MR. JUSTICE BLACK, dissenting.

If I could agree with the Court that eavesdropping carried on by electronic means (equivalent to wiretapping) constitutes a "search" or "seizure," I would be happy to join the Court's opinion For on that premise, my Brother STEWART sets out methods in accord with the Fourth Amendment to guide States in the enactment and enforcement of laws passed to regulate wiretapping by government. In this respect, today's opinion differs sharply from *Berger v. New York*, 388 U. S. 41, decided last Term, which held void on its face a New York statute authorizing wiretapping on warrants issued by magistrates on showings of probable cause. The *Berger* case also set up what appeared to be insuperable obstacles to the valid passage of such wiretapping laws by States. The Court's opinion in this case, however, removes the doubts about state power in this field and abates to a large extent the confusion and near-paralyzing effect of the *Berger* holding. Notwithstanding these good efforts of the Court, I am still unable to agree with its interpretation of the Fourth Amendment.

My basic objection is two-fold: (1) I do not believe that the words of the Amendment will bear the meaning given them by today's decision, and (2) I do not believe that it is the proper role of this Court to rewrite the Amendment in order "to bring it into harmony with the times," and thus reach a result that many people believe to be desirable. Page 389 U. S. 365

While I realize that an argument based on the meaning of words lacks the scope, and no doubt the appeal, of broad policy discussions and philosophical discourses on such nebulous subjects as privacy, for me, the language of the Amendment is the crucial place to look in construing a written document such as our Constitution. The Fourth Amendment says that

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

The first clause protects "persons, houses, papers, and effects against unreasonable searches and seizures. . . ." These words connote the idea of tangible things with size, form, and weight, things capable of being searched, seized, or both. The second clause of the Amendment still further establishes its Framers' purpose to limit its protection to tangible things by providing that no warrants shall issue but those "particularly describing the place to be searched, and the persons or things to be seized." A conversation overheard by eavesdropping, whether by plain snooping or wiretapping, is not tangible and, under the normally accepted meanings of the words, can neither be searched nor seized. In addition the language of the second clause indicates that the Amendment refers not only to something tangible so it can be seized, but to something already in existence, so it can be described. Yet the Court's interpretation would have the Amendment apply to overhearing future conversations, which, by their very nature, are nonexistent until they take place. How can one "describe" a future conversation, and, if one cannot, how can a magistrate issue a warrant to eavesdrop one in the future? It is argued that information showing what Page 389 U. S. 366 is expected to be said is sufficient to limit the boundaries of what later

can be admitted into evidence; but does such general information really meet the specific language of the Amendment, which says "particularly describing"? Rather than using language in a completely artificial way, I must conclude that the Fourth Amendment simply does not apply to eavesdropping.

Tapping telephone wires, of course, was an unknown possibility at the time the Fourth Amendment was adopted. But eavesdropping (and wiretapping is nothing more than eavesdropping by telephone) was, as even the majority opinion in *Berger, supra*, recognized, "an ancient practice which, at common law, was condemned as a nuisance. 4 Blackstone, Commentaries 168. In those days, the eavesdropper listened by naked ear under the eaves of houses or their windows, or beyond their walls seeking out private discourse." 388 U.S. at 388 U. S. 45. There can be no doubt that the Framers were aware of this practice, and, if they had desired to outlaw or restrict the use of evidence obtained by eavesdropping, I believe that they would have used the appropriate language to do so in the Fourth Amendment. They certainly would not have left such a task to the ingenuity of language-stretching judges. No one, it seems to me, can read the debates on the Bill of Rights without reaching the conclusion that its Framers and critics well knew the meaning of the words they used, what they would be understood to mean by others, their scope and their limitations. Under these circumstances, it strikes me as a charge against their scholarship, their common sense and their candor to give to the Fourth Amendment's language the eavesdropping meaning the Court imputes to it today.

I do not deny that common sense requires, and that this Court often has said, that the Bill of Rights' safeguards should be given a liberal construction. This Page 389 U. S. 367 principle, however, does not justify construing the search and seizure amendment as applying to eavesdropping or the "seizure" of conversations. The Fourth Amendment was aimed directly at the abhorred practice of breaking in, ransacking and searching homes and other buildings and seizing people's personal belongings without warrants issued by magistrates. The Amendment deserves, and this Court has given it, a liberal construction in order to protect against warrantless searches of buildings and seizures of tangible personal effects. But, until today, this Court has refused to say that eavesdropping comes within the ambit of Fourth Amendment restrictions. *See, e.g., Olmstead v. United States,* 277 U. S. 438 (1928), and *Goldman v. United States,* 316 U. S. 129 (1942).

So far, I have attempted to state why I think the words of the Fourth Amendment prevent its application to eavesdropping. It is important now to show that this has been the traditional view of the Amendment's scope since its adoption, and that the Court's decision in this case, along with its amorphous holding in *Berger* last Term, marks the first real departure from that view.

The first case to reach this Court which actually involved a clear-cut test of the Fourth Amendment's applicability to eavesdropping through a wiretap was, of course, *Olmstead, supra.* In holding that the interception of private telephone conversations by means of wiretapping was not a violation of the Fourth Amendment, this Court, speaking through Mr. Chief Justice Taft, examined the language of the Amendment and found, just as I do now, that the words could not be stretched to encompass overheard conversations:

"The Amendment itself shows that the search is to be of material things -- the person, the house, his papers or his effects. The description of the warrant necessary to make the proceeding lawful, is Page 389 U. S. 368 that it must specify the place to be searched and the person or things to be seized. . . ."

"* * * *"

"Justice Bradley in the *Boyd* case [*Boyd v. United States*, 116 U. S. 616], and Justice Clark[e] in the *Gouled* case [*Gouled v. United States*, 255 U. S. 298], said that the Fifth Amendment and the Fourth Amendment were to be liberally construed to effect the purpose of the framers of the Constitution in the interest of liberty. But that cannot justify enlargement of the language employed beyond the possible practical meaning of houses, persons, papers, and effects, or so to apply the words search and seizure as to forbid hearing or sight." 277 U.S. at 277 U. S. 464-465.

Goldman v. United States, 316 U. S. 129, is an even clearer example of this Court's traditional refusal to consider eavesdropping as being covered by the Fourth Amendment. There, federal agents used a detectaphone, which was placed on the wall of an adjoining room, to listen to the conversation of a defendant carried on in his private office and intended to be confined within the four walls of the room. This Court, referring to *Olmstead,* found no Fourth Amendment violation.

It should be noted that the Court in *Olmstead* based its decision squarely on the fact that wiretapping or eavesdropping does not violate the Fourth Amendment. As shown *supra* in the cited quotation from the case, the Court went to great pains to examine the actual language of the Amendment, and found that the words used simply could not be stretched to cover eavesdropping. That there was no trespass was not the determinative factor, and indeed the Court, in citing *Hester v. United States*, 265 U. S. 57, indicated that, even where there was a trespass, the Fourth Amendment does not automatically apply to evidence obtained by "hearing or Page 389 U. S. 369 sight." The *Olmstead* majority characterized *Hester* as holding "that the testimony of two officers of the law who trespassed on the defendant's land, concealed themselves one hundred yards away from his house, and saw him come out and hand a bottle of whiskey to another, was not inadmissible. While there was a trespass, there was no search of person, house, papers or effects."

277 U.S. at 277 U. S. 465. Thus, the clear holding of the *Olmstead* and *Goldman* cases, undiluted by any question of trespass, is that eavesdropping, in both its original and modern forms, is not violative of the Fourth Amendment.

While my reading of the *Olmstead* and *Goldman* cases convinces me that they were decided on the basis of the inapplicability of the wording of the Fourth Amendment to eavesdropping, and not on any trespass basis, this is not to say that unauthorized intrusion has not played an important role in search and seizure cases. This Court has adopted an exclusionary rule to bar evidence obtained by means of such intrusions. As I made clear in my dissenting opinion in *Berger v. New York*, 388 U. S. 41, 388 U. S. 76, I continue to believe that this exclusionary rule formulated in *Weeks v. United States*,232 U. S. 383, rests on the "supervisory power" of this Court over other federal courts and is not rooted in the Fourth Amendment. *See Wolf v.*

Colorado, concurring opinion, 338 U. S. 338 U.S. 25, 338 U. S. 39, at 40. *See also Mapp v. Ohio*,concurring opinion, 367 U. S. 367 U.S. 643, 367 U. S. 661-666. This rule has caused the Court to refuse to accept evidence where there has been such an intrusion regardless of whether there has been a search or seizure in violation of the Fourth Amendment. As this Court said in *Lopez v. United States*, 373 U. S. 427, 373 U. S. 438-439

"The Court has in the past sustained instances of 'electronic eavesdropping' against constitutional challenge when devices have been used to enable government agents to overhear conversations which would have been beyond the reach of the human ear [citing Page 389 U. S. 370 *Olmstead* and *Goldman*]. It has been insisted only that the electronic device not be planted by an unlawful physical invasion of a constitutionally protected area. *Silverman v. United States.*"

To support its new interpretation of the Fourth Amendment, which, in effect, amounts to a rewriting of the language, the Court's opinion concludes that "the underpinnings of *Olmstead* and *Goldman* have been . . . eroded by our subsequent decisions. . . ." But the only cases cited as accomplishing this "eroding" are *Silverman v. United States*, 365 U. S. 505, and *Warden v. Hayden*, 387 U. S. 294. Neither of these cases "eroded" *Olmstead* or *Goldman. Silverman* is an interesting choice, since there the Court expressly refused to reexamine the rationale of *Olmstead* or *Goldman* although such a reexamination was strenuously urged upon the Court by the petitioners' counsel. Also, it is significant that, in *Silverman*, as the Court described it, "the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by the petitioners," 365 U.S. at 365 U. S. 509, thus calling into play the supervisory exclusionary rule of evidence. As I have pointed out above, where there is an unauthorized intrusion, this Court has rejected admission of evidence obtained regardless of whether there has been an unconstitutional search and seizure. The majority's decision here relies heavily on the statement in the opinion that the Court "need not pause to consider whether or not there was a technical trespass under the local property law relating to party walls." (At 365 U. S. 511.) Yet this statement should not becloud the fact that, time and again, the opinion emphasizes that there has been an unauthorized intrusion:

"For a fair reading of the record in this case shows that the eavesdropping was accomplished by means of an *unauthorized physical penetration* into the premises occupied by the petitioners."

(At 365 U. S. 509, emphasis added.) "Eavesdropping Page 389 U. S. 371 accomplished by means of such a *physical intrusion* is beyond the pale of even those decisions. . . ." (At 365 U. S. 509, emphasis added.) "Here . . . the officers overheard the petitioners' conversations only by *usurping* part of the petitioners' house or office. . . ." (At 365 U. S. 511, emphasis added.) "[D]ecision here . . . is based upon the reality of an *actual intrusion.* . . ." (At 365 U. S. 512, emphasis added.) "We find no occasion to reexamine *Goldman* here, but we decline to go beyond it, *by even a fraction of an inch.*" (At 365 U. S. 512, emphasis added.) As if this were not enough, Justices Clark and Whittaker concurred with the following statement:

"In view of the determination by the majority that the *unauthorized physical penetration* into petitioners' premises constituted sufficient trespass to remove this case from the coverage of earlier decisions, we feel obliged to join in the Court's opinion."

(At 365 U. S. 513, emphasis added.) As I made clear in my dissent in *Berger*, the Court in *Silverman* held the evidence should be excluded by virtue of the exclusionary rule, and "I would not have agreed with the Court's opinion in Silverman . . . had I thought that the result depended on finding a violation of the Fourth Amendment. . . ." 388 U.S. at 388 U. S. 79-80. In light of this and the fact that the Court expressly refused to reexamine *Olmstead* and *Goldman*, I cannot read *Silverman*as overturning the interpretation stated very plainly in *Olmstead* and followed in *Goldman* that eavesdropping is not covered by the Fourth Amendment.

The other "eroding" case cited in the Court's opinion is *Warden v. Hayden*, 387 U. S. 294. It appears that this case is cited for the proposition that the Fourth Amendment applies to "intangibles," such as conversation, and the following ambiguous statement is quoted from the opinion: "The premise that property interests control the right of the Government to search and seize has been discredited." 387 U.S. at 387 U. S. 304. But far from being concerned Page 389 U. S. 372 with eavesdropping, *Warden v. Hayden* upholds the seizure of clothes, certainly tangibles by any definition. The discussion of property interests was involved only with the common law rule that the right to seize property depended upon proof of a superior property interest.

Thus, I think that, although the Court attempts to convey the impression that, for some reason, today *Olmstead* and *Goldman* are no longer good law, it must face up to the fact that these cases have never been overruled, or even "eroded." It is the Court's opinions in this case and *Berger* which, for the first time since 1791, when the Fourth Amendment was adopted, have declared that eavesdropping is subject to Fourth Amendment restrictions and that conversations can be "seized."* I must align myself with all those judges who up to this year have never been able to impute such a meaning to the words of the Amendment. Page 389 U. S. 373

Since I see no way in which the words of the Fourth Amendment can be construed to apply to eavesdropping, that closes the matter for me. In interpreting the Bill of Rights, I willingly go as far as a liberal construction of the language takes me, but I simply cannot in good conscience give a meaning to words which they have never before been thought to have and which they certainly do not have in common ordinary usage. I will not distort the words of the Amendment in order to "keep the Constitution up to date" or "to bring it into harmony with the times." It was never meant that this Court have such power, which, in effect, would make us a continuously functioning constitutional convention.

With this decision the Court has completed, I hope, its rewriting of the Fourth Amendment, which started only recently when the Court began referring incessantly to the Fourth Amendment not so much as a law against *unreasonable*searches and seizures as one to protect an individual's privacy. By clever word juggling, the Court finds it plausible to argue that language aimed specifically at searches and seizures of things that can be searched and seized may, to protect privacy, be applied to eavesdropped evidence of conversations that can neither be searched nor seized. Few things happen to an individual that do not affect his privacy in one way or another. Thus, by arbitrarily substituting the Court's language, designed to protect privacy, for the Constitution's language, designed to protect against unreasonable searches and seizures, the Court has made the Fourth Amendment its vehicle for holding all laws violative of the

Constitution which offend the Court's broadest concept of privacy. As I said in *Griswold v. Connecticut,* 381 U. S. 479,

"The Court talks about a constitutional 'right of privacy' as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the 'privacy' Page 389 U. S. 374 of individuals. But there is not."

(Dissenting opinion, at 381 U. S. 508.) I made clear in that dissent my fear of the dangers involved when this Court uses the "broad, abstract and ambiguous concept" of "privacy" as a "comprehensive substitute for the Fourth Amendment's guarantee against *unreasonable searches and seizures.'" (See generally dissenting opinion at 381 U. S. 507-527.)*

The Fourth Amendment protects privacy only to the extent that it prohibits unreasonable searches and seizures of "persons, houses, papers, and effects." No general right is created by the Amendment so as to give this Court the unlimited power to hold unconstitutional everything which affects privacy. Certainly the Framers, well acquainted as they were with the excesses of governmental power, did not intend to grant this Court such omnipotent lawmaking authority as that. The history of governments proves that it is dangerous to freedom to repose such powers in courts.

For these reasons, I respectfully dissent.

* The first paragraph of my Brother HARLAN's concurring opinion is susceptible of the interpretation, although probably not intended, that this Court "has long held" eavesdropping to be a violation of the Fourth Amendment and therefore "presumptively unreasonable in the absence of a search warrant." There is no reference to any long line of cases, but simply a citation to *Silverman,* and several cases following it, to establish this historical proposition. In the first place, as I have indicated in this opinion, I do not read *Silverman* as holding any such thing, and, in the second place, *Silverman* was decided in 1961. Thus, whatever it held, it cannot be said it "has [been] long held." I think my Brother HARLAN recognizes this later in his opinion when he admits that the Court must now overrule *Olmstead* and *Goldman.* In having to overrule these cases in order to establish the holding the Court adopts today, it becomes clear that the Court is promulgating new doctrine instead of merely following what it "has long held." This is emphasized by my Brother HARLAN's claim that it is "bad physics" to adhere to *Goldman.* Such an assertion simply illustrates the propensity of some members of the Court to rely on their limited understanding of modern scientific subjects in order to fit the Constitution to the times and give its language a meaning that it will not tolerate.