The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. . . . The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.<sup>23</sup>

Dystopian constitutionalism requires courts to consider the systemic negative consequences of constructing a rule one way rather than another. This task is logically more minimalist than utopian constitutionalism would be. A Court need not aim for a particular utopian social and political ideal. It need only avoid undesirable constitutional consequences.<sup>24</sup> Particular practices, if given a constitutional imprimatur, would remove the distinction between American constitutionalism and a police state, as Justice Frankfurter, joined by Justice Jackson, wrote in dissent in a Fourth Amendment case: “Arrest under a warrant for a minor or a trumped-up charge has been familiar practice in the past, is a commonplace in the police state of today, and too well-known in this country.”<sup>25</sup> In seeking to avoid undesirable consequences, the Court should consider structural or systemic effects of the rules it adopts.<sup>26</sup> And, in so doing, decision makers also need to provide some articulation of the underlying values, such as privacy or dignity, at stake. In this way, dystopian analysis is

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23 *Wolf v. Colorado*, 338 U.S. 25, 28 (1949).

24 In this sense, dystopian analysis promotes minimalist judicial decisions. See Cass R. Sunstein, *Minimalism at War*, 2004 SUP. CT. REV. 47, 48 (2005) (discussing the role of judicial minimalism in decisions relating to the scope of the Constitution's protection of liberty).

25 *United States v. Rabinowitz*, 339 U.S. 56, 82 (1950) (Frankfurter, J., dissenting) (citation omitted).

26 But, in this alternative sense, dystopian analysis promotes more maximalist judicial decisions. Sunstein, *supra* note 24, at 2.

not all negative. Dystopian analysis can be “jurisgenerative” in the sense that it helps legal analysts to create and articulate legal values in opposition to those they seek to avoid.<sup>27</sup>

Despite its power to organize constitutional principles in comparison to undesirable states, dystopian constitutionalism has waned somewhat in the periods following the mid-century. By contrast, over this same period, interest in constitutional theory has flourished. Debates among minimalism,<sup>28</sup> originalism,<sup>29</sup> living constitutionalism,<sup>30</sup> and even a hybrid living originalism<sup>31</sup> have gained much attention as methods for interpreting the constitution. Lumping these together, Judge Harvie Wilkinson claims they are all versions of what he calls “cosmic constitutionalism.”<sup>32</sup> Judge Wilkinson argues against the need to adopt a grand theory of constitutional law, preferring more deference to legislative processes.<sup>33</sup> What differentiates dystopian constitutionalism from all of these “grand theories” is that it does not purport to provide a comprehensive way of understanding the constitution. Rather, in the spirit of what Judith Shklar calls the “liberalism of fear,” it provides a way of organizing our collective thought in rela-

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27 See Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 11 (1983) (“[T]he creation of legal meaning—‘jurisgenesis’—takes place always through an essentially cultural medium.”); see also GUNTHER TEUBNER, *LAW AS AN AUTOPOIETIC SYSTEM* 1–2 (1993) (explaining that law “is not determined by external authorities . . . [r]ather, law arises from the arbitrary nature of its own positivity”).

28 See, e.g., CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 3 (1999) (noting the tendency for judges to narrowly tailor their decisions and “say[] as little as necessary in order to justify an outcome”).

29 See, e.g., JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, *ORIGINALISM AND THE GOOD CONSTITUTION* 1 (2013) (describing the prevalence of originalism among legal scholars and judges and justifying the continued reliance on the original meaning of the Constitution).

30 See Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1742–43 (2007) (positing that the living Constitution is the result of modern Americans’ nation-centered, rather than state-centered, political identity and noting that it is the judicial revolution and passage of landmark statutes, not formal amendments, that lead to fundamental transformations in constitutional law); see also DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 1–3 (2010) (arguing that originalism is flawed and positing that a living Constitution is best able to reflect current societal values).

31 See JACK M. BALKIN, *LIVING ORIGINALISM* 3–4 (2011) (arguing that originalism and the living Constitution are not, in fact, incompatible theories and positing that we must be faithful to the original text and principles of the Constitution, while maintaining the flexibility to apply it to the modern-day values of the American people).

32 J. HARVIE WILKINSON III, *COSMIC CONSTITUTIONAL THEORY* 3–4 (2012).

33 In this way, like minimalist approaches, Wilkinson has close affinities with James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) (detailing the deference courts must give to legislatures, overturning only those acts that “have not merely made a mistake, but have made a very clear one,—so clear that it is not open to rational question”).

tion to states of government we wish to avoid.<sup>34</sup> It helps us understand how to better implement constitutional principles into workable rules, not by holding up an ideal, but by urging us away from the negative alternative. In this respect, dystopian constitutionalism has a rich tradition going back to the founding era when institutional design was focused less on obtaining an ideal state of governance than on achieving a workable system of self governance that would avoid descent into tyranny.

Dystopian constitutionalism is also subject to transformations in our understandings of the states we fear. Constitutional moments are always possible whereby politics and interpretive meanings change to reflect new understandings and practices. Shifts in constitutional grammar can reflect, as well as create, transformations in the constitutional meanings of government practices.<sup>35</sup> Constitutional grammar includes the terms and concepts of legal analysis as well as the normative visions of how legal rules fit into a more comprehensive constitutional order. Thus, as a non-comprehensive analytic method, dystopian constitutionalism is subject to wax and wane as salient examples of undesirable states emerge, and as the polity shifts its understandings of unacceptable exercises of government power. When it came to NSA bulk metadata collection, for example, the Obama Administration relied on the particularistic reasoning in the Court's opinion in *Smith v. Maryland*, which applied a doctrine of third-party exposure to police access to telephone numbers dialed, to argue that the program violates no privacy rights.<sup>36</sup> Yet, the President in justifying pervasive surveillance referred to how "the basic values of most Americans" depend "on the law to constrain those in power," suggesting that American constitutionalism in practice requires not only judicial doctrine, but also a broader comparative constitutional dis-

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34 Judith Shklar, *The Liberalism of Fear*, in LIBERALISM AND THE MORAL LIFE 21 (Nancy L. Rosenblum ed., 1989).

35 Very different constitutional visions can give rise to very different constitutional practices, the consequences of which can matter far more than the changes wrought through processes of formal constitutional amendment. See BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998); Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 4–5, 8 (2003) (describing as "remarkable" the "unexpectedly liberal" turn of the Supreme Court's 2002 Term and "explor[ing] the various ways in which constitutional law is and is not independent from the beliefs and values of non-judicial actors"); Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 441 (2007) (describing the Court's interpretation of certain Article II wartime powers as "creatures of the extracanonial constitution" for Congress to "constitute" to the President "by devising the institutional structures and procedures through which it may be exercised").

36 *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979).

course about, as President Obama puts it, “how we remain true to who we are in a world that is remaking itself at dizzying speed.”<sup>37</sup> Past and future are mediated through constitutional analysis that is sometimes doctrinally particular—applying a third-party doctrine designed in an era of rotary telephones to digital communications—and at other times normatively holistic—comparing commitment to “our” values to alternative possibilities. It is the latter that makes salient the systemic effects of the former. In deciding whether to trade off liberties and security, dystopian constitutionalism asks decision makers to consider the structural consequences of the tradeoffs they make in the hope that if ideal outcomes are unachievable, that distinctively negative ones can be avoided.

In Part I, I will describe and explain the elements of dystopian constitutionalism. These include the use of consequence avoidance arguments often taking the form of slippery slopes. They also include the use of negative exemplars and legal archetypes—the latter first developed by Jeremy Waldron as a way of organizing our understanding of more holistic bodies of law.<sup>38</sup> Having described the method, Part II examines dystopian constitutionalism’s multiple uses throughout the past six decades in Supreme Court opinions and dissents. In democracy and individual freedom cases as well as in criminal procedure cases, the Supreme Court has used dystopian analytic contrasts to widen the scope of constitutional reasoning from more particularistic doctrinal considerations to more holistic structural questions. In Part III, I explore how consequence avoidance arguments can be turned on their head by a different ordering of priorities. Practices once thought undesirable can lose their taint, a shift reflected in the relationship between the logical argument forms of *modus tollens* and *modus ponens*. But, as this Part demonstrates, there are a number of positive effects in using a dystopian analysis, one of the chief virtues of which is to encourage more holistic analysis of legal rules. Moreover, holistic consideration of constitutional values in service of consequence avoidance arguments do not render dystopian constitutionalism into a version of irrational “tyrannophobia.”<sup>39</sup> Final-

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37 Obama, *supra* note 5, at 5, 9.

38 Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1722–23 (2005).

39 See ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 3–5 (2010) (characterizing liberal legalism’s fear of executive power, particularly in the modern administrative state, as “tyrannophobia, or unjustified fear of dictatorship,” in that it fails to consider the checks that politics and public opinion place on the executive).

ly, this Part ends by situating dystopian constitutionalism in relation to dominant theories of constitutional interpretation.

### I. WHAT IS DYSTOPIAN CONSTITUTIONALISM?

In 1516, Sir Thomas More published his fictional account of an island in the new world that had a high level of social and political organization.<sup>40</sup> This non-place, Utopia, provided a contrast to European states, with all their conflicts over political organization. Through presentation of the comparative ideal state of Utopia, More opened up the possibility of critical reflection on the real state of affairs his fellow Europeans occupied. This method of analysis owes much to Plato's *Republic*, which also described an ideal organization of the state to demonstrate why one should be just even if one could get away with injustice.<sup>41</sup> Seeing a political state in ideal form fosters insight into the non-ideal setting of actual practices. More's *Utopia* is less an organized philosophical analysis than a literary presentation of a purported travel narrative that makes possible critical reflection about possible social and political order. In publishing his *Utopia*, More initiated a form of narrative critical analysis, and gave the name to a genre of writing, since followed in many other works of fiction.<sup>42</sup>

But, ideals are not always so ideal. Indeed, even in More's *Utopia*, there is considerable ambiguity about the actual desirability of living in such a political order. When the ideal mirrors a darker reflection, utopia becomes dystopia. And just as there is a rich utopian literary tradition,<sup>43</sup> a related dystopian tradition exists as well.<sup>44</sup>

Dystopian constitutional analysis uses the negative exemplar of a state to be avoided as a way of understanding the scope and meaning of constitutional principles. Dystopian analysis can proceed from a

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40 THOMAS MORE, *UTOPIA*, at vii–xiv (Mildred Campbell ed., D. Van Nostrand Co. 1947) (1516).

41 PLATO, *PLATO'S REPUBLIC* 161–72 (I.A. Richards ed. & trans., Cambridge Univ. Press 1966) (c. 380 B.C.E.).

42 From the early modern period works such as FRANCIS BACON, *NEW ATLANTIS* (Alfred B. Gough ed., Clarendon Press 1924) (1627), James Harrington, *The Commonwealth of Oceana*, in *THE COMMONWEALTH OF OCEANA AND A SYSTEM OF POLITICS* (J.G.A. Pocock ed., Cambridge Univ. Press 1992) (1656), and Margaret Cavendish, *The Description of a New World, Called The Blazing-World* (Kate Lilley ed., 1994) (1666) followed this tradition, and examples of more modern texts include H.G. WELLS, *A MODERN UTOPIA* (Gregory Claeys ed., Penguin Books 2005) (1905) and ALDOUS HUXLEY, *ISLAND* (2009) (1962).

43 *See, e.g.*, BACON, *supra* note 42.

44 The dystopian tradition has flourished primarily over the past century. A few representative works include MARGARET ATWOOD, *THE HANDMAID'S TALE* (1985); ALDOUS HUXLEY, *BRAVE NEW WORLD* (1932); and GEORGE ORWELL, 1984 (1949).

particular case to examine the consequences that would follow if it were systemically adopted. Dystopian analysis can also call attention to the constitutive elements of the undesired state as a way of arguing against adopting those elements in the present case. As should become evident, an interesting feature of dystopian analysis is that it is often easier to measure a present practice against an undesirable state than it is to conform political and institutional practice to an ideal state to be achieved.

Utopias require perfectionist reasoning aimed at creating a completely ordered political society free from conflict. More's *Utopia* is comprised of fifty-four cities ordered alike and peopled by the same number of individuals all dressed similarly who conduct their affairs in complete conformity to prevailing norms. Political harmony produces a uniform order that in turn eliminates social and political dissensus. In this way, *Utopia* describes a state where politics becomes unnecessary and law is indistinguishable from social norms. A critical purpose of constructing a utopian state is the ability to measure the distance between the present state of affairs and the perfected ideal. Once the picture of the ideal state is suitably painted, it can be used as a mirror to reflect back upon our present practices and their deficiencies. Utopian thought, as the political philosopher Rainer Forst suggests, "aims to pull out the roots of social evil"<sup>45</sup> by showing what a world would look like without particular injustices. The difficulty, however, is with the suitability of any such painting, for if consensus on the ideal already existed, the path to its attainment would be less fraught.<sup>46</sup> In this way, a utopia can be illustrative. But a utopia can also become a project of political perfectionism to pursue.

Utopias can serve more than a critical purpose. They can become the aspirational guides to positive political action. But aspiring to fashion a utopian society free from the usual constraints of politics can be a problematic pursuit, often entailing a conception of perfectionism used to justify any means necessary to its pursuit. As Isaiah Berlin argues, the problem with utopian thinking put into action is that when people seek to achieve a utopia, not merely use it for criti-

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45 RAINER FORST, JUSTIFICATION AND CRITIQUE 177 (Ciaran Cronin trans., 2014).

46 As the political philosopher Rainer Forst notes, there is an ambiguity about utopia beyond its use as a source of critique: "Utopia is a complex mirror that shows that we must leave our world behind but at the same time that it is very difficult to reach another—difficult not only because of the long and arduous passage to utopia but also because of the constant doubts whether it is worth it." FORST, *supra* note 45, at 181.

cal analysis, violence and suffering are likely to ensue.<sup>47</sup> Reconstruction of social and political order in pursuit of some desired organizational end state requires disruption and compulsion.<sup>48</sup> No doubt, disruption is in part what defines a political project as revolutionary.<sup>49</sup> Eighteenth-century Americans sought to compel a new political order in pursuit of ideals of equality and political participation, that perhaps were far from utopian in their conception, but nonetheless were based on ideals that a “more perfect union” was possible.<sup>50</sup> But utopian politics involve the pursuit of more perfectly fixed notions of political and social order that is more than revolutionary. Regarding such pursuits, Isaiah Berlin concludes his analysis of utopian ideas in western thinking with the following: “Immanuel Kant . . . once observed that ‘Out of the crooked timber of humanity no straight thing was ever made.’ And for that reason no perfect solution is, not merely in practice, but in principle, possible in human affairs, and any determined attempt to produce it is likely to lead to suffering, disillusionment and failure.”<sup>51</sup> The pursuit of utopia can itself lead to a form of dystopia.

Unlike utopia, dystopias are not states of political desire. They are states of aversion. Dystopias function as warnings that help shape existing practices away from undesirable end states. Wholesale political or legal reorganization is not required. Instead, critical reflection on negative consequences enables an existing constitutional order to avoid taking steps that might lead to situations the polity seeks to avoid. Thus, as an initial matter, dystopian analysis can be conserva-

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47 ISAAH BERLIN, *THE CROOKED TIMBER OF HUMANITY: CHAPTERS IN THE HISTORY OF IDEAS* 47 (Henry Hardy ed., 1991). Berlin described the problem like this:

[T]here persists an age-old dream: there is, there must be—and it can be found—the final solution to all human ills; it can be achieved; by revolution or peaceful means it will surely come; and then all, or the vast majority, of men will be virtuous and happy, wise and good and free; if such a position can be attained, and once attained will last for ever, what sane man could wish to return to the miseries of men’s wanderings in the desert? If this is possible, then surely no price is too heavy to pay for it; no amount of oppression, cruelty, repression, coercion will be too high, if this, and this alone, is the price for ultimate salvation of all men? This conviction gives a wise license to inflict suffering on other men, provided it is done for pure, disinterested motives.

*Id.*

48 This sentiment is shared by Sir Karl Popper, who wrote: “I consider what I call Utopianism an attractive an, indeed, an all too attractive theory; for I also consider it dangerous and pernicious. It is, I believe, self-defeating, and it leads to violence.” Karl R. Popper, *Utopia and Violence*, in *CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE* 477, 482 (1963).

49 *See generally* HANNAH ARENDT, *ON REVOLUTION* (1963).

50 U.S. CONST. pmbl.

51 BERLIN, *supra* note 47, at 48.

tive. It need not require any action other than preservation of the status quo. Any legal or political change aims to maintain its distance from the undesirable state, wary of pursuing a more perfect political idea. In this way, dystopian thought begins with a shared aversive agreement. We might disagree over what the good life would be like or how to “promote the general welfare,”<sup>52</sup> but we might more easily agree on what would constitute an undesirable state of affairs. Examples from life and literature provide content to these agreements. Nazi Germany, Soviet communism, Oceana,<sup>53</sup> and London After Ford<sup>54</sup> all signify dystopian possibilities to be avoided on which widespread agreement might exist. These dystopian states form a shared vocabulary on which constitutional analysis can draw.<sup>55</sup>

#### A. *Elements of Dystopian Analysis*

Three primary elements are involved in dystopian analysis. First, begin with a rough factual agreement about a known or imagined alternative state the governance of which involves repression, violence, tyranny, or disrespect for human rights and liberties. These can be actual or fictional. Such agreement can also extend to particular practices thought constitutive of the undesirable state. For example, as the Supreme Court has argued, arbitrary arrest is a practice constitutive of a police state.<sup>56</sup> The details can remain unspecified, for the point is to compare elements constitutive of an undesirable state rather than to provide a complete analysis of the comparative state.

The second element is a consequence avoidance argument. The basic argument form works as follows. If we do not want to become like the dystopian state, then we must avoid adopting policies or legal rules that are either constitutive of the dystopian state or would likely set us on a path that would lead to such a state. Such consequence

52 U.S. CONST. pmbl.

53 See generally ORWELL, *supra* note 44.

54 See generally HUXLEY, *supra* note 44.

55 See, e.g., Robert M. Cover, *Forward: Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983) (“No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.”).

56 See, e.g., *United States v. Watson*, 423 U.S. 411, 433 (1976) (noting the balance between “society’s valid interest in the earliest detention of suspected criminals that is consistent with the individual’s interest in freedom from arbitrary interference with his liberty”); *United States v. Rabinowitz*, 339 U.S. 56, 82 (1950) (Frankfurter, J., dissenting) (“Arrest under a warrant for a minor or a trumped-up charge has been familiar practice in the past, is a commonplace in the police state of today, and too well-known in this country.”); see also *infra* note 134 and accompanying text (citing judicial references to the importance of the Fourth Amendment in protecting a free society and avoiding a police state).

avoidance arguments have the logical form of a *modus tolens* argument. If a legal rule or political practice is consequentially related to the dystopian state, then to avoid the consequence, we deny the legal rule or practice. Take, for example, the legal status of torture. Begin with the proposition that if particular interrogation methods are thought consistent with constitutional principles, then the polity will share a practice with undesirable states known to torture. Posit widespread agreement on the claim that a polity understands the practice of torture to be a constitutive practice of a dystopian state it wishes to avoid. It follows that if the polity does not want to be like those nations that torture, then it should not adopt constitutional rules that allow the methods of interrogation they use. Such consequence avoidance arguments construct a common narrative about a constitutive normative identity. Who we are as a polity is in part a function of what we value. And what we value is manifest through what we do—or what we refuse to do.

Examination of the constitutive values at stake when seeking to avoid a negative outcome comprises the third element. Dystopian analysis makes clear that examination of values is necessary in order to determine what principles and practices a polity should adopt. It is difficult to measure how best to avoid undesirable outcomes without some articulation of why those outcomes are undesirable. A constitutive element of the negative model is not merely the precise practices, but how those practices reflect and further values alien to those to which we are committed. If we sought to do no more than adopt a particular practice or institution because that is the opposite of what is done in a comparative undesirable state, we would lack the ability to analyze, and thus anticipate, how other practices might lead to similar undesirable consequences. In this way, constitutional avoidance leads to questions about national identity; and questions about constitutional meaning are, in turn, inseparable from national identity. Thus, consideration of key values and principles is necessary when deciding whether a rule of law or institutional practice coheres with a polity's traditions or leads to a dystopian possibility.

By engaging in dystopian analysis, we are better able to articulate national identity and constitutional values. Professor Kim Scheppelle makes a similar analytic distinction between what she calls aversive and aspirational constitutionalism.<sup>57</sup> She argues that the process of

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57 Scheppelle, *supra* note 9, at 299–300. Throughout this project, I have been greatly influenced by Scheppelle's formulation of aspirational and aversive comparative constitutionalism.

borrowing when engaging in constitution building or in legal decision making can be both aspirational and aversive. Sometimes comparative legal analysis aspires to achieve some principle or practice found desirable in another system. In this way, a court, for example, might cite foreign law for aspirational guidance about how best to understand a domestic legal principle. Or constitutional designers might explicitly adopt another constitution's institutional framework by "borrowing" desirable features. When forming a constitution, a polity need not reinvent the wheel, but can begin by borrowing design elements from other constitutions that might best work within its unique circumstances.<sup>58</sup>

But sometimes comparative legal analysis cites to other sources of law that a polity seeks to avoid. In this way, aversive constitutionalism "is backward-looking, proceeding from a critique of where past (or other) institutions and principles went badly wrong and taking such critiques as the negative building blocks of a new constitutional order."<sup>59</sup> The logic of aversive constitutional analysis, using the example of coerced confessions, reasons that "[i]f America is to do the opposite of what these bad governments do, then the Court should hold that this confession was coerced."<sup>60</sup> In this way, aversive analysis focuses on the practices attributable to the negative model, and reasons to a contrary position. Aversive arguments look to actual examples of undesirable states. During the Cold War, for example, the Court looked to the Soviet Union and recent European totalitarian regimes as concrete examples of states to avoid. The better formed the example of the aversive state and the greater the agreement on its undesirability, the more effective the constitutional argument. So understood, aversive constitutionalism is one way of engaging in what I am identifying as dystopian analysis.<sup>61</sup>

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58 See Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 463 (2010) (defining constitutional borrowing as "an interpretive practice characterized by a deliberate effort to bridge disparate constitutional fields for persuasive ends").

59 Scheppele, *supra* note 9, at 300. Moreover, "Aversive constitutionalism . . . calls attention to the *negative models* that are prominent in constitution builders' minds." *Id.* Negative comparisons are also part of the literary tradition from which constitutional analysis borrows. As Daniel Defoe observes in *Robinson Crusoe*, "[t]hus we never see the true State of our Condition till it is illustrated to us by its Contraries, nor know how to value what we enjoy, but by the want of it." DANIEL DEFOE, *ROBINSON CRUSOE* 147 (Angus Ross ed., Penguin Books 1965) (1719).

60 *Id.* at 315.

61 Scheppele is also focused on the identity constitutive aspects of constitutional analysis. "Aversive constitutionalism identifies a deeper sense of knowing who you are by knowing what you are not; it incorporates a *nation-making sense of rejection of a particular constitutional possibility*." *Id.* at 300.

Dystopian analysis does more than reject alternative models. It also requires the legal decision maker to examine possible political practices and legal rules for what their systemic tendencies might be. It is proleptic as well as reactive. The negative model serves an important purpose not merely in encouraging us to adopt contrary positions, but to think more holistically and systemically about how a rule or practice might produce similar consequences or lead to otherwise undesirable outcomes. Thus, more than doing the opposite of the negative model, dystopian analysis asks how a decision might lead to consequences of similar effect to those found in, or consistent with, the negative model. How might rules that are neither the same nor the opposite of something found in the negative model nonetheless produce consequences to be avoided? Moreover, under dystopian analysis the negative model need not be precisely formed. It can be a general idea of totalitarianism or of the general notion of a “police state.” Just as utopias can be more or less precise guides to greater political perfection, dystopias can be more or less well-formed exemplars of states of affairs a polity wishes to avoid. A principal reason for wishing to avoid the dystopia is the inconsistency with deeply held values thought constitutive of the polity’s identity.

Because dystopian analysis requires an examination of values, it has a positive—utopian—aspect as well. To understand why the alternative state is undesirable a legal decision maker must provide a positive articulation of the values to be preserved. In this way, dystopian constitutionalism does not entirely escape the problems of articulating and pursuing an ideal conception of politics and society. Though in seeking to avoid negative consequences, the role that the positive articulation plays is far less a project of holistic transformative political projects as it is a project of affirming existing or desired values. Yet these acts of affirmation are themselves acts of creation, for they solidify and further develop values in pursuit of a “more perfect” governing state, as the United States Constitution’s Preamble projects.<sup>62</sup>

### *B. Sliding Towards Dystopia: The Slippery Slope*

Beginning with a shared conception of some undesirable state, dystopian analysis can also take the form of slippery slope argu-

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62 U.S. CONST. pmb1; *see also* FORST, *supra* note 45, at 179 (“[U]topian thinking: it is neither bound to existing reality nor to the ideal; instead it is *in between*—that is the real meaning of ‘nowhere.’”).

ments.<sup>63</sup> These arguments do not conclude that the rule, practice, or institution under consideration will produce an immediate dystopian state. Rather, these arguments reason that adopting a particular legal rule, for example, will lead down a slope towards dystopia. This slope becomes more slippery when the legal rule becomes embedded in widespread practice. To avoid sliding down the slope to political ruin, we should adopt a consequence avoidance argument—where the consequence to be avoided is a future consequence that would follow if the slope were sufficiently slippery.<sup>64</sup>

In logical form, this reasoning is expressed in the conditional statement: If we adopt the proposed legal rule, then we produce an intolerable risk of creating a police state.<sup>65</sup> The risk will not be realized by merely adopting the proposed rule itself. Rather, having taken the initial step, then through a series of additional steps leading down the slope, we may find ourselves at the bottom. To avoid the slide, we should avoid the first step. The risk captured by the slippery slope argument can take several forms. First, it could be that the proposed rule change opens up good analogies for other rule changes based on the same rationale, which if adopted collectively would lead to the undesirable state. A rationale affirmed for one case, can apply to additional cases. Through a series of analogies, cases that bear a family resemblance to the initial precedent, when taken as a whole, can produce a legal system that has the undesirable characteristics. Thus, to avoid adopting reasoning that would have widespread application and risk wholesale practical and institutional consequences, the argument urges against opening up the chain of analogies.

Second, it could be a problem that exists in the implementation of the legal rule licensing either a particular practice or an exception to a particular practice. The limited use of the rule or the exception in itself might be acceptable, but it opens the risk to widespread use, which would change the nature of the practice. An exception adopted in one case could with repetition become the norm, altering the

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63 See generally DOUGLAS WALTON ET AL., ARGUMENTATION SCHEMES 339–41 (2008); DOUGLAS WALTON, SLIPPERY SLOPE ARGUMENTS (1992).

64 See Eric Lode, *Slippery Slope Arguments and Legal Reasoning*, 87 CAL. L. REV. 1469, 1469–70 (1999) (analyzing the role that slippery slope arguments play in legal reasoning in current debates); Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 361 (1985) (examining the prevalence of slippery slope arguments in the realm of free speech); Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1028 (2003) (describing the role of slippery slopes in policymaking and lawmaking).

65 See WALTON, SLIPPERY SLOPE ARGUMENTS, *supra* note 63, at 217 (discussing the *modus ponens* logical form of the slippery slope argument).

nature of the rule.<sup>66</sup> Because a decision maker cannot control the frequency of future uses, and because frequency can matter to the nature of the legal practice, the slippery slope argument recommends against adopting the limited use rule or exception. Moreover, even if we were tempted to adopt a rule that has the potential for both positive and negative consequences depending upon the circumstances, its use by other institutions might remain largely unchecked and therefore open to the undesirable uses. A decision maker within one institution cannot foresee or control how the rule might be adopted, or used as justificatory precedent, in other institutional settings.

Third, it could be that the proposed legal rule or institutional practice would be constitutive of the kinds of rules and practices found in the dystopia. For example, arbitrary arrest is a practice that itself is thought to be constitutive of a police state. A legal regime that authorizes arbitrary arrest is also likely to license similar practices constitutive of the undesirable state. Thus, if we adopt constitutive features of the police state in one situation, what would prevent the growth of similar practices, setting us on the path to becoming like the negative example?

If the emotional state that accompanies utopia is desire, the emotional state that motivates dystopia is fear.<sup>67</sup> A fourth way the link between a present case and the future slippery slope is related is through our emotional attachments and aversions. Fear can alter how we assess risks, and if the consequences are sufficiently dire, we might reassess the legal rules and practices we adopt.<sup>68</sup> The more catastrophic the consequences of reaching the bottom of the slope, the more skeptical we might become of taking the first step—or refusing to take the steps necessary to avoid the slide. Fear can motivate both the slippery slope version of dystopian analysis as well as the simple consequence avoidance version. For example, reassessment of national security risks happened in the wake of the attacks of September 11.<sup>69</sup> Vice President Dick Cheney, for instance, reasoned that

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66 See, e.g., *Kentucky v. King*, 131 S. Ct. 1849 (2011); see also *infra* notes 156–157, 159, 166 (establishing an exception to the constitutional prohibition of warrantless search and seizure).

67 See, e.g., Shklar, *supra* note 34, at 23.

68 See generally CASS R. SUNSTEIN, *LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE* (2005).

69 See RON SUSKIND, *THE ONE PERCENT DOCTRINE: DEEP INSIDE AMERICA'S PURSUIT OF ITS ENEMIES SINCE 9/11* 150 (2006) (explaining Vice President Cheney's "one percent doctrine" which holds that if there is even a one percent chance of another terrorist attack, given the gravity of the possible harm, that risk must be addressed as if it were a certainty).

lest we risk catastrophic consequences, we must forego legal constraints on executive action.<sup>70</sup> Even when there is a very low probability of catastrophe, fearing the dire consequences of sliding down the slope can inform decisions about legal rules and practices. By contrast to the way that utopias can provide more unified regulative ideals, the potential pathways into a dystopian state are more numerous and uncharted. Risk aversion provides a powerful motivation to avoid these possible pathways.

Emotional attitudes like fear or desire express attitudes about an initial case, the bottom of the slope, and the relation between the two. In this fifth way, dystopian analysis expresses conservative attitudes and implicit judgments about the present and possible states of affairs that relate to a proposed change in legal rule or institutional practice. Slippery slope arguments seek to preserve the status quo against change that might take the first step down the slope. When change in the direction of the slope is thought desirable, slippery slope arguments motivate decision makers to build in greater checks to the initial decision to prevent further slide. As always, the degree to which one worries about the slope depends on one's attitude about the bottom of the slope. The more catastrophic the bottom, the more vigilant one will be about the top.

Slippery slope arguments reflect a fear the proposed legal rule would undermine constitutional values thought necessary to avoid key features of the undesirable state.<sup>71</sup> So, it is not merely that the proposed rule creates a precedent for future analogical reasoning, but that the proposed rule alters a key principle or value constitutive of the polity's present identity. To change the principle would be to change a core constitutional meaning, which in turn would give new shape to national identity in a way that makes the undesirable state possible.

### C. *Negative Exemplars and Legal Archetypes*

When it comes to expressing deeply held constitutional commitments, not all laws have equivalent legal or moral status. Some laws structure our understanding of broader areas of legal and political practice. Habeas corpus, for example, is no doubt an important pro-

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70 *Id.*; see also Jane Mayer, *The Hidden Power: The Legal Mind Behind the White House's War on Terror*, NEW YORKER, July 3, 2006, <http://www.newyorker.com/magazine/2006/07/03/the-hidden-power>.

71 See Lode, *supra* note 64, at 1540–41 (“Often, allowing [a proposed legal rule] would threaten values that are important to a significant segment of our population.”).

vision enabling the jailed to contest the jailor's power. But it is more than that. It expresses the fundamental importance of protecting individual liberties against arbitrary exercises of executive power by guaranteeing institutional checks against overzealous political action.<sup>72</sup> Habeas corpus stands as the “bulwark of our liberties” according to William Blackstone, occupying a status within the legal system that exceeds its procedural function.<sup>73</sup>

Because of its unique status within our legal system, Jeremy Waldron argues that it is a legal archetype.<sup>74</sup> To understand what he means by a legal archetype, we must first recognize that positive law acquires meaning through how we see and implement the relations among disparate legal provisions over time. Individual laws work in relation to other laws to embody principles and norms that express more comprehensive, as well as background, shared moral and legal meanings. In this way, any particular law derives its practical meaning in part from a background of settled principles and practices. For example, a law prohibiting political protest targeted at a specific residential address can be understood only against the background principles of privacy and free expression, combined with the acknowledged special role the home plays in everyday life.<sup>75</sup> When the Supreme Court upholds such a law, it must appeal to background principles of law with which any particular law must cohere. Sometimes there is a particular law that occupies a position within the legal system that stands for the principle and spirit of a whole area of law. Habeas corpus is an example. Waldron suggests that a particular law becomes an archetype when it “by virtue of its force, clarity, and vividness expresses the spirit that animates the whole area of law. It be-

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72 See LARRY MAY, *GLOBAL JUSTICE AND DUE PROCESS* 107 (2011) (“[F]rom a fairly early point the Magna Carta provision of no arbitrary imprisonment was associated with the idea that arbitrary treatment was to be understood in terms of not following the ‘law of the land.’”); Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2034 (2007) (following a legal process perspective to illuminate the “distinctive competencies” of the legislature, executive, and judiciary in handling issues arising in habeas cases).

73 1 WILLIAM BLACKSTONE, *COMMENTARIES* 136–37.

74 Waldron, *supra* note 38, at 1718–39.

75 See *Frisby v. Schultz*, 487 U.S. 474, 488 (1988) (upholding a city ordinance banning residential protests). For the significance of privacy in the home, see, for example *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) (finding the area immediately surrounding a residence to be part of the home itself and therefore constitutionally protected from investigation by police dogs); *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (holding that the Fourth Amendment draws a “firm” and “bright” line “at the entrance to the house”) (internal quotation marks omitted); *Silverman v. United States*, 365 U.S. 505, 511 (1961) (“At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.”).

comes a sort of emblem, token, or icon of the whole . . . .”<sup>76</sup> He further explains:

The idea of an archetype, then, is the idea of a rule or positive law provision that operates not just on its own account, and does not just stand simply in a cumulative relation to other provisions, but operates also in a way that expresses or epitomizes the spirit of a whole structured area of doctrine, and does so vividly, effectively, and publicly,<sup>77</sup> establishing the significance of that area for the entire legal enterprise.

The positive significance of an archetype for Waldron is that it can guide our understanding of “the point, purpose, principle, or policy of a whole area of law.”<sup>78</sup>

Archetypes are important for their ability to organize legal meaning. *Brown v. Board of Education*, for example, sums up our understanding that an era of widespread discrimination is no longer to be given legal sanction, and social practices that humiliate individuals are no longer to be tolerated.<sup>79</sup> In a closely contested case, we can appeal to the principle for which a particular law, or a particular precedent, stands as the paradigm. *Brown’s* status extends beyond the school desegregation question. In this sense, an archetype can assert what Ronald Dworkin has described as a “gravitational force”<sup>80</sup>—pulling later decisions within the orbit of its normative meaning.<sup>81</sup> Overturning or displacing an archetype with an alternative rule or practice also has a more pervasive effect within a legal system and therefore faces a more substantial hurdle to passage or implementation.

Archetypes are not always positive examples of our best ideals. Sometimes, what defines and motivates a body of law is a state of af-

76 Waldron, *supra* note 38, at 1722.

77 *Id.* at 1723.

78 *Id.*

79 347 U.S. 483 (1954). *Brown v. Board of Education* serves as a good example of a legal archetype establishing a principle against entrenched humiliation in American constitutional law. See BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION 133 (2014) (challenging “constitutionalists to make the principle of equality meaningful to ordinary Americans . . . [I]f segregated schools didn’t humiliate, what did?”). See generally Jack M. Balkin, *Brown as Icon*, in WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S LANDMARK CIVIL RIGHTS DECISION (Jack M. Balkin ed., 2001).

80 See RONALD DWORIN, TAKING RIGHTS SERIOUSLY 111 (1977) (postulating that the full force of a decision is not known until later cases are decided).

81 In a similar fashion, some legal precedents have a different status than others. We can describe some as “superprecedents.” See Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1207 (2006) (“Super precedent marks the point at which the institutional values of stability, consistency, institutional and social reliance, and predictability in constitutional law become compelling, enduring, and fixed. Super precedent reflects, in short, what may be sacred in American constitutional law.”).

fairs it seeks to avoid. At its most basic organizational level, the rule of law is contrasted with chaos or arbitrariness.<sup>82</sup> These are each conditions under which the order law imposes on social and political practices is absent. Lacking such order, social and political practices cease to have the regularity necessary to settle and organize human affairs. As more specific bodies of law develop, particular states of affairs can serve as negative exemplars against which the law is arrayed.

Take, for example, criminal prosecutions conducted through farcical trials adhering to the outlines of procedure without any of the substance. Such was the case in 1923 when Arkansas prosecuted black citizens for their response to the “Elaine Race Riot,” promising that in lieu of a lynch mob, the white citizens should “let the law take its course”—by which was meant that the law would undoubtedly find the black defendants guilty and impose capital sentences.<sup>83</sup> A trial “dominated by a mob,” the Supreme Court concluded, violates due process of law. Similarly, when the State of Mississippi adhered to the bare form of a trial, extracting confessions by torture admitted in open court, the Supreme Court concluded that “what is denominated, in complimentary terms, the trial of these defendants,” violated constitutional standards of due process.<sup>84</sup> As the Court admonished, “[t]he rack and torture chamber may not be substituted for the witness stand.”<sup>85</sup> Or, finally, consider the prospect of forcibly pumping a suspect’s stomach to retrieve possible evidence. The Court concluded that such conduct constitutes “methods too close to the rack and the screw to permit” police the power to use such means to extract confessions.<sup>86</sup> Claims against such abusive and brutal practices are claims about the fundamental lack of due process of law. The substantive violation stands as a negative exemplar of conduct forbidden to state officials under a system of law and ordered liberty.

The fact that these due process cases do not establish doctrinal rules of criminal procedure derives from the nature of the definite

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82 See, e.g., THOMAS HOBBS, *LEVIATHAN* 84, 177 (A.R. Waller ed., Cambridge Univ. Press 1904) (1651) (contrasting the state of nature where “the life of man[] [is] solitary, poor[], nasty, brutish, and short” with the peace and security provided by a commonwealth).

83 *Moore v. Dempsey*, 261 U.S. 86, 90 (1923). As local officials put the point: “they would execute those found guilty in the form of law.” *Id.* at 89. Or again, local officials promised that “if the guilty parties were not lynched, and let the law take its course, that justice would be done and the majesty of the law upheld.” *Id.* at 90. See also Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 50–52 (2000).

84 *Brown v. Mississippi*, 297 U.S. 278, 284 (1936).

85 *Id.* at 285–86.

86 *Rochin v. California*, 342 U.S. 165, 172 (1952).

description used. In these cases, the Court does not provide a rule that supplies necessary and sufficient conditions for the proscribed practices. Rather, the Court uses a definite description to refer to prohibited state of affairs.<sup>87</sup> The referring expression takes the form: Whatever else due process of law requires in criminal process, *this* practice—farcical trials or forced confessions, for example—fails on any account. Both the logic and the spirit of these decisions use negative exemplars to define an area of prohibited government action. Practices similar to those identified by definite description are off limits. For the strict doctrinalist, or the jurist focused on providing defined rules for police conduct, such an approach is far too imprecise. But negative exemplars are meant to provide meaning to areas of life by establishing parameters that guide by example, not by rule. In this way, farcical trials and confession by torture become negative exemplars of criminal process.

Negative exemplars are also used to articulate constitutional and political values. Dappling presidential speeches, or those of other executive officials, American identity is often constructed according to shared values. These common values constitutive of our identity are often articulated in contrast to negative exemplars. More opaque in content, President Obama defended the need for widespread NSA surveillance practices by acknowledging:

[I]t is not enough for leaders to say, “Trust us, we won’t abuse the data we collect.” For history has too many examples when that trust has been breached. Our system of government is built on the premise that our liberty cannot depend on the good intentions of those in power, it depends on the law to constrain those in power.<sup>88</sup>

The oblique reference to history must contemplate the history of abuse of domestic surveillance the Church Committee compiled and that led to the passage of the Foreign Intelligence Surveillance Act in 1978.<sup>89</sup>

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87 Definite descriptions have an important role in the philosophy of language. See, e.g., Bertrand Russell, *On Denoting*, 14 MIND 479, 479 (1905) (“The subject of denoting is of very great importance . . . in theory of knowledge.”); see also Keith S. Donnellan, *Reference and Definite Descriptions*, 75 PHIL. REV. 281, 281 (1966) (critiquing Russell’s failure to “deal with the duality of function” of definitive descriptions as “obscur[ing] the genuine referring use of definitive descriptions”).

88 Obama, *supra* note 5, at 5.

89 The FBI engaged in a Counter Intelligence Program (“COINTELPRO”) beginning in the 1950s, monitoring the activities of anti-war and civil rights groups. Discovery of this program led to an eventual Senate investigation by Senator Church. See S. REP. 94-755, at 1–2 (1976) (“The inquiry arose out of allegations of substantial, even massive wrongdoing within the ‘national intelligence system.’”).

These negative exemplars exist in the identity claims we often make by reference to constitutive political identity—to who we are not and what we do not do. “We” do not torture. We do not act arbitrarily. We do not deny individuals their basic human rights. Regarding farcical trials or torture, courts construct rules to limit governing power. But in making rules effective in theory or practice, courts employ the negative exemplar to articulate what kinds of practices or what states of affairs exist beyond the limit. These same limits are those that President Obama recognizes when he claims that law needs to constrain those in power.

Dystopian constitutionalism is a way of constructing arguments and identity. A polity can define their constitutive identity both by the ideals they pursue and through the consequences they seek to avoid. As the next section will illustrate, in Supreme Court practice, dystopian analysis focuses on the various ways Americans employ particularly robust negative models to help define the constitutional principles and political practices we wish to constitute our identity. Dystopian analysis relies on consequence avoidance arguments that make use of slippery slopes and negative exemplars to help define and refine constitutional meaning. In so doing, dystopian constitutionalism focuses on more than narrowly constructed doctrinal issues by bringing into view systemic and holistic constitutional concerns.

Holistic considerations exemplified by Waldron’s conception of negative exemplars matter because the effects of a particular constitutional rule can vary, depending on its importance within constitutional and political practice—considerations invisible to particularistic approaches. Constitutional principles examined within a more holistic setting have the additional virtue of requiring decision makers to consider questions of value that might elude the jurist focused on narrow, particularistic questions of doctrine. In this way, there is a positive aspect to dystopian analysis in asking what are the values at stake and how do they function in social and political life. When a particular constitutional principle takes on a role as a negative exemplar, it stands for more than a narrow consideration related to a particular doctrinal rule. Rather, it shapes constitutional meanings and values that provide broader conceptions of appropriate government practice. In this way, the negative exemplar can be a positive enabler of sound governing practice. Dystopian constitutionalism is also positive constitutionalism.<sup>90</sup>

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90 On the distinction between negative and positive constitutionalism, see, for example STEPHEN HOLMES, *PASSIONS & CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* 6–8

## II. DYSTOPIAN CONSTITUTIONALISM IN PRACTICE

Having described the elements of dystopian constitutional analysis, it will be instructive to examine dystopian analysis at work in Supreme Court cases to provide a basis for seeing why these arguments are an important feature of American constitutionalism. In practice, constitutional criminal procedure and free speech cases involve review of state practices that implicate entrenched values vulnerable to state violations that left unchecked could produce a slide towards undesirable governing states. When deploying consequence avoidance arguments, courts have the task of affirming the values they seek to preserve as well as those they wish to avoid. When it comes to constitutional criminal procedure, dystopian analysis is often employed to protect core values such as privacy and liberty. In free speech cases, dystopian analysis affirms the values of collective self-governance and liberty of thought. Criminal procedure and free speech cases both implicate the relation between the power of the state as exercised by its police and the ability of individuals to live free from unjustified interference—the right to be let alone as identified by Justice Brandeis. To see dystopian analysis at work is to begin to see why it is indispensable to American constitutionalism.

### A. *Democracy and Individual Freedom*

Free speech doctrine has been forged through wartime struggles and emergency circumstances, perhaps more so than in peacetime and normal political life.<sup>91</sup> Often, when the pressure mounts to suppress speech most, the need for First Amendment protection is greatest. Yet, the Supreme Court's record in forging free speech protections during wartime has not been stellar, succumbing to executive claims of necessity in the heat of the moment, only to adjust doctrine later.<sup>92</sup> And when times are difficult during war or crisis, the urge to suppress or compel speech invites comparisons to negative consequences. Responding to the City of Chicago's imposition of a

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(1995) (describing negative constitutionalism as a theory that views a constitution as a check on tyranny and abuses of power and positive constitutionalism as an idea that a constitution can reinforce royal sovereignty).

91 See, e.g., GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* (2004).

92 See *id.* at 530–50. Compare, for example the distance the Court travelled from its early First Amendment cases such as *Schenk v. United States*, 249 U.S. 47 (1919) and *Debs v. United States*, 249 U.S. 211 (1919), with the standard that emerged in *Brandenburg v. Ohio*, 395 U.S. 444 (1969). See generally HARRY KALVEN, JR., *A WORTHY TRADITION* (1988).

“breach of peace” ordinance to a provocative speaker, Justice Douglas explained,

[I]t is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.<sup>93</sup>

Even during ordinary times, there exists a temptation by governing officials to censor the content of speech—to regulate what is appropriate and what is disallowed. Considering the constitutionality of the congressional Stolen Valor Act passed in 2005, which made it a crime to falsely claim to have received a military award, the Court switched the comparison to a fictional dystopia, though the comparative analysis remained the same:

Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle. Our constitutional tradition stands against the idea that we need Oceania’s Ministry of Truth.<sup>94</sup>

Allowing government officials to regulate permissible and impermissible statements would be a practice without a clear distinction from the dystopian state George Orwell imagined.<sup>95</sup> In this way, dystopian constitutionalism is not restricted by comparison to actual comparative tyranny, but can be based on a general dystopian totalitarianism as well as a fictionalized dystopian state. Supreme Court Justices have made ample use of Orwell.<sup>96</sup>

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93 *Terminiello v. Chicago*, 337 U.S. 1, 4, (1949). Justice Douglas repeats this claim in a majority opinion in a later case involving an individual sentenced to prison for circulating a pamphlet concerning a labor dispute. *See Ashton v. Kentucky*, 384 U.S. 195, 199 (1966).

94 *United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012) (citing GEORGE ORWELL, 1984 (1949) (Centennial ed. 2003)).

95 *See generally* ORWELL, *supra* note 44.

96 *See, e.g.,* *Cnty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 611 (1989) (“Although Justice Kennedy accuses the Court of ‘an Orwellian re-writing of history,’ perhaps it is Justice Kennedy himself who has slipped into a form of Orwellian newspeak when he equates the constitutional command of secular government with a prescribed orthodoxy.”); *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 335 (2003) (Kennedy, J., concurring) (“We are supposed to find comfort in the knowledge that the ad is banned under § 203 only if it ‘is targeted to the relevant electorate . . .’ This Orwellian criterion, however, is analogous to a law, unconstitutional under any known First Amendment theory, that would allow a speaker to say anything he chooses, so long as his intended audience could not hear him.”); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 995–96 (1992) (Scalia, J., dissenting) (“[T]o portray *Roe* as the statesmanlike ‘settlement’ of a divisive issue, a jurisprudential Peace of Westphalia that is worth preserving, is nothing less than Orwellian.”); *Florida v. Riley*, 488 U.S. 445, 466–67

No matter the source of the comparison, the attempt to compel order by regulating what speech is appropriate belongs to the ways of thinking that totalitarian regimes adopt. But to compel speech, no different than to censor it, can also lead to dystopian contrast. In neither case, Justice Jackson reasoned, has the government power “in our constitutional constellation . . . [to] prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.”<sup>97</sup> In holding that a compulsory flag salute violated the First Amendment, Justice Jackson observed that “[s]truggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men.”<sup>98</sup> He continued by arguing that the “[u]ltimate futility of such attempts to compel coherence is the lesson of every such effort . . . down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters.”<sup>99</sup> Given the fact that the Court had upheld a similar compulsory flag salute a mere three years earlier,<sup>100</sup> *West Virginia State Board of Education v. Barnette* was decided explicitly because of the contrast with the governing state to be avoided. It is a paradigm of dystopian constitutionalism. It posits a comparative state to be avoided, reasons that particular practices are constitutive of the undesirable state, and employs slippery slope arguments to dire consequences American constitutionalism should seek to avoid.

These examples of dystopian analysis examine the implications of the challenged government action (censorship and compulsion) for their consistency with principles and institutions of deliberative self-

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(1989) (Brennan, J., dissenting) (“The Fourth Amendment demands that we temper our efforts to apprehend criminals with a concern for the impact on our fundamental liberties of the methods we use. I hope it will be a matter of concern to my colleagues that the police surveillance methods they would sanction were among those described 40 years ago in George Orwell’s dread vision of life in the 1980’s: ‘The black-mustachio’d face gazed down from every commanding corner. There was one on 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 bluebottle, and darted away again with a curving flight. It was the Police Patrol, snooping into people’s windows.’ Who can read this passage without a shudder, and without the instinctive reaction that it depicts life in some country other than ours?” (quoting GEORGE ORWELL, 1984 4 (1949))).

97 *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

98 *Id.* at 640.

99 *Id.* at 641.

100 *See Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 595–600 (1940) (upholding requirement that students recite the Pledge of Allegiance despite religious objection).

government. If we are to avoid becoming like our enemies—those who censor dissenters and eliminate dissent—then we have to understand constitutional principles as protecting individuals from government action that compares to what totalitarian governments do. When there is a question about how best to interpret a constitutional principle, dystopian analysis asks us to consider how best to distinguish the principle from totalitarian practice. Beyond a general concern for freedom of speech and thought as well as democratic process, the breadth of constitutional issues capable of such distinction include structural issues of the President's power to seize private property in the name of national security,<sup>101</sup> or the power of the Court to consider habeas petitions,<sup>102</sup> or even the power of a state to criminalize distribution of contraceptives.<sup>103</sup>

This process of distinction does not always produce principles that give priority to civil liberties over national security. During the Cold War, the Supreme Court confronted First Amendment challenges to prosecutions under the Smith Act of persons accused of conspiring to advocate overthrow of the government. National security loomed as a pressing governing necessity. In *Dennis v. United States*, the Court

101 See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring) (“[T]he description of its evils in the Declaration of Independence leads me to doubt that [the Founding Fathers] were creating the new Executive in [George III’s] image. . . . [I]f we seek instruction from our own times, we can match it only from the executive powers in those governments we disparagingly describe as totalitarian. I cannot accept the view that this clause is a grant in bulk of all conceivable executive power. . . .”).

102 Writing for a majority the year after his *Youngstown* concurrence, Justice Frankfurter reasoned concerning the writ of habeas corpus that “[i]ts history and function in our legal system and the unavailability of the writ in totalitarian societies are naturally enough regarded as one of the decisively differentiating factors between our democracy and totalitarian governments.” *Brown v. Allen*, 344 U.S. 443, 512 (1953).

103 *Griswold v. Connecticut*, 381 U.S. 479, 497 (1965) (Goldberg, J., concurring) (“While it may shock some of my Brethren that the Court today holds that the Constitution protects the right of material privacy, in my view it is far more shocking to believe that the personal liberty guaranteed by the Constitution does not include protection against such totalitarian limitation of family size, which is at complete variance with our constitutional concepts.”). When the issue of Connecticut’s contraception law first came before the Court, Justice Douglas had dissented from the Court’s claim that the petitioners lacked standing, reasoning that:

One of the earmarks of the totalitarian understanding of society is that it seeks to make all subcommunities—family, school, business, press, church—completely subject to control by the State. . . . Can there be any doubt that a Bill of Rights that in time of peace bars soldiers from being quartered in a home, ‘without the consent of the Owner’ should also bar the police from investigating the intimacies of the marriage relation? The idea of allowing the State that leeway is congenial only to a totalitarian regime.

*Poe v. Ullman*, 367 U.S. 497, 521–22 (1961) (Douglas, J., dissenting) (quoting Robert L. Calhoun, *Democracy and Natural Law*, 5 NAT. LAW FORUM, 31, 36 (1960) and U.S. CONST. amend. III).

reasoned that mere conspiracy to advocate the desirability of overthrowing the government “creates the danger” of bringing about that end, and noted the dangers created by “the inflammable nature of world conditions, similar uprisings in other countries, and the touch-and-go nature of our relations with countries with whom petitioners were in the very least ideologically attuned . . . .”<sup>104</sup> The analysis here is attuned to the prospect of negative political consequences from the claimed threat. Thus, although the dystopian analysis is more implicit, the logic begins with an undesirable consequential state (the overthrow of the government in favor of a communist totalitarian system) and then reasons to what understanding of constitutional principle might best avoid such consequences. In this case, the best understanding of principle, according to the Court, is that the prosecutions for mere speech were consistent with First Amendment constraints.<sup>105</sup> Speech produces the threat of totalitarianism, not its censorship.

As the Supreme Court turned away from upholding convictions for violation of the Smith Act based on membership in communist organizations, it employed language exhorting the contrast between our system of democratic governance and that of totalitarian systems as prohibiting further suppression of speech and association in the name of national security.<sup>106</sup> During this period of reassessment, Justice Hugo Black was particularly apt to turn to dystopian contrasts.<sup>107</sup> Along with Justice Douglas, these appeals to dystopian consequences were often in dissent. But, the Court’s views were in flux, eventually becoming far more skeptical of government claims that prosecution

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104 *Dennis v. United States*, 341 U.S. 494, 510–11 (1951).

105 *Id.* at 509 (regarding the First Amendment “clear and present danger” test, the Court reasoned that “the words cannot mean that before the Government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal awaited”) (emphasis omitted).

106 *See, e.g., Elfbrandt v. Russell*, 384 U.S. 11, 18–19 (1966) (White, J., dissenting) (“A law which applies to membership without ‘specific intent’ to further the illegal aims of the organization infringes unnecessarily on protected freedoms.”); *see also United States v. Robel*, 389 U.S. 258, 264 (1967) (“It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile.”); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 609–10 (1967) (upholding First Amendment rights to academic freedom).

107 *See, e.g., Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 77–78, (1961) (Black, J., dissenting) (“In my judgment this case must take its place in the ever-lengthening line of cases in which individual liberty to think, speak, write, associate[,] and petition is being abridged in a manner precisely contrary to the explicit commands of the First Amendment. . . . I believe that the loyalty and patriotism of the American people toward our own free way of life are too deeply rooted to be shaken by mere talk or argument from people who are wedded to totalitarian forms of government.” (footnote omitted)).

for speech or association was necessary to preserve national security. For example, in overturning a conviction of individuals prosecuted under the Smith Act based on mere membership in a communist organization, Justice Black explained:

The conviction of the petitioner here is being reversed because the Government has failed to produce evidence the Court believes sufficient to prove that the Communist Party presently advocates the overthrow of the Government by force. The Government is being told, in effect, that if it wishes to get convictions under the Smith Act, it must maintain a permanent staff of informants who are prepared to give up-to-date information with respect to the present policies of the Communist Party. . . . I do not disagree with the wisdom of the Court's decision . . . [b]ut I think that it is also important to realize . . . such a system of laws gives to the perpetuation and encouragement of the practice of informing - a practice which, I think it is fair to say, has not always been considered the sort of system to which a wise government would entrust the security of a Nation. I have always thought, as I still do think, that this Government was built upon a foundation strong enough to assure its endurance without resort to practices which most of us think of as being associated only with totalitarian governments.<sup>108</sup>

A possible consequence of the claim that the government had not shown sufficient evidence that mere speech apart from organized leadership roles was a sufficient threat would be for the government to redouble its effort at surveillance and to prove the threat. Justice Black argued that not only is suppression of speech a constitutional problem, but so too is the government's method of making its case. Both the suppression and the monitoring are indistinguishable from totalitarian practices that seek to dominate the social and political lives of citizens. Constitutional foundations that include protection for politically disfavored speech are very different from those on which totalitarian governments are built.

Justice Black also employed such reasoning against the loyalty oaths that many states required. He argued,

It seems self-evident that all speech criticizing government rulers and challenging current beliefs may be dangerous to the status quo. With full knowledge of this danger the Framers rested our First Amendment on the premise that the slightest suppression of thought, speech, press, or public assembly is still more dangerous. . . . Tyrannical totalitarian governments cannot safely allow their people to speak with complete freedom. I believe with the Framers that our free Government can.<sup>109</sup>

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108 *Noto v. United States*, 367 U.S. 290, 301–02 (1961) (Black, J., concurring).

109 *Wieman v. Updegraff*, 344 U.S. 183, 194 (1952) (Black, J., concurring). In time, the Supreme Court articulated constitutional grounds for eliminating loyalty oaths in American life. See, e.g., *Robel*, 389 U.S. at 264 (“It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of asso-

Are loyalty oaths required of government employees distinguishable from totalitarian practices? The answer, according to Justice Black's concurrence is a clear negative, because such oaths change the order of priority between citizen and government. Citizens who are empowered to speak with complete freedom are capable of self-governing. By contrast, those constrained by mandatory oaths are deprived of the critical tools necessary for democratic governance.

Using the same method of distinction in another free speech case involving the arrest of a street corner speaker, however, Justice Black argued that:

[t]he end result of the affirmance here is to approve a simple and readily available technique by which cities and states can with impunity subject all speeches, political or otherwise, on streets or elsewhere, to the supervision and censorship of the local police. I will have no part or parcel in this holding which I view as a long step toward totalitarian authority.<sup>110</sup>

In *Feiner v. New York*, police had exercised discretion to maintain street order to silence the speaker rather than restrain the restless members of the audience, manifesting the connection between concern over policing practices and the robust functioning of democratic society.<sup>111</sup> Justice Black was not focused on the specific speaker and speech act at issue, but on the systemic effects of a principle of free speech law that would license silence of the speaker at the discretion of the police officer. Constitutional principles that license state and local action, whether loyalty oaths or discretionary police action that censors speech, can produce dystopian systemic effects. The question in such cases is not whether a dystopia would result in Oklahoma or in New York if such practices were allowed. Rather, the question is whether the constitutional principle is consistent with dystopian states if put into systemic effect. In these and related cases, the Supreme Court's task was to define the values that constitute a free and deliberative polity by contrast to real and possible states of governance inconsistent with these values.

### B. Criminal Procedure

The concern Justice Black articulated in his *Feiner* dissent was that giving power to police at their discretion to censor speech on side-

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ciation—which makes the defense of the Nation worthwhile”); *Keyishian*, 385 U.S. at 609–10 (upholding First Amendment rights in academic freedom); *Elfrandt*, 384 U.S. at 18–19 (finding a statute must be drawn narrowly enough so as not to infringe upon protected rights without a compelling state interest).

110 *Feiner v. New York*, 340 U.S. 315, 323 (1951).

111 *Id.* at 316–18.

walks, which the Court at times has held up as the paradigm place of free speech activity,<sup>112</sup> is indistinguishable from totalitarian practices. The freedom to speak and the freedom from compulsion to speak are related values protected under the First and Fifth Amendments. When considering the systemic effects of criminal procedure rules, democratic concerns are unavoidably preeminent. For example, a citizen's encounter with an officer of the law has implications for a person's standing and expressed membership in the polity. The kind of state in which one lives, and the kinds of citizens that state fosters, depend in part on the rules of criminal procedure.<sup>113</sup> And the kind of state one might rationally seek to avoid makes dystopian analysis salient in both doctrinal domains.

In addition, by attempting to compel conformity through mandatory flag salutes, or loyalty oaths, or suppression of speech deemed dangerous to the state, the state can enforce its conception of order through its policing practices. Bringing constitutional constraints to bear on police practices from the mid to the late twentieth century, the Supreme Court confronted examples of police abuses that raised fundamental constitutional questions and invited dramatic contrasts.<sup>114</sup> These examples covered both police searches and interrogations. Regarding searches, for example, *Irvine v. California* featured police officers arranging for a locksmith to provide them with a key to a suspect's home, using the key to enter and place microphones in a hallway, closet and bedroom, and boring a hole in the roof of the house to run wires to transmit the information to a nearby location—all without the benefit of a judicial warrant, leading Justice Douglas to proclaim that such actions “smack of the police state.”<sup>115</sup> Because of their possible systemic political effects, the methods employed by the police are susceptible to dystopian constitutional analysis. Regarding interrogations, for example, writing for a majority in *Chambers v. Florida*, Justice Black reasoned that confessions wrought from interroga-

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112 See, e.g., *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (holding that public fora “have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions”); see also *Schneider v. New Jersey*, 308 U.S. 147, 162 (1939) (finding that an ordinance prohibiting distribution of leaflets on public property violates the First Amendment).

113 See, e.g., *Harris v. United States*, 331 U.S. 145, 161 (1947) (Frankfurter, J., dissenting) (“[T]he protection afforded by the Fourth Amendment against search and seizure by the police, except under the closest judicial safeguards, is not an outworn bit of Eighteenth Century romantic rationalism but an indispensable need for a democratic society.”).

114 See Margaret Raymond, *Rejecting Totalitarianism*, *supra* note 9, at 1260.

115 347 U.S. 128, 149 (1954) (Douglas, J., dissenting).

tions conducted over a week invite comparisons with “[t]yrannical governments [which] had immemorially utilized dictatorial criminal procedure and punishment to make scapegoats of the weak, or of helpless political, religious, or racial minorities and those who differed, who would not conform and who resisted tyranny.”<sup>116</sup> Similarly, considering whether a confession wrought from thirty-six hours of continuous interrogation violated constitutional standards, Justice Black reasoned:

The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession. There have been, and are now, certain foreign nations with governments dedicated to an opposite policy: governments which convict individuals with testimony obtained by police organizations possessed of an unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental torture. So long as the Constitution remains the basic law of our Republic, America will not have that kind of government.<sup>117</sup>

Here again, the dystopian method posits a comparative state to be avoided. If American policing practice is to avoid being like “certain foreign nations and governments”<sup>118</sup> that practice torture and other abuses, then the Constitution must be read to prohibit such practices. Constitutional principle, not simply political choice, bars such practices. Justice Black’s reasoning is not only about how policing practices might function, but also about a “kind” of government, a form understood in contrast to other political forms to be avoided.

Holistic constitutional principles governing searches, like confessions wrought from abusive police practice, are basic elements of a due process approach to criminal procedure and invite use of dystopian analysis. In this way, under both Fifth Amendment and due process standards, the Court used dystopian contrasts to guide the principles that have now become embedded in constitutional doctrines related to interrogations.<sup>119</sup>

A similar story exists for the development of Fourth Amendment search and seizure law. For example, in applying Fourth Amendment search standards to the states via the Due Process Clause, Justice Frankfurter reasoned that

[t]he security of one’s privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. . . . The knock at the door, whether by day or by night, as a prelude to

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116 309 U.S. 227, 236 (1940).

117 *Ashcraft v. Tennessee*, 322 U.S. 143, 155 (1944) (citations omitted).

118 *Id.*

119 *See Raymond*, *supra* note 114, at 1203–05.

a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples.<sup>120</sup>

Obliquely referring to “recent history” to paint a particular, yet generalizable, image of the dystopian possibility to be avoided, Justice Frankfurter does more than make a doctrinal argument for why the Fourth Amendment should be understood to forbid the search in question; rather, he takes a more holistic approach to explain why searches of the kind in question are inconsistent with the foundational form and function of American constitutionalism.<sup>121</sup> In this way, holistic considerations, when it comes to questions of widespread surveillance, conflict with more particularistic approaches that focus primarily on providing bright line rules to aid everyday policing practices. Without judicial vigilance in subordinating police action to constitutional scrutiny, Justice Frankfurter warned in *United States v. Rabinowitz* that “the progress is too easy from police action unscrutinized by judicial authorization to the police state.”<sup>122</sup> Doctrinal scrutiny looks not only to the episodic and sequential nature of a police action, but also the systemic effects of its repetition.

With Justice Jackson’s opinion in *Johnson v. United States*, the Supreme Court crafted Fourth Amendment search and seizure doctrines with the aim of establishing a bulwark against the possibility of what it identified as a “police state”:

An officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in law for the intrusion. Any other rule would undermine “the right of the people to be secure in their persons, houses, papers and effects,” and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law.<sup>123</sup>

In this opinion, Justice Jackson draws a key distinction between a regime in which police officers have unfettered discretion and one in which they are confined within rule of law constraints.<sup>124</sup> Who de-

120 *Wolf v. Colorado*, 338 U.S. 25, 27–28 (1949).

121 *Id.*

122 *United States v. Rabinowitz*, 339 U.S. 56, 82 (1950) (Frankfurter, J., dissenting).

123 333 U.S. 10, 17 (1948) (citations omitted).

124 *Id.* The philosopher Bertrand Russell, describing the consequences of “State-Socialism,” as “an increase of the powers of [a]bsolutism and [p]olice [r]ule,” warned that “acquiescence in such a state . . . [was] acquiescence in the suppression of all free speech and all free thought,” and was tantamount to “acquiescence in intellectual stagnation and moral servility.” BERTRAND RUSSELL, GERMAN SOCIAL DEMOCRACY 114–15 (1896).

cides matters.<sup>125</sup> Regarding judgments about probable cause, Justice Jackson observed that the “point of the Fourth Amendment . . . consists in requiring that those inferences be drawn by a neutral and detached magistrate, instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.”<sup>126</sup> Otherwise, the Court reasoned, allowing police officers to search on their own determinations of probable cause would “leave the people’s homes secure only in the discretion of police officers.”<sup>127</sup> When the state governs through the arbitrary and discretionary practice of police, then, as the Court admonished, it risks transforming its police powers into the workings of a “police state.”<sup>128</sup> It is one thing for the state to have broad powers to make laws in pursuit of the general welfare of the people, but it is a very different matter for the state to enforce its laws through the discretionary function of an institution left unchecked by constitutional constraints. In this way, the “police state” organizes a dystopian conception of political practice, and informs, by contrast, a positive view of American constitutionalism that prioritizes rule of and by law rather than rule by police.<sup>129</sup>

Emerging technologies enabling more widespread and cost-effective surveillance strain the balance between rule and discretion, and challenge the Court’s alternating focus on particularistic and holistic constitutional analysis. In concurring that a New York statute was unconstitutionally broad in granting police discretion to engage in surreptitious eavesdropping by placing a recording device in a private office, Justice Douglas explained:

I do not see how any electronic surveillance that collects evidence or provides leads to evidence is or can be constitutional under the Fourth and Fifth Amendments. We could amend the Constitution and so provide—a step that would take us closer to the ideological group we profess to despise. Until the amending process ushers us into that kind of totalitarian regime, I would adhere to the protection of privacy which the Fourth

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125 See generally Thomas P. Crocker, *Who Decides on Liberty?*, 44 CONN. L. REV. 1511 (2012).

126 *Johnson v. United States*, 333 U.S. 10, 13–14 (1948).

127 *Id.* at 14.

128 As Justice Frankfurter, joined by Justice Jackson, explained in his dissent in another Fourth Amendment case, “[t]he founders wrote into the Constitution their conviction that law enforcement does not require the easy but dangerous way of letting the police determine when search is called for without prior authorization by a magistrate.” *United States v. Rabinowitz*, 339 U.S. 56, 82 (1950) (Frankfurter, J., dissenting).

129 Justice Jackson also used the term “police state” to refer to totalitarian political regimes in Eastern Europe during the Cold War, observing in a 1950 case that, “[t]he international police state has crept over Eastern Europe by deception, coercion, *coup d’etat*, terrorism and assassination. Not only has it overpowered its critics and opponents; it has usually liquidated them.” *Am. Commc’ns Ass’n, v. Douds*, 339 U.S. 382, 429 (1950) (Jackson, J., concurring in part and dissenting in part).

Amendment, fashioned in Congress and submitted to the people, was designed to afford the individual.<sup>130</sup>

In the end, however, Justice Douglas's overall stance against pervasive electronic surveillance did not prevail.

In a set of opinions that authorized surreptitious eavesdropping, the Court fashioned a doctrine premised on the claim that individuals have no reasonable expectation of privacy in information and items they share with third parties. Under the Court's reasoning, whether it is phone numbers dialed,<sup>131</sup> banking transactions completed,<sup>132</sup> public roadways travelled,<sup>133</sup> or conversations shared,<sup>134</sup> when we share with others, we lose Fourth Amendment privacy protections. Rather than confronting what the systemic effects of pervasive surveillance might be, the Court looked narrowly at each episode of social sharing, and concluded that because a person cannot control a third party's use of what is shared, no privacy protections could attach against discretionary police action to obtain that information. As a result, Justice Douglas warned that "[o]nce electronic surveillance . . . is added to the techniques of snooping which this sophisticated age has developed, we face the stark reality that the walls of privacy have broken down and all the tools of the police state are handed over to our bureaucracy on a constitutional platter."<sup>135</sup> This constitutional platter is crafted from a particularistic approach to the Fourth Amendment that does not contemplate questions about whether widespread policing practices would be indicative of a dystopian totalitarian state.

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130 *Berger v. New York*, 388 U.S. 41, 67–68 (1967) (Douglas, J., concurring).

131 *See Smith v. Maryland*, 442 U.S. 735, 743–44 (1979) (holding that no expectation of privacy exists in phone numbers dialed).

132 *See United States v. Miller*, 425 U.S. 435, 443 (1976) ("The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government.").

133 *See United States v. Knotts*, 460 U.S. 276, 281 (1983) ("A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.").

134 *See United States v. White*, 401 U.S. 745, 747 (1971) (holding no expectation of privacy exists in private conversation overheard by police).

135 *Osborn v. United States*, 385 U.S. 323, 349 (1966) (Douglas, J., dissenting). During the period in which the Warren Court shaped constitutional criminal procedure, Justice Douglas was often in dissent. In *Terry v. Ohio*, which established the authority for police officers to stop and frisk persons on the basis of reasonable suspicion, Justice Douglas employed a similar dystopian critique:

To give the police greater power than a magistrate is to take a long step down the totalitarian path. Perhaps such a step is desirable to cope with modern forms of lawlessness. But if it is taken, it should be the deliberate choice of the people through a constitutional amendment.

*Terry v. Ohio*, 392 U.S. 1, 38 (1968) (Douglas, J., dissenting).

Following the pattern of other dystopian references, many invocations of the “police state,” as a state of excessive police discretion, occur in dissents that look to the wider effects of criminal procedure decisions.<sup>136</sup> Dissents keep the analytic method salient even when not ascendant. When the Court eliminated the Fourth Amendment’s prohibition against searches for mere evidence—as contrasted with an instrumentality, fruit, or contraband—Justice Douglas wrote in dissent that

I would adhere to [precedents] and leave with the individual the choice of opening his private effects (apart from contraband and the like) to the police or keeping their contents a secret and their integrity inviolate. The existence of that choice is the very essence of the right of privacy. Without it the Fourth Amendment and the Fifth are ready instruments for the police state that the Framers sought to avoid.<sup>137</sup>

Regarding the Court’s holding in *United States v. White*, that persons assume the risk that their private communications will be electronically monitored through use of a confidential informant, Justice Douglas warned of “the need for judicial supervision under the Fourth Amendment of the use of electronic surveillance which, uncontrolled, promises to lead us into a police state.”<sup>138</sup> He further warned that “[e]lectronic surveillance is the greatest leveler of human privacy ever known.”<sup>139</sup> Similarly, Justice Douglas, writing in dissent, observed that a practice of executing search warrants at nighttime is “more characteristic of a ‘police state’ lacking in the respect for due process and the right of privacy dictated by the U.S.

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136 *Harris v. United States*, 331 U.S. 145, 171 (1947). Utilizing the term “police state” for the first time in a judicial opinion, Justice Frankfurter, in his dissent, stated that Fourth Amendment “protection extends to offenders as well as to the law abiding, because of its important bearing in maintaining a free society and avoiding the dangers of a police state.” *Id.* The comparison has persisted despite subsequent changes to the composition of the Court. *See, e.g., United States v. Montoya de Hernandez*, 473 U.S. 531, 550 (1985) (Brennan, J., dissenting) (asserting that “[i]ndefinite involuntary incommunicado detentions ‘for investigation’ are the hallmark of a police state, not a free society”).

137 *Warden v. Hayden*, 387 U.S. 294, 325 (1967) (Douglas, J., dissenting). Since *Hayden*, the Court has not attended to questions involving the object of searches, an omission with repercussions for surveillance. *See* Christopher Slobogin, *Cause to Believe What? The Importance of Defining a Search’s Object—Or, How the ABA Would Analyze the NSA Metadata Surveillance Program*, 66 OKLA. L. REV. 725, 729–34, (2014) (examining the Court’s failure to address the relationship between the Fourth Amendment and an “object of the search” inquiry, and discussing the effect on probable cause issues in surveillance and records searches).

138 *United States v. White*, 401 U.S. 745, 760 (1971) (Douglas, J., dissenting).

139 *Id.* at 756.

Constitution and history.”<sup>140</sup> On the issue of electronically enhanced third-party informants, Justice Douglas’s view has not won the day.<sup>141</sup>

But, the idea that there might be limits to pervasive electronic surveillance—even under a claimed third-party justification—has continued constitutional salience, as the oral arguments in *United States v. Jones* illustrate through their repeated reference to Orwell’s *1984*.<sup>142</sup> Justice Sonia Sotomayor’s concurrence in *Jones* echoes Justice Douglas’s dissents, cautioning against extended GPS monitoring of a vehicle’s movement:

I would also consider the appropriateness of entrusting to the Executive, in the absence of any oversight from a coordinate branch, a tool so amenable to misuse, especially in light of the Fourth Amendment’s goal to curb arbitrary exercises of police power to and prevent “a too permeating police surveillance.”<sup>143</sup>

Even though the dystopian element of Justice Sotomayor’s warning is oblique, the reader knows, from past Supreme Court majority opinions and dissents, that a “too permeating police surveillance”<sup>144</sup> is a way of describing practices endemic to dystopian police state, which is “a greater danger to a free people”<sup>145</sup> than constrained police practice, as Justice Jackson argued for the majority in 1948 in *United States v. Di Re*. Indeed, Justice Jackson also wrote his opinion in *Johnson v. United States*, providing the paradigm statement of the dangers of the

140 *Gooding v. United States*, 416 U.S. 430, 460 (1974) (Douglas, J., dissenting).

141 *See Cioffi v. United States*, 419 U.S. 917, 918 (1974) (Douglas, J., dissenting) (“[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.’ In the absence of such judicial supervision, there is no effective safeguard against the possibility of an uncontrolled electronic police state.” (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967))).

Justice Douglas’s dissents decrying the “police state” have not been entirely ineffective. For example, when a New York statute forbade membership in organizations that the state determined were “subversive,” Justice Douglas claimed in dissent that “[w]hat happens under this law is typical of what happens in a police state. Teachers are under constant surveillance; their pasts are combed for signs of disloyalty; their utterances are watched for clues to dangerous thoughts.” *Adler v. Bd. of Educ.*, 342 U.S. 485, 510 (1952) (Douglas, J., dissenting). Justice Douglas’s view won out, as the Supreme Court reversed course and began to find laws proscribing membership in organizations unconstitutional under the First Amendment. The Court’s decision in *Keyishian* effectively overruled *Adler* fifteen years later. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 608–09 (1967).

142 Transcript of Oral Argument at 10, 13, *United States v. Jones*, 132 S. Ct. 945, (No. 10-1259).

143 *United States v. Jones*, 132 S. Ct. 945, 956 (2012) (Sotomayor, J., concurring) (quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948)).

144 *United States v. Di Re*, 332 U.S. 581, 595 (1948).

145 *Id.*

police state, in the same year.<sup>146</sup> These concerns—that unconstrained police surveillance alters the nature of a political state—whether expressed in majorities or dissents retain their salience in criminal procedure analysis focused more holistically on the consequences of constitutional rule implemented by policing practice. Unconstrained police discretion “does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat.”<sup>147</sup> Indeed, merging the concerns of criminal procedure and free speech, the Court warned that “[i]nstant with its ever-present potential for arbitrarily suppressing First Amendment liberties, that kind of law bears the hallmark of a police state.”<sup>148</sup>

One of the problems in evaluating the prospects for wholesale government surveillance of communications is the uncertainty about the scope and scale of future practices under a doctrinal rule. What might appear *ex ante* as a dystopian prospect could turn out *ex post* to be less frightening and more normal. With dystopian analysis, there is the ever-present objection that it constitutes overwrought rhetoric, the reality being something less objectionable. For example, Professor Jack Balkin foretells the inevitability of a new “National Surveillance State,” that is a voracious consumer and analyzer of information about populations with the capacity to never forget.<sup>149</sup> Such a state, Professor Balkin argues, “grows naturally out of the Welfare State and the National Security State; it is their logical successor.”<sup>150</sup> The welfare state requires information in order to build institutions to govern domestic affairs, while the national security state acquires information and creates military and other institutions in furtherance of national security and power. The greater the quantity

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146 333 U.S. 10, 16 (1948) (“An officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in law for the intrusion. Any other rule would undermine ‘the right of the people to be secure in their persons, houses, papers and effects,’ and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law.”).

147 *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90 (1965) (quoting *Cox v. Louisiana*, 379 U.S. 536, 579 (1965)).

148 *Id.* at 90–91. See generally Thomas P. Crocker, *The Political Fourth Amendment*, 88 WASH. U. L. REV. 303 (2010); Daniel J. Salove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112 (2007).

149 See Jack M. Balkin, Essay, *The Constitution in the National Surveillance State*, 93 MINN. L. REV. 1, 3 (2008) (describing the “National Surveillance State,” as one in which “the government uses surveillance, data collection, collation, and analysis to identify problems, to head off potential threats, to govern populations, and to deliver valuable social services”).

150 *Id.* at 5.

and quality of information, the better the welfare and national security states can function. Balkin's national security state seems to merge police powers with the "police state" into a normalized system of governance aimed at both social and national security.

An older mode of governance, the "police power," focused on the security of everyday internal practices, including commerce, achieved through the civil administration of laws designed to augment the welfare of the people.<sup>151</sup> As Bernard Harcourt demonstrates, administration of public economy and "police" were conceptually indistinct during the late eighteenth century.<sup>152</sup> By contrast to this concept of "police," the Oxford English Dictionary provides its earliest example of the English term "police state" from 1851,<sup>153</sup> a concept not available until the emergence of modern urban police forces.<sup>154</sup> When the dystopian example of the "police state" emerged in Supreme Court opinions in the mid-twentieth century, it was distinct from both ordinary police power and from the accepted role that modern police forces played in the maintenance of civil order. What Balkin foretells, and the Supreme Court at times warned against, is the merging of policing powers with security priorities into something that might look like the dystopian "police state," albeit as the "national surveillance state" it may no longer be thought dystopian. In this way, what limits the practice of dystopian constitutional analysis are the attitudes we adopt and the salience of examples we have in mind, each of which can change with time and political circumstance. Nonethe-

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151 Michel Foucault traces the history of the development of "police" as a form of what he calls "governmentality." He explains: "Police is the set of interventions and means that ensure that living, better than just living, coexisting will be effectively useful to the constitution and development of the state's forces." MICHEL FOUCAULT, *SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLEGE DE FRANCE, 1977-78*, 421 (Michel Senellart, ed., Graham Burchell, trans. 2007). He continues: "It is this connection between strengthening and increasing the powers of the state, making good use of the forces of the state, and procuring the happiness of its subjects, that is specific to police." *Id.* at 421-22.

152 BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* 18-21 (2011).

153 Dictionaries cannot settle the question of meaning when meaning is, in part, the very issue. Nonetheless, the Oxford English Dictionary provides an instructive summary of a common way of understanding "police state": "A totalitarian state run by means of a national police force, using repressive methods such as covert surveillance and arbitrary arrest and imprisonment to control the population." *Police State Definition*, OXFORD ENGLISH DICTIONARY ONLINE, <http://www.oed.com/view/Entry/146832> (from Oxford English Dictionary, 3d. Ed. 2006) (last visited Oct. 11, 2015).

154 See, e.g., John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 55 (1983). See also Eric H. Monkkenon, *History of Urban Police*, 15 CRIME & JUSTICE 547, 553 (1992) (asserting that "[u]niformed police spread across the United States to most cities in the three decades between 1850 and 1880").

less, dystopian analysis remains an established method of constitutional analysis, requiring decision makers to consider the implications of constitutional rules for whatever kind of “national state” they might create.

Seeing dystopian constitutional analysis in practice leaves open the question of the value it provides to American constitutionalism. Because fears and aspirations are subject to change, because choice in the scope of doctrinal analysis alters outcomes, and because constitutional practice cannot avoid theory, as the next section explores, dystopian analysis has a significant role to play in American constitutionalism.

### III. WHY DYSTOPIAN CONSTITUTIONALISM?

Dystopian constitutionalism is not a comprehensive constitutional theory. Comprehensive theory requires greater agreement on goals and values than does dystopian constitutionalism. Judge Harvie Wilkinson is troubled by the tendency for judges to engage in what he calls “cosmic constitutionalism,” the attempt to explain all of constitutional law through a theory that has the effect of empowering the judiciary.<sup>155</sup> On his view, cosmic constitutionalism is more akin to utopian constitutionalism in that it purports to shed light on the ideals towards which we should strive. By contrast, dystopian constitutionalism is far more modest. It purports to keep in view states of government we wish to avoid or practices that might introduce a slide towards an undesirable state. Dystopian constitutionalism, as we have seen, also has a positive aspect. To know what we wish to avoid requires us to say something about the values that make our desired forms of government distinctive.<sup>156</sup> In this way, avoiding the negative consequence requires us to consider the values we wish to preserve. Values such as privacy or dignity or democratic deliberation can remain general, requiring no utopian expression. A chief virtue of dystopian analysis is its modesty—both negative and positive.

Dystopian analysis, as we have seen, also invites holistic constitutional analysis. A decision maker must look beyond the particular de-

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155 J. HARVIE WILKINSON III, *COSMIC CONSTITUTIONAL THEORY* 3 (2012) (positing that “[m]odern constitutional law has fallen victim to cosmic constitutional theory. Over the last fifty years, we have witnessed the rise of theories that purport to unlock the mysteries of our founding document”).

156 *See* SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 77 (1988) (“One cannot begin to engage in constitutional interpretation without having in mind a model of the point of the entire constitutional enterprise. That point of the American Constitution . . . must be to achieve a political order worthy of respect . . .”).

tails of a doctrinal domain to consider the systemic and structural effects that follow from adopting one rule or another. As this Part explores, case outcomes can differ in part by whether more holistic or particularistic perspectives are adopted. Whether to view costs or police practice in one way, or to allow technology to introduce new policing practices, depends in part on the salience of negative exemplars. Moreover, how we understand the negative examples is itself a matter of debate. When it comes to criminal procedure, for example, deference to police practices will never be without limits, nor will limits to police practices ever go without some deference. Instead, the nature of a possible, or real, dystopian state of affairs—like the nature of policing practices themselves—depends on historically and socially situated technological capacities, perceived needs, and political climates, among other factors. Which form of analysis—deference or dystopian—takes priority depends on what risks legal decision makers view as most salient.<sup>157</sup> These risk perceptions are manifest in different argument forms as the next Part examines.

A. *How One Justice's Modus Tollens Can Be Another Justice's Modus Ponens*

Shifting constitutional meanings central to the continued salience of dystopian constitutional analysis are on display in the reasoning of the Roberts Court in *Kentucky v. King*.<sup>158</sup> Recall that one of the paradigm cases employing a “police state” comparison is the Court’s opinion in *Johnson v. United States*, establishing Fourth Amendment protections against warrantless home searches.<sup>159</sup> Affirming the importance of the home, Justice Jackson admonished: “The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance.”<sup>160</sup> For the Roberts Court, neither “reasonable security” nor “freedom from surveillance” are reasons to reject such police practices under reasoning devoid of dystopian considerations, for in *Kentucky v. King* the Court affirmed a “right” of officers to “thrust themselves into a home” without a warrant, rejecting the central rationale of the prior framework.<sup>161</sup> That

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157 See generally Thomas P. Crocker, *Order, Technology, and the Constitutional Meanings of Criminal Procedure*, 103 J. CRIM. L. & CRIMINOLOGY 685 (2013).

158 *Kentucky v. King*, 131 S. Ct. 1849 (2011).

159 *Johnson v. United States*, 333 U.S. 10 (1948).

160 *Id.* at 14.

161 *Id.*

prior framework *Johnson* established had insisted that “[w]hen the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial offer, not by a policeman.”<sup>162</sup> At issue in *King* was whether the police were justified in entering a home without a warrant after smelling burning narcotics at the door where they had knocked, mistakenly believing a suspect had recently entered the apartment.<sup>163</sup> The claimed justification was the exigent fear of evidence being destroyed. The officers’ knock at the door, however, produced this possibility and their fear. Justice Samuel Alito’s opinion reasoned: “[A] rule that precludes the police from making a warrantless entry to prevent the destruction of evidence whenever their conduct causes the exigency would unreasonably shrink the reach of this well-established exception to the warrant requirement.”<sup>164</sup> Exigency creates an exception to the requirement that a judicial officer determine when the right to privacy must yield to the discretionary need of law enforcement. In this way, the dystopian analysis—that such police practice would produce a police state—recedes in the face of the priority of the exception over the rule. The Court’s analysis focused only upon the needs of police. In fact, privacy enters the analysis only through a passing attempt at reassurance that the Court’s rule “provides ample protection for the privacy rights that the Amendment protects.”<sup>165</sup>

Justice Jackson’s opinion provided a consequence avoidance argument in the form of a *modus tollens*. If the Constitution allows police to enter homes without a warrant based on their own discretionary judgments of need, then we would live in a police state. In order to avoid the dystopian consequence of living in a police state then we must not allow police to enter homes based on their own discretionary judgments. Philosophers have a saying that helps us link the opinions in *Johnson* and *King*: One philosopher’s *modus ponens* is another philosopher’s *modus tollens*.<sup>166</sup> What marks the difference between the two argument forms is whether one affirms the antecedent or denies the consequent. Justice Jackson denies the consequent in denying that our Constitution allows us to live in a police state. If this

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162 *Id.*

163 *King*, 131 S. Ct. at 1854.

164 *Id.* at 1857.

165 *Id.* at 1862. The opinion seems ambivalent about the “privacy right that the Amendment protects,” which could entail very little protection indeed. *Id.*

166 See, e.g., HILARY PUTNAM, WORDS AND LIFE 280 (James Conant ed., 1994) (illustrating the well-known maxim that one philosopher’s *modus ponens* is another philosopher’s *modus tollens*).

denial is correct then it follows that the antecedent must also be false: the police should not have the discretion to enter a home without a warrant. But by contrast, Justice Alito's opinion in *King* affirms the antecedent in affirming that the exception should be its own rule that allows police to enter a home at their own discretion when they can claim an exigency.<sup>167</sup> But a real difficulty arises from the conditional statement that Justice Jackson's opinion creates. If police can enter at their own discretion, as Justice Alito's opinion affirms, then it would follow that the Constitution is no barrier to living in a police state. Justice Jackson's *modus tollens* becomes Justice Alito's *modus ponens*.

If the "police state" was once defined in relation to the evils cases such as *Johnson* sought to avoid, contemporary affirmation of those evils must also be affirmation of the basic features of the police state, at least, that is, if that definition still holds. But of course, to affirm these "evils" is not to affirm of them as evil, since under the Court's majority analysis these practices are now seen as goods. Meanings are subject to change, even inversion, over time. By constructing constitutional meaning to provide "ample protection for the privacy rights"<sup>168</sup> of individuals subject to such intrusions, the Supreme Court authorized practices once thought constitutive of a police state, creating new assumptions about the relationship between governing power and personal liberty. It may be that yesterday's dystopian police state can become tomorrow's normal state of governance. For the home to yield to the pressures of discretionary police practice—given the home's special place in Fourth Amendment doctrine—something has changed analytically from *Johnson* to *King*, not merely in how the majority decided the facts before it, but through how the opinion construes the constitutional meaning of governing practices it confronts. One of the key features in this transformation is the absence of dystopian constitutional analysis.

Through citation to *Johnson*, Justice Ruth Bader Ginsburg's lone dissent in *King* makes the dystopian contrast.<sup>169</sup> Giving analytic priori-

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167 *King*, 131 S. Ct. at 1857.

168 *Id.* at 1862.

169 *Id.* at 1864 (Ginsburg, J., dissenting) (distinguishing "our form of government, where officers are under the law, and the police-state where they are the law") (citing *Johnson v. United States*, 333 U.S. 10, 17 (1948)). At the time *King* was decided, the most recent majority opinion using "police state" occurred in Justice Brennan's 1987 opinion in *Houston v. Hill*, 482 U.S. 451, 462–63 (1987). After 1987, three more cases, including *King*, make reference to the police state. See *Hill v. Colorado*, 530 U.S. 703, 774–75 (2000) (Kennedy, J. dissenting) (citing *Houston v. Hill*, 482 U.S. 451, 462–63 (1987)); *United States v.*

ty to the needs of police practices produces different constitutional meanings than granting priority to the privacy of individuals.<sup>170</sup> The emergence of judicial attitudes towards police practice that Justice Jackson claimed indicative of a police state is therefore visible in the priorities articulated in Fourth Amendment doctrine.<sup>171</sup> If the Court asks “[h]ow ‘secure’ do our homes remain if police, armed with no warrant, can pound on doors at will and, on hearing sounds indicative of things moving, forcibly enter and search for evidence of unlawful activity”<sup>172</sup> it has in view a very different constitutional meaning for the forms of governance in which police discretion plays an important role than if it focuses on constructing how “warrantless searches are allowed when the circumstances make it reasonable.”<sup>173</sup> A Supreme Court determined to curtail the discretionary power of law enforcement, like a Court determined to curtail executive power itself, will create different constitutional meanings and structures that constrain governing practices, in part informed by consequence avoidance arguments and negative exemplars.<sup>174</sup> In pursuit of these differences, the Supreme Court’s decision in *Kentucky v. King* represents a mature articulation of the basic elements of constitutional analysis and vision devoid of dystopian considerations. In this opinion, the holistic considerations about the nature of governance, the

Montalvo-Murillo, 495 U.S. 711, 725 n.7 (1990) (citing *United States v. Salerno*, 481 U.S. 739, 755 (1987) (Brennan, J., dissenting)).

170 See Crocker, *The Political Fourth Amendment*, *supra* note 148, at 326 (positing that “[i]t is not enough to say that we have a right to —reasonable police practices, because questions of reasonableness presuppose answers to questions concerning the analytic priority of privacy and police practice. These prior questions require articulation of comparative constitutional values involving privacy, liberty, and social good”); see also David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1702 (2005) (stating that “the goal is to strike the right balance between letting the police do their job and preserving our democratic liberties”).

171 On the one hand, the Court has explained that “[t]he purpose of the Fourth Amendment is to prevent unreasonable governmental intrusions into the privacy of one’s person, house, papers, or effects. The wrong condemned is the unjustified governmental invasion of these areas of an individual’s life.” *United States v. Calandra*, 414 U.S. 338, 354 (1974). On the other hand, “Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities.” *New York v. Belton*, 453 U.S. 454, 458 (1981) (quoting Wayne R. LaFare, “Case-By-Case Adjudication” Versus “Standardized Procedures”: *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 141 (1974)). In regulating police conduct, the Court is mindful that its rule not “impede[] effective law enforcement.” *California v. Acevedo*, 500 U.S. 565, 574 (1991).

172 *King*, 131 S. Ct. at 1865 (Ginsburg, J., dissenting).

173 *Id.* at 1858.

174 Compare, for example, discussions of executive power in BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010), with those offered by POSNER & VERMEULE, *supra* note 39.

effects on privacy and liberty, and the comparative meanings of constitutional practice are missing in favor of a narrow focus on doctrinal considerations of the relation between an exception and a rule and the claimed needs for police discretion.<sup>175</sup>

To convert one Justice's *modus tollens* into another's *modus ponens* requires affirming antecedent conditions rather than denying consequences. Dystopian analysis provides salient examples of consequences to be avoided, asking us to question the antecedents we might be tempted to affirm. In this way, negative exemplars—totalitarian governments or the concept of a police state—can be thought to function as availability heuristics that make particular examples salient in our thought.<sup>176</sup> If the examples provide insufficient resonance, then no defining heuristic will resonate, making affirmation of policing practices more likely. To choose one argument form over the other makes a difference in constitutional analysis and outcomes. In *King*, Justice Alito engaged in a particularistic doctrinal analysis focused only on the specific details of the case at hand, concluding that a contrary ruling would “unreasonably shrink the reach of this well-established exception.”<sup>177</sup> By contrast, Justice Jackson conducted a holistic inquiry, mindful of the structural and systemic effects on governing practices from the rule of police procedure that the Court adopts. This contrast between the presence and absence of dystopian analysis determines doctrinal outcomes, shapes policing practice, and reflects differing visions of American constitutionalism

#### B. Particularism and Holism in Legal Analysis

Dystopian analysis takes into consideration the potential holistic implications of not only the doctrinal rules themselves, but also the political world they reflect and impart. When Justice Douglas dissents in *United States v. White* against the possibility of pervasive surveillance, as we have seen, he contests not only the doctrinal rule in which individuals assume the risk of government eavesdropping in all of their interpersonal interactions, but also the political world such a rule makes possible.<sup>178</sup> Justice White, writing for the majority, focused instead on the fact of public exposure and the risks that entail without

175 See *King*, 131 S. Ct. at 1858–62.

176 See generally JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982); CASS R. SUNSTEIN, LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE (2005).

177 *King*, 131 S. Ct. at 1857.

178 *United States v. White*, 401 U.S. 745, 762–63 (1971) (Douglas, J., dissenting) (“Monitoring, if prevalent, certainly kills free discourse and spontaneous utterances.”).

concern for broader implications for police practice and political life.<sup>179</sup> This contrast between analytic approaches to constitutional cases—divided between particularistic and holistic considerations—is central to an explanation of dystopian constitutionalism’s unique contribution. One cannot reason from avoidance of dystopian consequences, or construct the slippery slope, without consideration of the more holistic implications of doctrinal development. Dystopian analysis excludes narrow particularism.<sup>180</sup>

The choice of approach can be outcome determinative, as two approaches to constitutional analysis of GPS tracking illustrate. Under a sequential approach, each action a police officer takes is isolated and analyzed synchronically in a step-by-step fashion to determine at each step whether an unreasonable search or seizure has occurred. Seeking “to analyze whether government action constitutes a Fourth Amendment search or seizure, courts take a snapshot of the act and assess it in isolation.”<sup>181</sup> This approach is set in contrast to an analysis of the aggregate effects of police surveillance that taken sequentially might yield different conclusions.<sup>182</sup> So, for example, the question when it comes to deciding whether police may temporarily stop a person and engage in a limited search, a stop and frisk, is not what the systemic effects of adopting such a practice might be, but whether a “particular governmental invasion of a citizen’s personal security”<sup>183</sup> has occurred. Personal security is considered in the isolated moment, devoid of further considerations of the nature of that personal security, even as the Court might consider a balance of interests between individual privacy and government need.<sup>184</sup> And in determining whether personal security has been invaded under particularism,

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179 *Id.* at 752–53 (holding that there is not a constitutional difference between infiltrating a criminal organization electronically or through covert agent).

180 By taking a more holistic approach, dystopian constitutionalism asks questions of fit and justification of a rule within a wider system of constitutional practice in a way similar to Ronald Dworkin’s argument for herculean legal analysis. *See generally* RONALD DWORKIN, *LAW’S EMPIRE* (1986).

181 Orin Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311, 315 (2012).

182 *See generally* David Gray & Danielle Keats Citron, *A Shattered Looking Glass: The Pitfalls and Potential of the Mosaic Theory of Fourth Amendment Privacy*, 14 N.C. J. L. & TECH. 381 (2013); Christopher Slobogin, *Making the Most of United States v. Jones in a Surveillance Society: A Statutory Implementation of Mosaic Theory*, 8 DUKE J. CONST. L. & PUB. POL’Y 1, 3–4 (2012) (discussing ways to codify the Court’s decision in *Jones*).

183 *Terry v. Ohio*, 392 U.S. 1, 19 (1968).

184 *See, e.g., Samson v. California*, 547 U.S. 843, 848 (2006) (“Whether a search is reasonable ‘is determined by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.’”).

courts assess each action in a step-by-step fashion. Was the act of stopping to speak to a person a seizure? Was a limited pat down of outer clothing a search? If so, what standard governs that act? Or, under the third-party doctrine, courts ask whether police access to information disclosed to a third party for limited purposes would constitute a search, without considering the systemic effects of such a practice.<sup>185</sup> And under the public observation doctrine, courts ask whether a person's movements were observable from a public vantage point, without regard to the scope, scale, or implications of pervasive public surveillance.<sup>186</sup> These inquiries focus on discrete and isolated police actions taken at a particular time. More holistic views of actions over time or in combination are invisible to the particularistic approach.<sup>187</sup>

Holistic analysis, by contrast, considers the quantity, in addition to the nature, of police actions.<sup>188</sup> As Danielle Citron and David Gray argue, the Fourth Amendment protects privacy in more than particularistic terms, by contemplating the quantity of police activities in the aggregate as having constitutional significance.<sup>189</sup> Such a view gained the sympathy of five Justices in *Jones*.<sup>190</sup> Even if line-drawing exercises

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185 *E.g.*, *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979) (“This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.”).

186 *See, e.g.*, *United States v. Knotts*, 460 U.S. 276, 281 (1983) (noting that there is a limited expectation of privacy in a car because it is not typically a primary residence and therefore surveillance techniques are acceptable).

187 In a dissent from denial of en banc review from the D.C. Circuit opinion in *Jones*, Judge David Sentelle reasoned that “[t]he sum of an infinite number of zero-value parts is also zero.” *United States v. Jones*, 625 F.3d 766, 769 (D.C. Cir. 2010) (Sentelle J., dissenting). One problem with this formulation is with the assertion that actions taken in the aggregate have no constitutional value because individually they have none. Such a claim would run afoul of the compositional fallacy in asserting that the composition of a group of activities has the same traits as the individual constitutive parts (e.g., a wall and the individual bricks that comprise it).

188 Judge Alex Kozinski, writing in dissent from denial of re-hearing en banc of the Ninth Circuit's opinion that GPS monitoring did not violate the Fourth Amendment, reasoned that “[t]here is something creepy and un-American about such clandestine and underhanded behavior. To those of us who have lived under a totalitarian regime, there is an eerie feeling of déjà vu.” *United States v. Pineda-Moreno*, 617 F.3d 1120, 1126 (9th Cir. 2010) (dissenting from denial of re-hearing en banc).

189 *See* Danielle Citron & David Gray, *Quantitative Privacy*, 98 MINN. L. REV. 62, 144 (2013) (arguing surveillance actions should be viewed in their totality when examining their compatibility with the Fourth Amendment).

190 In *United States v. Jones*, Justice Alito, joined by three others, concurred, reasoning that the quantity of surveillance violated an expectation of privacy. 132 S. Ct. 945, 963–64 (2012) (Alito, J., concurring). Writing a separate concurrence to join Justice Scalia's majority opinion, which relied on the existence of a physical trespass, Justice Sotomayor expressed

might be difficult when deciding what quanta of surveillance alters the nature of the police action, the Court nonetheless recognizes the holistic effects of GPS monitoring. Reflecting this concern over the quantitative attributes of GPS monitoring, Justice Sotomayor “would ask whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on.”<sup>191</sup> And as we have seen, Justice Sotomayor connects these quantitative concerns to matters of democratic governance.<sup>192</sup>

A sequential approach that neither looks at the aggregate effect of a police activity directed at a single individual such as Antoine Jones nor at the systemic effect of a practice upon the social and political life of the polity, would seem to rely on a claim that each action taken sequentially has no effect upon the next. Iterative police activities, like investigations taken as a whole, are not random, discrete physical events in the universe (like a fair coin toss). Unlike the random actions that generate the Gambler’s Fallacy,<sup>193</sup> each action taken in a police investigation is not independent of the next. Rather, they are aggregative, interpretive, interpersonal, and political. They are aggregative in that the sum of police actions can have a qualitative and quantitative difference from the episodic event. They are interpretative because they depend on discretion and judgment requiring both momentary and later analysis of meaning and reasonableness. They are interpersonal because police actions occur within a background of personal and social relations. And they are political because police practices construct a political world that relates citizens to governing practices and executive discretion.

The quantity of information, and some hint at the systemic effects of allowing police searches, are matters the Court considers in *Riley v. California* in applying the search incident to arrest doctrine to smart

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her sympathy for the view that the quantity of surveillance was of Fourth Amendment concern as well. *Jones*, 132 S. Ct. at 954–57 (2012) (Sotomayor, J., concurring).

191 *Jones*, 132 S. Ct. at 956 (Sotomayor, J., concurring).

192 *Id.*

193 The Gambler’s Fallacy occurs when a person mistakenly believes that short-term patterns of random events (like a fair coin toss) alter the underlying randomness of events such that the next iteration after a string of heads is more likely to be tails. The fallacy occurs in thinking that the probabilities of each event have some connection to the prior and subsequent events. See, e.g., Amos Tversky and Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124–31 (Sept. 27, 1974).

phones.<sup>194</sup> Holding that the nature of the smart phone is insufficiently similar to the kinds of physical objects subject to search upon arrest under the Fourth Amendment, the Court acknowledged that both quantitative and qualitative privacy issues are involved.<sup>195</sup> The opinion recognizes that too unlimited a freedom to search bespeaks the founding worry over “general warrants”—an analysis that uses a negative exemplar.<sup>196</sup> In this way, limitations on searches of cell phones are tied to foundational concerns over unchecked government power to engage in general searches. This concern has implications for the proper role of government in our constitutional system. Because a search of a cell phone incident to arrest reveals too many of the “privacies of life,” it reveals too great a quantity of information to grant discretion to individual police officers to conduct a search.<sup>197</sup> The Court reasoned that searches of cell phones are “quite different,”<sup>198</sup> and thus do not require automatic application of existing doctrine to a new technology. The Court went out of its way, however, to explain that exigency exceptions still apply that would enable police to search a phone’s contents in an appropriate circumstance.<sup>199</sup> The opinion considers the privacy implications only after surveying the two principal justifications for the search incident doctrine—officer safety and preserving evidence.<sup>200</sup> It is only because these justifications fail in the case of cell phones that the opinion then turns to the quantitative dimensions of privacy. The quantity of information itself creates a qualitative difference in the meaning and implications of the practice

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194 *Riley v. California*, 134 S. Ct. 2473, 2489 (2014) (discussing the unique nature of modern cell phones due to their immense storage capacity).

195 *Id.* at 2491 (“A [cell] phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is.”).

196 *Id.* at 2494 (“Our cases have recognized that the Fourth Amendment was the founding generation’s response to the reviled ‘general warrants’ and ‘writs of assistance’ of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity. Opposition to such searches was in fact one of the driving forces behind the Revolution itself.”).

197 *Id.* at 2495.

198 *Id.* at 2490 (noting that the quantity of information on a cell phone makes it very different from any other potential personal item seized during an arrest).

199 *Id.* at 2484–85.

200 Linda Greenhouse’s assessment of the opinion’s rationale is that it is highly personal because it recognizes that the Justices might be just as vulnerable as the rest of us to violations of cell phone privacy. See Linda Greenhouse, *The Supreme Court Justices Have Cell Phones Too*, NY TIMES, June 26, 2014, at A27 (“[E]mpathy,’ the ability to put oneself in someone else’s shoes, [is] so often missing from the Supreme Court’s criminal law decisions but perhaps on display here. But on reflection, it’s not really empathy. The justices are walking in their own shoes. The ringing cellphone could be theirs—or ours.”).

federal and state officials sought to regularize. *Riley* is therefore a holistic opinion in that it ties its rationale to the negative exemplar of revolution-causing government abuse, but particularistic in that it gets to such questions only because narrower doctrinal approaches fail to suffice.

A tendency for constitutional law to take a particularistic doctrinal, rather than a holistic, approach to constitutional questions is enabled by the absence of dystopian analysis. The Founders, according to the Court in *Riley*, had reason to fear general warrants. In this way, the *Riley* Court employed a founding-era negative exemplar used in a form of early dystopian analysis. But the Court does not explain why modern Americans might fear government practice having access to the quantity of data available on cell phones. Having in view such broader considerations for ourselves, rather than citing to our forebears' revolutionary concerns, allows consideration of values apart from policing needs for "easily administrable rules." The absence of contemporary negative exemplars yields no further explanation of why the quantity of data is too much—that is, how general warrants might be a feature of present-day form of undesirable governance.

One might think a too generalized arrest power would be as problematic as a general search power, but an emphasis on more particularized doctrine produces a different result. Prioritizing easily administrable rules, for example, in examining whether a custodial arrest of a young mother who committed a minor, non-jailable, offense complied with the Fourth Amendment, the Supreme Court in *Atwater v. City of Lago Vista* looked only to whether the officer had probable cause to believe that an offense had been committed.<sup>201</sup> The Court recognized that "the physical incidents of arrest were merely gratuitous humiliations imposed by a police officer" upon Ms. Atwater.<sup>202</sup> Nonetheless, holistic questions about such discretionary power in the hands of the individual police officer, combined with the violation of dignitary interests of the person arrested, played no part in the Court's analysis.<sup>203</sup> By contrast, the four-Justice dissent in *Atwater* viewed the dignitary harm of being arrested and jailed for "gratui-

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201 *Atwater v. Lago Vista*, 532 U.S. 318, 354 (2001) ("If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.").

202 *Id.* at 346.

203 The Court even acknowledged that the arrest imposed a "pointless indignity" upon the young woman. *Id.* at 347. See Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a "Pointless Indignity,"* 66 STAN. L. REV. 987, 1002 (2014) ("[T]he *Atwater* Court refused even to ask whether an objectively reasonable officer would have acted likewise.").

tous” reasons more than sufficient to undermine the reasonableness, and hence the constitutionality, of the officer’s conduct.<sup>204</sup> In so doing, the dissent took a more holistic perspective, warning that “[t]he per se rule that the Court creates has potentially serious consequences for the everyday lives of Americans.”<sup>205</sup> Moreover, “[s]uch unbounded discretion carries with it grave potential for abuse.”<sup>206</sup> Choice of perspective can be outcome determinative.

Arrests are accompanied by searches, and the systemic implementation of arrest, and searches incident, can have effects that are invisible to particularistic approaches.<sup>207</sup> When DNA testing as a technologically advanced means of identifying individuals became available to police, the Court concluded that “the intrusion of a cheek swab to obtain a DNA sample is a minimal one,”<sup>208</sup> outweighed by “significant state interests in identifying [an arrestee] not only so that the proper name can be attached to his charges but also so that the criminal justice system can make informed decisions concerning pretrial custody.”<sup>209</sup> In deciding in *Maryland v. King* that police searches using DNA testing to identify arrestees in custody are reasonable, the Court added one more implication for the individual subject to arrest.<sup>210</sup> The reasoning is based on the “critical role”<sup>211</sup> DNA identification plays in furthering law enforcement interests in accurate identifications combined with the claimed limited privacy interest invaded. Since arrestees are subject to searches of their person and identification through fingerprints, the Court reasoned in *King* that the added benefit of greater accuracy and quantity of information available through DNA is an “important advance” that outweighs any further incidental intrusion on privacy.<sup>212</sup> Moreover, the Court recognized a tradition of allowing law enforcement to utilize “scientific advancements in their standard procedures.”<sup>213</sup> As a version of “special needs” jurisprudence, and as a doctrinal extension of the loss of privacy experienced through arrest, the Court looks no further than

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204 See *id.* at 362–63 (O’Connor, J., dissenting) (discussing the behavior that the majority found to be “merely gratuitous humiliations imposed by a police officer”).

205 *Id.* at 371.

206 *Id.* at 372.

207 As the *Atwater* dissent observes: “A custodial arrest exacts an obvious toll on an individual’s liberty and privacy, even when the period of custody is relatively brief.” *Id.* at 364.

208 *Maryland v. King*, 133 S. Ct. 1958, 1977 (2013).

209 *Id.* at 1980.

210 *Id.* at 1963.

211 *Id.* at 1963.

212 *Id.* at 1964.

213 *Id.* at 1975.

what it sees as the incidental additional burden DNA swabbing imposes. In adopting this particularistic approach, the majority focuses primarily on the needs of police in isolation from the broader social and political contexts in which such an exercise of government power is situated.<sup>214</sup>

Writing in dissent, by contrast, Justice Antonin Scalia offers a negative exemplar with a new name—"a genetic panopticon."<sup>215</sup> This new form of "panopticon," as Justice Scalia notes, will provide government officials with a database of citizens' DNA to aid in various identifications—for school, travel, solving crimes, and more.<sup>216</sup> For one thing, the majority's attempt to limit its holding to identification of those arrested for "serious offenses" does not relate to the reasons proffered for the government's interest in identification. "[R]eluctant to circumscribe the authority of the police"<sup>217</sup> to engage in such searches, the Court accepted the government's claim to have a special need to ensure proper identification of criminal arrestees. But the Transportation Safety Administration also has an important interest in determining that airline travelers are properly identified, as Justice Scalia observes, so why not allow DNA swabs for air passengers? Moreover, why limit law enforcement to "serious offenses"? As Justice Scalia asserts, "logic will out"<sup>218</sup> with the predictable future consequence that "your DNA can be taken and entered into a national DNA database if you are ever arrested, rightly or wrongly, and for whatever reason."<sup>219</sup> Justice Scalia, as does the *Riley* majority, evokes the similarity to eighteenth century British practices of issuing "general warrants"—practices that motivated revolutionary fervor against the tyranny the Fourth Amendment proscribes.<sup>220</sup>

A panopticon allows officials to exercise state power from a central location that renders visible a targeted population without the source of surveillance itself being open to view. Designed as prison architecture by Jeremy Bentham,<sup>221</sup> the basic power structure can occur in other contexts—including the "genetic panopticon" Justice

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214 *Id.*

215 *Id.* at 1989 (Scalia, J., dissenting).

216 *Id.*

217 *Id.* at 1974.

218 *Id.* at 1989.

219 *Id.*

220 *Id.* at 1980.

221 *See generally* JEREMY BENTHAM, *THE PANOPTICON WRITINGS* (Verso 1995) (1787); *see also* MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 207–08 (Aland Sheridan trans., Vintage Books 2d ed. 1995) (1977).

Scalia identifies.<sup>222</sup> Forms of panoptic state power can be used to regulate the quotidian aspects of everyday life alongside conduct deemed criminal. Exercising such panoptic power is not in itself indicative of a dystopian state, but is perhaps a necessary condition for the possibility of such a state, and power that is not clearly necessary for forms of democratic governance. Without the dystopian analysis a conception of the “genetic panopticon” provides—that is, the idea that panoptic structures can go too far—the majority in *King* lacks an important analytic tool for examining the reasonableness of its doctrinal conclusion that DNA swabs are no different in kind or degree from other information the state obtains from arrestees.

The measure of doctrines employing Fourth Amendment requirements of reasonableness can only be taken through a social imaginary of the practices at stake.<sup>223</sup> We cannot have an adequate understanding of where our decisions are located in political space if we do not occasionally remind ourselves of what it is we seek to avoid, even if we struggle to agree on that to which we aspire. Particularism does not allow us a vantage point from which we can measure the distance we have traveled towards or away from undesirable governing states. Focused only upon the narrow doctrinal question, particularism fails to see the bigger picture of the repeated and systemic practice and the potential effects it will have on democratic governance and constitutional practice.<sup>224</sup> Nor does particularism ring true to a tradition of constitutional discourse originating from the founding period, and enshrined in the Declaration of Independence, of casting Americans’ constitutive legal commitments in opposition to those states of tyranny they seek to avoid. Holistic reasoning through the grammar of consequence avoidance makes salient questions of national identity and commitment often otherwise absent from constitutional discourse.

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222 133 S. Ct. at 1989 (Scalia, J. dissenting).

223 CHARLES TAYLOR, *MODERN SOCIAL IMAGINARIES* 25 (2004) (“[The social imaginary] is in fact that largely unstructured and inarticulate understanding of our whole situation, within which particular features of our world show up for us in the sense that they have.”).

224 As Justice Jackson observed:

Only occasional and more flagrant abuses come to the attention of the courts, and then only those where the search and seizure yields incriminating evidence . . . I am convinced that there are[] many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we never hear.

*Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting). *See also Harris v. United States*, 331 U.S. 145, 173 (1947) (Frankfurter, J., dissenting) (“To sanction conduct such as this case reveals is to encourage police intrusions upon privacy . . . it is important to remember that police conduct is not often subjected to judicial scrutiny.”).

### C. *Dystopian Constitutional Theory*

Holistic analysis of the structure of government set against undesirable exercises of governing power has a long tradition in American constitutionalism. From the founding period the Declaration of Independence warned that “[t]he history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States.”<sup>225</sup> Advocating the structural advantages of federalism, Alexander Hamilton argued that the institutional division of power complements the strength of the people, where they will be “more competent to a struggle with the attempts of the government to establish a tyranny.”<sup>226</sup> Combining structural concerns with a practical political warning about the danger of faction in his Farewell Address, George Washington admonished that, “[t]he disorders and miseries which result gradually incline the minds of men to seek security and repose in the absolute power of an individual.”<sup>227</sup> These considerations from the early Republic bespeak a reliance on a method of dystopian constitutional analysis seeking to avoid states of governance against which early Americans defined themselves.

Despite this tradition we find present both at the Founding and through Supreme Court opinions in the post World War II era, Professors Eric Posner and Adrian Vermeule argue that this tradition constitutes a “tyrannaphobia” that either “produces no benefits . . . or it produces minimal benefits and substantial costs.”<sup>228</sup> Rather than being a source for analytic contrasts and consequence avoidance arguments, they find that a set of “irrational beliefs” and “the emotion of fear” distorts decision making.<sup>229</sup> They define tyrannaphobia, however, more narrowly, covering a subset of dystopian analytic cases that might be said to equate a “legally unconstrained executive with one that is unconstrained *tout court*. The horror of dictatorship that results from this fallacy and that animates liberal legalism is what we call ‘tyrannophobia.’”<sup>230</sup> If what they call “tyrannaphobia” does no analytic and causal work in preventing harmful executive excess, then what checks executive discretion? On their view, demographics provide

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225 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

226 THE FEDERALIST NO. 28, at 180 (Hamilton) (Clinton Rossiter ed., 1961).

227 GEORGE WASHINGTON, FAREWELL ADDRESS (Sept. 19, 1796), *reprinted in* 35 WRITINGS OF WASHINGTON 214, 227 (John C. Fitzpatrick ed., 1940).

228 ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 204 (2010).

229 *Id.* at 179.

230 *Id.* at 176.

the best check. They reason that “[t]he modern economy, whose complexity creates the demand for administrative governance, also creates wealth, leisure, education, and broad political information, all of which strengthen democracy and make a collapse into authoritarian rule nearly impossible.”<sup>231</sup> Tyranny is avoided by political and economic checks, not by law or legal institutions.

Dystopian constitutionalism is about more than avoiding authoritarian dictatorial regimes, but about avoiding states of governance that put us on a path to such rule or to states of affairs that have similar liberty diminution outcomes. Liberal constitutionalists want to avoid other governing forms and practices more indicative of a “police state” that do not constitute arbitrary rule by an individual or small group. In this way, even if the argument about “tyrannaphobia” were correct, it would be far too narrow to count as an objection to dystopian constitutionalism.<sup>232</sup> But second, there is good reason to doubt that demographics alone provide the bulwark against undesirable governing states such as dictatorships. Liberal legal constitutionalism depends upon a set of beliefs, commitments, and attitudes that in part constitute a normative order within which our political practices occur.<sup>233</sup> Without legal principles and reasoning, our political practices would lack the structure necessary for ordering debate and constraining expectations. That the “United States is too wealthy, with a population that is too highly educated, to slide into authoritarianism,”<sup>234</sup> is a factual condition that itself is the product of liberal legal principles and institutions designed to curb arbitrary exercises of authority. Shared commitments to constitutional principles and constraints structure political possibilities. Moreover, shared sensibilities about what constitutes states of governance to be avoided, such as the tyranny of arbitrary rule, are part of the American constitutional reasoning. That the novel *1984*, for example, could serve as

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231 *Id.* at 201.

232 *See* Crocker, *supra* note 125, at 1539–43.

233 *See, e.g.,* Post, *supra* note 35, at 76 (“Constitutional law draws inspiration, strength, and legitimacy from constitutional culture, which endows constitutional law with orientation and purpose.”); *see also* Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323, 1342 (2006) (“[P]opular confidence that the Constitution is the People’s is sustained by understandings and practices that draw citizenry into engagement with questions of constitutional meaning and enable communication between engaged citizens and officials charged with enforcing the Constitution.”); *id.* at 1327 (“[C]onstitutional culture supplies understandings of role and practices of argument through which citizens and officials can propose new ways of enacting the society’s defining commitments—as well as resources to resist those proposals.”).

234 POSNER & VERMEULE, *supra* note 39, at 193.

a common point of reference in oral arguments in *United States v. Jones* illustrates how dystopian analysis helps structure legal and political reasoning.<sup>235</sup> Orwellian discourse provides this structure by informing a social imaginary in which particular political outcomes become infeasible.

No doubt, consequence avoidance arguments rely in part on fear that present decisions will produce, or put us on a path towards, the undesirable governing state. What Judith Shklar calls the “liberalism of fear” requires “the possibility of making the evil of cruelty and fear the basic norm of its political practices and prescriptions.”<sup>236</sup> The liberalism of fear does not aspire to utopian states, but it also does not rely on the contingent historical circumstances of wealth and politics without the backing of constitutional forms and rights limitations. Like the liberalism of fear, dystopian constitutional analysis seeks to avoid those conditions of systemic fear or cruelty that would lead a citizenry to take refuge in the most immediate solutions to necessities irrespective of otherwise operable legal commitments. But fear does not stand alone as a reason to adopt policies one way or another. Rather, fear motivates further justificatory arguments about whether a rule or outcome best coheres with constitutional principles, and in so doing, examines what best avoids a slide towards an undesirable state of governance. When employed in judicial reasoning, far from manifesting phobia, dystopian reasoning plays a role in both checking excess through constitutional principles and in keeping systemic consequences salient for our constitutional analysis.

As we have seen it in operation, dystopian analysis does not require decision makers to agree on ideal states of governance, or upon a unique conception of what the constitution means. In this respect, dystopian constitutionalism is modest and ideologically neutral. It does not tell us what states of governance to avoid. It asks us to keep in mind that only through self-conscious attention to the boundaries of our constitutional principles and practices can we be sure to avoid the slippery slopes that might lead to undesirable institutional practices. To avoid negative consequences, decision makers have to look more holistically beyond the narrow confines of a doctrinal domain to see how a potential rule or rule application fits into broader institutional practices. In so doing, however, the fit need not be one that

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235 Transcript of Oral Argument at 5, *United States v. Jones*, 132 S. Ct. 945 (2012) (No. 10-1259).

236 Shklar, *supra* note 34, at 30.

necessarily coheres with outcomes generated by adhering to grand visions of constitutional theory.<sup>237</sup>

Dystopian constitutionalism is contingently related to the forms of government we happen to fear most at any given time. We do not have to divine what the Founders feared, for fear depends on the development of technology and forms of political life. Totalitarian regimes were unimaginable to the Founders, though other forms of tyranny were.<sup>238</sup> It does not require agreement on ideal states, but something more like an overlapping consensus that particular practices appear too constitutive of the undesirable state of governance for the polity to adopt as their own.<sup>239</sup> Shifts in the analysis of warrantless home entries reflected in the differences between earlier cases like *United States v. Johnson* that warned of a looming police state to those like *Kentucky v. King* that prioritize the needs of law enforcement may be a product of changes in risk assessments and toleration of practices that may have once seemed constitutive of states to be avoided.<sup>240</sup> Although obtaining overlapping consensus on the undesirable states is meant to be easier than doing so for the ideal, it is by no means assured. But the conversation the dystopian analysis invites is one that considers the structural and systemic effects of the rule if adopted. Without this more searching analysis, we cannot make explicit what forms of government the polity finds undesirable and which it might seek to avoid through choice of constitutional rules and principles.

Dystopian constitutionalism provides a common analytic grammar. Consensus on ideal states may prove difficult to obtain, but a tradition of comparative analysis provides a shared set of references. Thus, in oral arguments in *United States v. Jones*, as we have seen, Justices could make reference to *1984*, and even specific aspects of the novel such as the existence of the Ministry of Peace, in shaping their inquiry into the systemic effects of adopting one or another rule in

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237 I borrow the term “grand visions” from the article title by H. Jefferson Powell, *Grand Visions in an Age of Conflict*, 115 YALE L.J. 2067 (2006).

238 See, e.g., THE FEDERALIST NO. 47 (Madison). The Writs of Assistance case focused attention on the abuses of general warrants, the significance of which is reflected in *Boyd v. United States*, 116 U.S. 616, 625 (1886) (“‘Then and there,’ said John Adams, ‘then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.’”).

239 I adopt the idea of an overlapping consensus from JOHN RAWLS, A THEORY OF JUSTICE (1971) and from JOHN RAWLS, POLITICAL LIBERALISM 385–95 (1996).

240 See *supra* notes 158–176 and accompanying text.

the case.<sup>241</sup> No one needed to spell out the plot, or explain the reference because it already had the common grammatical role within constitutional discourse. Dystopian avoidance provides a way of talking about common aversions and aspirations. If there is a tendency in one direction that produces bad outcomes, then to avoid them is to aspire to different, presumptively good outcomes, even if we need further analytic terms to describe these better outcomes.<sup>242</sup> Beyond shared grammar, however, constitutionalism in practice depends upon constitutionalism in theory. And dystopian analysis need not be wedded to any particular theory of constitutional interpretation, even as it does invite decision makers to seek rules that best fit and cohere with an American tradition of describing and avoiding undesirable governing states.<sup>243</sup>

Dystopian constitutionalism is more modest than living constitutionalism.<sup>244</sup> In the sense that the states of government we may fear are subject to change, it has affinities with living constitutionalism. But to the extent that constitutional meanings require more substantive articulations of what, for example, free speech requires, dystopian analysis is only ever part of the interpretive process. It asks us to articulate the positive values that separate our understanding from the undesirable state, but it does not compel any particular content or means of generating that content. Though, like the living constitutionalism advocated by Bruce Ackerman, it does require analysis of the actual constitutive commitments Americans have made through the institutions they have built and the laws they have passed.<sup>245</sup> In this way, our commitments can be manifest against changing circum-

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241 Transcript of Oral Argument at 13, 34, *United States v. Jones*, 132 S. Ct. 945 (2012) (No. 10-1259).

242 In this way, as Mark Graber emphasizes, “[w]hat constitutes good or legitimate constitutional politics depends on the best answers to questions about what citizens hope to accomplish by constitution writing and constitutional government.” MARK A. GRABER, *A NEW INTRODUCTION TO AMERICAN CONSTITUTIONALISM* 3 (2013).

243 In this way, dystopian constitutionalism shares a method with legal empire building of the kind Dworkin envisioned. See generally DWORKIN, *supra* note 180; Ronald Dworkin, *The Moral Reading of the Constitution*, N.Y. REV. OF BOOKS (Mar. 21, 1996), <http://www.nybooks.com/articles/1996/03/21/the-moral-reading-of-the-constitution/> (last visited Jan. 26, 2016).

244 See Ackerman, *The Living Constitution*, *supra* note 30, at 1754 (“The aim of interpretation is to understand the constitutional commitments that have actually been made by the American people in history, not the commitments that one or another philosopher thinks they should have made.”). See also STRAUSS, *supra* note 30, at 33–49 (defending common law constitutionalism as a form of living constitutionalism).

245 Ackerman, *supra* note 30, at 1754.

stances in which new consequences to be avoided become salient while others fade away.

More robust than minimalism, dystopian constitutionalism disavows the necessity of deciding cases in both narrow and shallow ways.<sup>246</sup> A conception of judicial minimalism asks judges to decide cases on narrow grounds and with shallow analysis, leaving much undecided for future cases and legal development.<sup>247</sup> Minimalism may be an appropriate way at times to decide difficult cases, but it is unclear how a decision maker can say *ex ante* that decisions should take a particular scope and form.<sup>248</sup> Dystopian analysis requires consideration of holistic structural questions in the attempt to avoid undesirable consequences, but it is not methodologically committed to the particular substantive form a decision must take. It is, however, committed to a method of reasoning when appropriate. Systemic issues might prove unavailing, but in cases in which consequence avoidance arguments become salient, dystopian constitutionalism requires decision makers to confront them. In this way, dystopian constitutionalism overlaps in appropriate cases with minimalism, but departs in those cases in which a wider frame of analysis compels a wider rule to avoid the effects of a negative exemplar.

If constitutional theorists were to take an original approach to originalism by examining the tradition of dystopian analysis that extends from the founding era, embedded in the texts of the Declaration of Independence and the popular case for adopting the Constitution of 1789 found in *The Federalist*, then dystopian constitutionalism is an original and constitutive feature of constitutional analysis.<sup>249</sup> So in this sense, it is consistent with originalism. But it is both more modest and more robust than originalism as a practice of doctrinal interpretation. It is more modest in that it does not require adherence to such a rigid methodology as discerning what the original meanings might be of, at times, aspirational and

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246 See Sunstein, *supra* note 24, at 48.

247 See SUNSTEIN, *supra* note 28, at 10–11.

248 In this way, judges should provide “reasoned elaboration of how the relevant legal analysis produces the particular outcome,” in a way that fits the needs of case. DANIEL A. FARBER & SUZANNA SHERRY, *JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW* 43 (2009). Sometimes, that reasoned elaboration makes dystopian analysis both relevant and required.

249 See generally H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (challenging the validity of original intent through an examination of cultural traditions in legal interpretation).

open-ended clauses.<sup>250</sup> It is more robust because in relevant cases, it requires decision makers to consider more than original meaning by inquiring about the possible states of governance we presently most seek to avoid. These states, as we have seen, are subject to change as new forms and fears develop. The original grammar of American constitutionalism has this dystopian element, leaving to future generations the task of providing the substantive content for their aversions and their aspirations.

Living and original constitutionalism, as well as theories of judicial minimalism, do not account for the rich array of approaches to constitutional theory. Dystopian constitutionalism is partial constitutional theory. It is partial in that it is incomplete by design. It does not purport to provide a comprehensive theory of constitutional interpretation. It is an analytic supplement that plays an important role in broadening constitutional analysis by considering the systemic and structural effects of the rules courts adopt. But is also partial in that it is biased against forms of governance that lead to systemic deprivation of liberty and undermining of democratic processes—the constitutive elements of an alternative constitutive national identity against which the American polity identifies itself. As method, it is about keeping in mind negative boundaries, and providing a grammar for talking about how to construct rules that steer us away from negative consequences. As substance, it is about affirming a national agreement on core values and commitments that comprise a constitutional identity. And where agreement proves elusive, dystopian constitutionalism reminds us why keeping faith in the constitutional conversation is vital to the future.

#### CONCLUSION

Dystopian constitutionalism can never be the sole approach to constitutional analysis. We the People cannot govern only in the mode of consequence avoidance. But constitutional practice has multiple aspirations and many aversions. At the same time, constitutional analysis would be deficient without some negative exemplars to warn against practices that might lead to unwanted consequences. Unlike utopian constitutionalism, however, a polity need not reach agreement on common conceptions of the good or the ideal of a perfect society. Dystopian constitutionalism requires the easier contrast

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250 See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINCINNATI L. REV. 849, 856–57 (1989) (discussing the complexity involved when attempting to “plumb the original understanding of an ancient text”).

rather than the more difficult aspiration. We may disagree over the good, but find it easier to attain agreement on the bad consequences we wish to avoid. Dystopian constitutionalism uses this asymmetry to make possible holistic thinking about principles and values without presupposing utopian agreement. Disagreement can persist over the best rendering of due process values, for example, or Fourth Amendment reasonableness, for dystopian constitutionalism asks only that we maintain critical awareness of the negative consequences on which we do agree. But this critical awareness has a positive value, supplementing other modes of constitutional argument that focus on doctrine, precedent, history, and purpose. For we may find it difficult to see how a present constitutional question when considered in doctrinal isolation furthers or inhibits broader constitutional values. Dystopian analysis supplements other constitutional arguments to facilitate analysis of the more comprehensive constitutional fidelity and fit we might expect from a proposed decision. We may find it difficult to measure how close we come to realizing the ideals of the “more perfect Union” our Constitution seeks to achieve without keeping in view how distant we remain from the dystopian states we seek to avoid.