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## On the Broadness of the Fourth Amendment

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# ON THE BROADNESS OF THE FOURTH AMENDMENT

*Janine Young Kim\**

## ABSTRACT

*This Article considers the role of property rights in defining Fourth Amendment searches. Since United States v. Jones in 2012, the Supreme Court has relied on both privacy and property to determine whether a Fourth Amendment search has occurred. But recently, many of the Justices have expressed increasing skepticism about not only the effectiveness but also the appropriateness of safeguarding privacy. The 2018 case of Carpenter v. United States, which ruled that an individual's cell site location information is protected under the Fourth Amendment, saw all four dissenters urging a larger role for property rights in the analysis of a search. Although they disagreed on exactly how much larger that role ought to be—from Justice Kennedy's argument that property controls the existence of privacy to Justice Thomas's property-only stance—the dissenters, together with the majority, seemed to assume that property rights were the central concern under the Fourth Amendment until 1967, when Katz v. United States was decided. This Article questions that assumption by first looking to the history leading up to the Amendment and the text of the Amendment itself, and then examining the Supreme Court's search cases up to and including Katz. This detailed study of the development of the Fourth Amendment demonstrates that, in fact, property was never the primary, let alone the only, concern. From the beginning of the English protests against government searches in the sixteenth century to the Supreme Court's twentieth-century cases, the Fourth Amendment was understood to safeguard multiple values, such as property, privacy, and freedom of thought and speech, among others. Accordingly, this Article argues that narrowing the search analysis to focus on property would actually constitute a departure from the past and a diminishment of what has long been conceived to be a broad personal right.*

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## I. INTRODUCTION

**D**ISSATISFACTION with the current state of Fourth Amendment search rules is widespread, not only among commentators but also within the ranks of those who fashioned them: the U.S. Supreme Court Justices. While compelling dissents have long been written about the way the test in *Katz v. United States*<sup>1</sup> is applied, it was not until *United States v. Jones* in 2012 that the Justices unanimously agreed it was time to find another path to secure the rights promised by the Fourth Amendment.<sup>2</sup> In *Jones*, Justice Scalia, together with Justice Sotomayor, appeared to resurrect an older trespass-to-property rule to supplement *Katz*'s privacy test. By holding that the government's act of attaching a GPS device to the defendant's car was a trespass to chattel that constituted a search—irrespective of any privacy concerns the act raised—the Court required such investigatory action to be constitutionally reasonable.<sup>3</sup> Justice Alito, on the other hand, rejected the trespass rule and argued that the two-pronged privacy test in *Katz* had supplanted it.<sup>4</sup> Nonetheless, he ultimately agreed that *Katz* was insufficient to protect privacy rights in this day and age and urged Congress to take steps to preserve the Fourth Amendment's guarantee of personal security against government intrusions.<sup>5</sup>

The Court's willingness in *Jones* to rethink the definition of a search

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1. 389 U.S. 347 (1967). The test determines that a search has occurred where the defendant can show (1) a subjective expectation of privacy that is (2) objectively reasonable. *Id.* at 361 (Harlan, J., concurring).

2. See *United States v. Jones*, 565 U.S. 400 (2012).

3. *Id.* at 404, 413. Although the approach in *Jones* focused on government trespass, it should be noted that to constitute a Fourth Amendment search, Justice Scalia contemplated not only the bare trespass but also a specific intent by the government to obtain information thereby. See *id.* at 404. It is difficult to know what he would have made of government trespasses for other purposes, such as to intimidate or harass. See William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1830 (2016) (observing that government actions motivated by the latter aims are not difficult to imagine).

4. *Jones*, 565 U.S. at 422 (Alito, J., concurring in the judgment).

5. *Id.* at 427–30.

has led to several scholarly recommendations.<sup>6</sup> Laurent Sacharoff, for example, defended Justice Scalia's move toward trespass.<sup>7</sup> According to Sacharoff, general, rather than local, rules of trespass (such as those reflected in treatises or the Restatement) should constitute the minimum protection provided by the Fourth Amendment, while a privacy test can be used to expand the Fourth Amendment's protections even further.<sup>8</sup> Thus, Sacharoff advocates for the continued development of both property and privacy rules.

Others have argued for a more dramatic overhaul. Professors Baude and Stern suggested that a Fourth Amendment search occurs whenever the police do something that ordinary citizens are not legally allowed to do.<sup>9</sup> For Baude and Stern, this not only encompasses illegal trespasses against property and intrusions into a person's privacy but also includes any other violations of positive law that the police may commit to obtain information. Indeed, since positive laws are numerous and wide-ranging across all jurisdictions, the positive law approach to the Fourth Amendment could protect not only property and privacy but also other values such as "freedom from harassment; dignity, as in the case of a strip search; protection of economic investments and of incentives to cultivate resources; political freedom; and emotional attachment to the things that one owns."<sup>10</sup>

More significantly, since *Jones*, Supreme Court Justices have also made various proposals for the future direction of the Fourth Amendment. In the 2018 case *Byrd v. United States*, Justice Thomas openly called for the rejection of the *Katz* privacy test, arguing for Fourth Amendment search rules based on property law instead.<sup>11</sup> Justice Thomas may have taken his

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6. To be sure, even before *Jones*, commentators dissatisfied with the *Katz* privacy regime had proffered alternative approaches to the Fourth Amendment, including some who urged a return to a property-based understanding. See, e.g., Christian M. Halliburton, *How Privacy Killed Katz: A Tale of Cognitive Freedom and the Property of Personhood as Fourth Amendment Norm*, 42 AKRON L. REV. 803, 812–13 (2009) (arguing that taking a property-based approach to the Fourth Amendment could safeguard a variety of meaningful interests related to one's personhood); Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 620–21 (1996) (advocating for a formalist approach to the Fourth Amendment with special regard accorded to papers).

7. See Laurent Sacharoff, *Constitutional Trespass*, 81 TENN. L. REV. 877, 878–80 (2014). I say "defend" because, as Sacharoff notes, the Court appeared to walk back its trespass test in *Florida v. Jardines*, 569 U.S. 1 (2013), where the majority avoided the term "trespass" in favor of "physical intrusion." *Id.* According to Baude and Stern, Justice Scalia's *Jones* opinion did not actually espouse a trespass test but merely scrutinized "trespass-like acts" by the government. Baude & Stern, *supra* note 3, at 1834. They also describe *Jardines* as a "property-ish case." *Id.*

8. Sacharoff, *supra* note 7, at 898–900. In this way, trespass concepts would act as the "constitutional floor" for Fourth Amendment protections against potentially unreasonable government searches. *Id.* at 889; see also *Jardines*, 569 U.S. at 11 (applying a "property-rights baseline").

9. Baude & Stern, *supra* note 3, at 1831. For these authors, the Fourth Amendment was centrally concerned with government's abuse of power. *Id.* at 1828.

10. *Id.* at 1857–58 (footnotes omitted).

11. *Byrd v. United States*, 138 S. Ct. 1518, 1531 (2018) (Thomas, J., concurring) (expressing "serious doubts" about the *Katz* test). Although Justice Thomas's concurrence

cue from Justice Scalia's *Jones* opinion, where the late Justice asserted that the Court had followed an "exclusively property-based approach" prior to *Katz*.<sup>12</sup> One month after *Byrd*, in *Carpenter v. United States*, Justice Thomas elaborated on his view that the Fourth Amendment was intended to protect property interests rather than privacy.<sup>13</sup> Moreover, Justice Thomas's emphasis on property over privacy was favored by Justices Kennedy,<sup>14</sup> Alito,<sup>15</sup> and Gorsuch<sup>16</sup>—though in differing ways. Thus, while the *Carpenter* majority continued to apply *Katz*, the strong and fundamentally unified dissents signaled that major changes may be coming in the near future.

There is little doubt that any such change will involve a greater role for property law in Fourth Amendment search analysis. But how much, and why, property law should affect this analysis remains an open question. This Article argues against an exclusively property-based approach because it is contrary to both the text and the substance of the Fourth Amendment. While it cannot be gainsaid that infringement of property rights contributed to the antipathy toward unchecked government searches, there were many other concerns that also animated the desire for the restrictions set forth in the Fourth Amendment. Moreover, far from being the sole rationale, a close reading of Fourth Amendment history and jurisprudence reveals that property did not have primary status among the range of interests at stake in regulating government searches. Thus, the belief that only property protection underlies the Fourth Amendment is false.<sup>17</sup>

Part II of this Article begins with a brief description of the property-based arguments raised in *Carpenter*. The purpose of this Part is not to offer a full analysis of *Carpenter*, but rather to identify the Justices' various conceptions of the role of property law in defining Fourth Amendment searches. The five *Carpenter* opinions indicate some of the possible directions that the Court may go in future cases as it continues to rethink

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was short and vague, his approach, joined by Justice Gorsuch, raised concerns among some commentators that the end of *Katz* is near. See, e.g., Jay Michaelson, *Justices Thomas and Gorsuch Just Hinted They Would End Privacy as We Know It*, DAILY BEAST (May 15, 2018, 10:42 AM), <https://www.thedailybeast.com/justices-thomas-and-gorsuch-just-hinted-they-would-end-privacy-as-we-know-it?yptr=yahoo> [<https://perma.cc/X8QR-FVAQ>].

12. *United States v. Jones*, 565 U.S. 400, 405 (2012). Justice Scalia wrote something similar, though milder, in *Kyllo v. United States*, where he observed that common law trespass was merely "tied" to the Fourth Amendment. 533 U.S. 27, 31 (2001).

13. *Carpenter v. United States*, 138 S. Ct. 2206, 2239 (2018) (Thomas, J., dissenting).

14. *Id.* at 2227–35 (Kennedy, J., dissenting).

15. *Id.* at 2257–60 (Alito, J., dissenting).

16. *Id.* at 2267–72 (Gorsuch, J., dissenting).

17. It may well be that the protection of property is at the heart of Fourth Amendment seizures of things, but this Article focuses on searches rather than seizures. This Article is also mainly interested in examining the values behind the restrictions on searches rather than the legal tests that have been used to determine when searches occur. As to the more specific question of a trespass test for searches, Orin Kerr has shown that *Jones* "purports to revive a test that did not actually exist." Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 68.

the *Katz* regime. These possibilities will then be tested against the textual and historical discussion in the remainder of the Article.

Part III will focus on searches and seizures in England and in the American colonies leading up to the adoption of the Fourth Amendment in 1791. While numerous sources were consulted for this Part, a great deal of the history presented here relies on William Cuddihy's detailed and comprehensive analysis of searches and seizures from the seventh to the eighteenth centuries.<sup>18</sup> Cuddihy's work shows, unsurprisingly, that this history is winding and complex, never achieving consensus or a single focus. Instead, multiple and sometimes contradictory interests were pursued along the path to establishing the Fourth Amendment. While property rights were undoubtedly important, there is little evidence that they were the only, or even the chief, concern as the colonists began to formulate constraints on government searches and seizures. Accordingly, this Part concludes that neither a property-only nor a property-first regime is urged by the text and history of the Fourth Amendment.

Next, Part IV turns to early Supreme Court interpretations of the Fourth Amendment to determine whether that jurisprudence establishes a strong precedent for a property-focused approach. As mentioned above, there are those, like Justice Scalia, who believe that *Katz* broke new ground by emphasizing privacy over property with its reasonable expectations test.<sup>19</sup> Suggesting that *Katz* took a (wrong) turn away from a long-established property regime, they have argued that returning to property would restore and reinvigorate the Fourth Amendment. This Part attempts to verify that claim by examining the Supreme Court's Fourth Amendment search cases from adoption through the early twentieth century. This study indicates that in this early period, the Supreme Court embraced a broad understanding of the Fourth Amendment and especially emphasized the value of individual privacy.

Part V picks up where Part IV leaves off and examines the more modern twentieth-century search cases that led up to *Katz*. During this period, the Court began to delve more deeply into the meaning of the Fourth Amendment as it confronted increased policing and expanded the Amendment's application beyond the federal government to the states. The middle part of the twentieth century was also when the Court de-

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18. See WILLIAM J. CUDDIHY, *THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING* 602–1791 (2009).

19. See, e.g., *Carpenter*, 138 S. Ct. at 2236 (Thomas, J., dissenting) (“The *Katz* test has no basis in the text or history of the Fourth Amendment.”); Trevor Burrus & James Knight, *Katz Nipped and Katz Cradled: Carpenter and the Evolving Fourth Amendment*, 2018 CATO SUP. CT. REV. 79, 81 (“In *Katz*, the Court rejected the textual, property-based approach to the Fourth Amendment that had been followed until that point and substituted an inquiry into whether the challenged government action violated an individual’s ‘reasonable expectation of privacy.’” (quoting *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring))); Laura K. Donohue, *Functional Equivalence and Residual Rights Post-Carpenter: Framing a Test Consistent with Precedent and Original Meaning*, 2018 SUP. CT. REV. 347, 348 (“For decades, the Court adopted a property-based approach, tying the doctrine to common-law trespass.”). *But see* Kerr, *supra* note 17, at 68 (reversing his earlier position that pre-*Katz* search cases turned on trespass).

cided cases such as *Olmstead v. United States*, *Goldman v. United States*, and *Silverman v. United States*, which many point to as evidence of the Court's property-only approach. As this Part reveals, however, the full range of the Court's Fourth Amendment jurisprudence during this time belies that claim. In fact, the Court continued to take disparate interests into account throughout the greater part of the twentieth century, explicitly bringing property, privacy, and freedom of expression under the protection of the Fourth Amendment. Among these protections, privacy, more than the others, remained the predominant theme in the Court's cases. Privacy's ascendance in the *Katz* case was therefore not the deviation that some make it out to be.

This Article concludes with observations about the implications of the Fourth Amendment's history. To summarize, there is support in the language, history, and jurisprudence of the Fourth Amendment to consider property law concepts in defining a search. However, a property-only or property-first understanding of searches is simply not justified from these sources. Other prominent values historically protected by the Fourth Amendment's restriction on government searches include privacy and freedom of thought and speech. Accordingly, constraining government searches to protect only, or primarily, property would set us on a new course rather than returning us to an original or past understanding of the Fourth Amendment.

## II. PROPERTY AND THE FOURTH AMENDMENT IN *CARPENTER*

The much-anticipated *Carpenter* case did not disappoint. To those commentators arguing that the Court's "third-party doctrine" deeply undermined individual privacy, *Carpenter* established what may prove to be a significant limitation on that doctrine as it applies to modern information-gathering technologies.<sup>20</sup> On the other hand, critics of the *Katz* privacy regime could take heart that a growing number of Justices appeared willing to abandon privacy in favor of property rules to determine the scope of Fourth Amendment rights.<sup>21</sup>

*Carpenter* involved an investigation in which the government sought the defendant's cell site location information (CSLI) records to discover his whereabouts at the time that a series of robberies took place.<sup>22</sup> In order to obtain those records from the cell service provider, investigators successfully applied for a court order pursuant to the Stored Communica-

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20. See, e.g., Burrus & Knight, *supra* note 19, at 86–89 (stating that the *Carpenter* majority "carved out a special 'cell phone exception'"); Paul Ohm, *The Many Revolutions of Carpenter*, 32 HARV. J.L. & TECH. 357, 358 (2019) (observing that the third-party doctrine was "significantly narrow[ed]").

21. See Burrus & Knight, *supra* note 19, at 110–11 (arguing that Justice Gorsuch's property and positive law approach in *Carpenter* will prove lastingly significant); see also Donohue, *supra* note 19, at 388–400 (explaining how CSLI can be protected through a property lens).

22. *Carpenter*, 138 S. Ct. at 2212.

tions Act, which allowed an order to be issued upon “reasonable grounds,” a standard that falls short of the probable cause required for a warrant under the Fourth Amendment.<sup>23</sup> Carpenter argued that the government conducted a search when they accessed the records and that the lack of a valid warrant backed by probable cause meant that the search violated his rights.<sup>24</sup>

Chief Justice Roberts wrote the majority opinion in Carpenter’s favor. In doing so, he hewed closely to the precedent set by *Jones*, acknowledging that property law played an important role in the history of the Fourth Amendment while at the same time urging the significance of privacy in the modern jurisprudence of searches.<sup>25</sup> Ultimately, however, the Chief Justice relied on only privacy to conclude that the government searched Carpenter.<sup>26</sup> Applying *Katz*, he found that Carpenter maintained a “legitimate privacy interest” in the location data collected by his phone service provider.<sup>27</sup> With this reasoning, a majority of the Court affirmed Justice Scalia’s assertion in *Jones* that, at least since the *Katz* case, either privacy or property could serve as the basis for defining a Fourth Amendment search.<sup>28</sup>

Justice Kennedy’s dissent offered a different perspective on the relationship between privacy and property. His immediate disagreement with the majority was based on the third-party doctrine, which he argued gave no Fourth Amendment protection to business records held by a third party, even if those records were “personal and sensitive” to the defendant.<sup>29</sup> Although the third-party doctrine is arguably a privacy-based rule—i.e., the information one shares with a third party is no longer private and thus cannot trigger a search<sup>30</sup>—Justice Kennedy located the rationale behind the third-party doctrine in property law.<sup>31</sup> The problem for

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23. *See id.*

24. *Id.*

25. *Id.* at 2213–14.

26. *Id.* at 2222. As explained below in the analysis of the dissenting opinions, the Justices apparently thought that Carpenter had a weak property claim over the CSLI records.

27. *Id.* As previously mentioned, this is not meant to be a full analysis of *Carpenter* but a summary of the various positions the Justices took on property and Fourth Amendment searches. The majority opinion in fact delved deeply into privacy concepts and other principles touching upon the relationship between individuals and the government that are beyond the focus of this Article.

28. *See United States v. Jones*, 565 U.S. 400, 406–07 (2012). It should be noted that Justice Scalia’s assertion in *Jones* about the continued vitality of a property analysis after *Katz* came as a surprise to commentators as well as several other Justices on the Court. *See id.* at 421–23 (Alito, J., concurring) (joined by Justices Ginsburg, Breyer, and Kagan); Erin Murphy, *Back to the Future: The Curious Case of United States v. Jones*, 10 OHIO ST. J. CRIM. L. 325, 327 (2012) (noting that most criminal procedure scholars “had long assumed property law [was] a non-starter”).

29. *Carpenter*, 138 S. Ct. at 2223 (Kennedy, J., dissenting).

30. *Id.* at 2262 (Gorsuch, J., dissenting) (observing that *Smith v. Maryland*, 442 U.S. 735 (1979), and *United States v. Miller*, 452 U.S. 435 (1976), held that no reasonable expectation of privacy can be found where an individual shared the evidence at issue with a third party).

31. *Id.* at 2226–30 (Kennedy, J., dissenting). Justice Kennedy cited to the Court’s statement in *United States v. Miller* that the defendant neither owned nor possessed the bank records at issue in that case. *See* 425 U.S. at 440. However, the Court at the time was



Carpenter was not that he had shared his location information with his phone service provider, but rather that the *records* of such information did not belong to him.<sup>32</sup> This situation, Justice Kennedy argued, was unlike *Katz*, where the defendant who sought to exclude the words he spoke in a public phone booth had a legitimate property interest, albeit a temporary one, in the booth.<sup>33</sup> This was a striking reinterpretation of the *Katz* decision, which had long been viewed as a rejection of a property-based analysis of a search.<sup>34</sup> In affirming *Katz* in this somewhat revisionist way, Justice Kennedy posited an enduring coexistence between privacy and property in the Court's Fourth Amendment search jurisprudence.<sup>35</sup> But unlike the Chief Justice, who also endorsed both privacy and property, Justice Kennedy appeared to subsume privacy within property and criticized the Chief Justice for departing "from the property-based concepts that have long grounded the analytic framework that pertains in these cases."<sup>36</sup> It appeared that, to Justice Kennedy, an analytic framework built purely on privacy was too abstract and elusive, lacking the grounding provided by property law.<sup>37</sup>

Justice Alito joined Justice Kennedy's dissent but wrote a separate opinion pursuing two distinct points. The first focused on the idea that a government search using a court order was different from an "actual

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mainly distinguishing the facts of *Miller* from those of *Boyd*, which the court of appeals relied upon to find in favor of the defendant. *Id.* The Court was observing that unlike the papers in *Boyd*, the bank records were not Miller's "private papers" because the bank was a party to the financial transactions. *Id.* at 440–41. Thus, one could say that the subpoena was for the bank's papers, not those of Miller. As to Miller's claim that he nonetheless had an expectation of privacy in the bank's papers, the Court concluded that he relinquished his privacy by knowingly exposing his transactions to the bank and its employees. *Id.* at 442–43. Property had an even lesser role in *Smith v. Maryland* where the police warrantlessly installed a pen register device at the phone company to record the numbers that Smith dialed from his home phone. 442 U.S. at 737. The Court did note in passing that none of Smith's property was affected under the facts. *Id.* at 741. But the Court's focus was squarely on privacy—both the fact that private conversations could not be taken by the pen register and that the dialed numbers were knowingly exposed to the phone company. *Id.* at 741–44.

32. *Carpenter*, 138 S. Ct. at 2223–24 (Kennedy, J., dissenting) (stating that the CSLI records here are "possessed, owned, and controlled by a third party").

33. *See id.* at 2227–28.

34. *See* Murphy, *supra* note 28, at 326–27; Kerr, *supra* note 17, at 86 (arguing that *Katz* itself invented the myth of a trespass test). Specifically, the majority in *Katz* wrote, "One who occupies [a public phone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world." *Katz v. United States*, 389 U.S. 347, 352 (1967). While this wording does refer to the physical occupation and enclosure of space, the "entitlement" that such actions give rise to is clearly one of privacy rather than property.

35. *Carpenter*, 138 S. Ct. at 2227 (Kennedy, J., dissenting). For example, Justice Kennedy argued that an individual's property interest was "fundamental" to the existence of the privacy expectations protected by the Fourth Amendment. *Id.*

36. *Id.* at 2224. Accordingly, Justice Kennedy believed that the lack of a property interest held by Carpenter in the CSLI records was "dispositive of privacy expectations." *Id.* at 2228.

37. *Id.* at 2224. Justice Gorsuch also described privacy alone as "abstract" and "ethereal," leaving too much "to the judicial imagination" or "judicial intuitions." *Id.* at 2264 (Gorsuch, J., dissenting).

search” in which officers enter an individual’s “private premises and root through private papers and effects.”<sup>38</sup> Since the latter was far more intrusive of privacy, it required probable cause to be reasonable, whereas the former would be reasonable with a lesser justification.<sup>39</sup> In this way, Justice Alito made a privacy-based argument against the majority’s privacy-based decision, but he made this argument at a different point in the Fourth Amendment’s two-part analytical structure because he was discussing the reasonableness of this procedure rather than focusing on whether a search had occurred.

Justice Alito’s second point was a property-based one. He complained that the majority allowed Carpenter “to object to the search of a third party’s property.”<sup>40</sup> Looking to the text of the Fourth Amendment, which says that the people have a right to be secure in “*their* persons, houses, papers, and effects,” Justice Alito argued that Carpenter could not make out a valid claim because the CSLI records were not his.<sup>41</sup> Although this line of reasoning seemingly echoed Justice Kennedy’s property argument, there was a subtle but significant difference in the two Justices’ approaches. Justice Kennedy’s position directly endorsed a substantive property rights view, meaning that Carpenter needed to prove the CSLI records belonged to him either because he owned them or had some other claim to them.<sup>42</sup> Because Carpenter could not show that the records were his own, Justice Kennedy concluded that he therefore could not show he had a reasonable expectation of privacy in them.<sup>43</sup>

In contrast, when Justice Alito homed in on the word “their” in the Fourth Amendment, he cited to *Rakas v. Illinois*,<sup>44</sup> a case that established the rule governing what scholars call Fourth Amendment “standing.”<sup>45</sup> Under this rule, individuals challenging a police activity must show that it was *their* right that was violated, not someone else’s.<sup>46</sup> The standing rule affirms that the Fourth Amendment right is personal to the individual seeking exclusion, but it does not say that the substance of the right must be property-based. On the contrary, *Rakas* itself held that to have standing, the defendant must show he had a reasonable expectation of privacy.<sup>47</sup> This was because *Rakas* collapsed standing into the substantive Fourth Amendment right, which at that time was dominated by the *Katz*

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38. *Id.* at 2247 (Alito, J., dissenting).

39. *Id.*

40. *Id.*

41. *Id.* at 2247, 2257.

42. *Id.* at 2229–30 (Kennedy, J., dissenting).

43. *Id.* at 2235 (“This case should be resolved by interpreting accepted property principles as the baseline for reasonable expectations of privacy.”).

44. 439 U.S. 128 (1978).

45. *See Carpenter*, 138 S. Ct. at 2257 (Alito, J., dissenting).

46. *Rakas*, 439 U.S. at 133–34.

47. *Id.* at 142–43. Moreover, *Rakas* specifically found that a property interest was not controlling. *Id.* at 143 n.12; *see also* *Kyllo v. United States*, 533 U.S. 27, 32 (2001) (noting that *Rakas* “decoupled” the Fourth Amendment from property trespass).

privacy test.<sup>48</sup> Justice Alito's approach in fact upended *Rakas*, collapsing the substantive Fourth Amendment right into standing. In other words, to show that the Fourth Amendment is property-based (i.e., requiring that the records are Carpenter's own), Justice Alito relied on the rule of standing, which merely requires that the right be one's own—whatever that right happens to be. The flaw in this argument is clear: Justice Alito attempted to extract a particular substantive right from what had become an essentially empty rule on the eligibility to sue.<sup>49</sup> Despite this confusion, however, there was no doubt that Justice Alito endorsed a property-based interpretation of Fourth Amendment searches and agreed with Justice Kennedy that no search had occurred.<sup>50</sup>

Unlike Justice Alito (and Justice Thomas, whose opinion is discussed below), Justice Gorsuch did not join Justice Kennedy's dissent. Justice Gorsuch's separate opinion was in some ways the most radical of the group because he contemplated the rebuilding of the Fourth Amendment from the ground up.<sup>51</sup> Observing that the third-party doctrine gutted Fourth Amendment protections in the digital age,<sup>52</sup> Justice Gorsuch argued that the problem was fundamentally rooted in *Katz*, whose novel privacy test was supported by neither the text nor the history of the Fourth Amendment.<sup>53</sup> Thus, rather than continuing to prop up an unworkable *Katz* regime, Justice Gorsuch expressed a preference for moving toward what he called “the more traditional option”<sup>54</sup> of relying on “positive law or analogies to items protected by the enacted Constitution.”<sup>55</sup> Justice Gorsuch's proposal appeared traditional in the sense that the positive law he discussed focused largely on property rights.<sup>56</sup> On the other hand, it seemed radical in two ways. First, the positive law source need not have originated in 1791 when the Amendment was adopted.<sup>57</sup> In

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48. *Rakas*, 439 U.S. at 139. The *Rakas* rule was a practical one based on the premise that a separate standing inquiry would not affect case outcomes. *Id.* Despite the *Rakas* guidance to treat standing and the substantive right as one and the same, commentators still refer to *Rakas* and its progeny as standing cases because of the important conceptual difference between saying (1) that the right must belong to the defendant and may not be vicariously asserted, and (2) what that right must be.

49. Fourth Amendment standing was not always empty. Prior to *Rakas*, standing was determined according to various principles. For example, in *Jones*, the Court seemed to accept several bases for standing, including property, privacy, and general fairness. See *Jones v. United States*, 362 U.S. 257, 261–67 (1960). For a fuller discussion of *Jones*, see *infra* text accompanying notes 309–17.

50. See *Carpenter*, 138 S. Ct. at 2257–60 (Alito, J., dissenting).

51. Twice, Justice Gorsuch suggested that unlike the Sixth Circuit, which was bound by *Miller*, *Smith*, and *Katz* to reject Carpenter's claim, the Supreme Court could reject existing Fourth Amendment rules in favor of better ones. See *id.* at 2264, 2272 (Gorsuch, J., dissenting).

52. *Id.* at 2262.

53. *Id.* at 2264.

54. *Id.* at 2266.

55. *Id.* at 2268.

56. See *id.* at 2267–68 (“[T]he traditional approach asked if a house, paper or effect was yours under law.”).

57. He did suggest, however, that the positive law of 1791 may serve as the floor below which Fourth Amendment protections may not go. See *id.* at 2270–71. The idea of an eighteenth-century constitutional floor has been repeatedly affirmed since Justice Scalia

this way, he endorsed only an originalist method of analysis (which looks to positive law because that is what they did in 1791) but not its substance (which would apply the positive law as it existed in 1791).<sup>58</sup> Second, while the examples and discussion of positive law he used were largely property based,<sup>59</sup> positive law is, of course, broader. Indeed, Justice Gorsuch cited frequently to the Baude and Stern article, which advocates for a Fourth Amendment trigger that is grounded in *any* positive law, not just ones relating to property rights.<sup>60</sup> In sum, a narrow reading of Justice Gorsuch's opinion suggests that he is inclined toward a property-only view of the Fourth Amendment, but it is possible that he is open to protecting other interests so long as they are found in positive law.

Last but not least, Justice Thomas took the hardest line on property by arguing for an exclusively property-based understanding of the Fourth Amendment. Positing that the word "privacy" is not found anywhere in the Constitution, nor "part of the political vocabulary of the [founding]," Justice Thomas asserted that the focus should instead be on property.<sup>61</sup> Accordingly, he regarded privacy as a mere byproduct of the Framers' desire to protect property rights.<sup>62</sup> Under a property-based Fourth Amendment approach, Justice Thomas explained that the question is not whether a search occurred but rather *whose property* was searched.<sup>63</sup> He argued that the "whose" of this question is derived from the "their" in the text of the Fourth Amendment,<sup>64</sup> while the emphasis on property is justified by the Amendment's enumeration of "houses, papers, and effects."<sup>65</sup> For Justice Thomas, the answer to this question, in Carpenter's case, was that even if his location data were considered an

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used it to protect homes against government use of thermal imagers. See *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

58. Justice Gorsuch did say that "[m]uch work is needed" in order to determine what kinds of positive law would count, including the matter of age. *Carpenter*, 138 S. Ct. at 2268. At the same time, he seemed willing to accept that Carpenter had a viable property claim under the privacy provisions of the Telecommunications Act of 2008. See *id.* at 2272.

59. See *id.* at 2268–72.

60. See *id.* at 2263, 2268 (quoting Baude & Stern, *supra* note 3, at 1872, 1852); *supra* text accompanying notes 9–10.

61. *Carpenter*, 138 S. Ct. at 2239 (Thomas, J., dissenting) (alteration in original) (quoting Morgan Cloud, *Property is Privacy: Locke and Brandeis in the Twenty-First Century*, 55 AM. CRIM. L. REV. 37, 42 (2018)). Justice Thomas explained more broadly that while privacy was an important value during the 1960s and 1970s when *Katz* (along with *Griswold v. Connecticut*, 382 U.S. 479 (1965), and *Roe v. Wade*, 410 U.S. 113 (1973)) was decided, the concept of property was "[t]he organizing constitutional idea of the founding era." *Id.* at 2240.

62. *Id.* at 2240.

63. *Id.* at 2235. As for whether a search occurred, Justice Thomas argued that the term "search" had no special meaning at the founding, so the ordinary definition of "search" should be used, citing to multiple dictionary entries of that time. *Id.* at 2238 ("And its ordinary meaning was the same as it is today: '[t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as, to search the house for a book; to search the wood for a thief.'" (quoting *Kyllo v. United States*, 533 U.S. 27, 32 n.1 (2001))); see also Kerr, *supra* note 17, at 70–73 (describing how searches were understood by way of examples and analogies rather than a legal definition).

64. *Carpenter*, 138 S. Ct. at 2241–42 (Thomas, J., dissenting).

65. See *id.* at 2239.

“effect,” it was not his to contest.<sup>66</sup> Justice Thomas noted Carpenter’s lack of citation to any “property, tort, or contract law,” and concluded that his reliance on the Telecommunications Act of 1996 to establish a right over his CSLI was insufficient because the Act created only a privacy, not a property, right.<sup>67</sup> Calling *Katz* a “failed experiment,” Justice Thomas urged a rejection of the privacy regime.<sup>68</sup>

The above summaries of the *Carpenter* opinions demonstrate that the Supreme Court has unanimously accepted a larger role for property law in the definition of a search under the Fourth Amendment, but the Justices currently differ on precisely how large a role it ought to be.<sup>69</sup> The summaries have been given in order, starting from the majority’s equal-footing-between-privacy-and-property approach and ending with Justice Thomas’s hardline property-only stance.<sup>70</sup> Which approach is correct, and why? The next section will interrogate the common assumption made in these opinions, namely that the Fourth Amendment was animated by the Founders’ desire to protect property. The historical discussion below will demonstrate that the Justices are, at best, only partially correct. The Amendment did seek to protect property rights, but there were multiple interests at stake as legal limitations on searches developed. Moreover, it is hardly evident that protection of property was even the primary focus among the various concerns surrounding the problem of government searches.

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66. *Id.* at 2242–43.

67. *Id.* This conclusion is in tension with Justice Gorsuch’s interpretation of the same statute. *See id.* at 2272 (Gorsuch, J., dissenting).

68. *Id.* at 2246 (Thomas, J., dissenting). It is possible, at points, to read Justice Thomas’s opinion more narrowly as a critique only of the *Katz* test rather than an attack on the privacy approach that the test embodies. This may have been a strategic move on his part as it is plausible that more Justices would be willing to rethink the legal test than to jettison privacy entirely. However, even as Justice Thomas specifically urged the rejection of *Katz*, he also asserted the singular importance of property. *See id.* at 2239. Thus, I think it is fair to say that Justice Thomas’s ultimate position is a broad one that supports supplanting privacy with property.

69. In 2018, Justice Kennedy retired from the bench and was replaced by Justice Kavanaugh, whose record of opinions on the Fourth Amendment is quite thin. *See* Orin Kerr, *Judge Kavanaugh on the Fourth Amendment*, SCOTUSBLOG (July 20, 2018, 6:16 PM), <https://www.scotusblog.com/2018/07/judge-kavanaugh-on-the-fourth-amendment/> [<https://perma.cc/FY7B-7V5N>]. However, given that Justice Kavanaugh, while sitting on the D.C. Circuit, suggested the trespass theory before the Supreme Court adopted it in *Jones*, and considering his record of discounting privacy interests, *see id.*, it is reasonable to predict that he would accept the property approach when he has the opportunity to do so. With respect to Justice Amy Coney Barrett, who replaced Justice Ginsburg in 2020 and previously clerked for Justice Scalia, she testified during her confirmation hearing that “the Fourth Amendment is a principle” without identifying what that principle is. *See* David K. Shipler, *The Criminal Justice of Amy Coney Barrett*, WASH. MONTHLY (Oct. 25, 2020), <https://washingtonmonthly.com/2020/10/25/the-criminal-justice-of-amy-coney-barrett/> [<https://perma.cc/7FCP-4PCJ>]. Justice Barrett did appear to agree with the *Carpenter* decision, suggesting that she would take a broader approach than the dissenters in that case. *See id.*

70. Again, Justice Gorsuch may take a property-only stance as well, but it is yet difficult to tell. *See supra* text accompanying notes 51–60.

### III. THE SIGNIFICANCE OF PROPERTY RIGHTS IN THE DEVELOPMENT OF THE FOURTH AMENDMENT

A common starting point for the history of the Fourth Amendment is three cases from the mid-eighteenth century: *Wilkes v. Wood*<sup>71</sup> and *Entick v. Carrington*<sup>72</sup> in England, and the *Writs of Assistance Case*<sup>73</sup> in the American colonies.<sup>74</sup> All three cases challenged the use of general warrants to search and seize, and in the case of *Wilkes* and *Entick*, the challengers prevailed.<sup>75</sup> The eighteenth century was not, however, the start of the practice of, or protest against, government searches and seizures. By the time *Wilkes*, *Entick*, and James Otis (in the *Writs of Assistance Case*) made their arguments before the courts, searches and seizures had been taking place for centuries. At least since the thirteenth and fourteenth centuries, legislation allowed general searches and seizures to take place in England in three types of situations: the hue and cry, customs searches, and the regulation of guilds.<sup>76</sup> According to historian William Cuddihy, resistance against these searches and seizures was weak as they tended by nature to be infrequent or to target a select group of people (e.g., guild members).<sup>77</sup>

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71. 19 Howell's State Trials 1153 (C.P. 1763).

72. (1756) 95 Eng. Rep. 807 (KB), 19 Howell's State Trials 1029.

73. This case is sometimes referred to as *Paxton's Case* or *Petition of Lechmere*, and there is no case report. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 651 n.20 (1999).

74. For example, Justice Thomas argues for his property-only position by citing to two of these cases in his *Carpenter* dissent. See *Carpenter*, 138 S. Ct. 2206, 2239–40 (2018); see also CUDDIHY, *supra* note 18, at 382, 444 (noting that James Otis's brief in the *Writs of Assistance Case* “was the first recorded declaration of the central idea to the specific warrant clause,” and positing that *Wilkes* supplied the “intellectual roadmap” to the Fourth Amendment); Richard A. Epstein, *Entick v. Carrington and Boyd v. United States: Keeping the Fourth and Fifth Amendments on Track*, 82 U. CHI. L. REV. 27, 28 (2015) (referring to *Entick* as “a flawed template” for the Fourth Amendment); Davies, *supra* note 73, at 560–61 (referring to Nelson B. Lasson's 1937 history of the Fourth Amendment as the origin of this conventional account); William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 396 (1995) (referring to this “trio of famous cases” as the “real source” of the Fourth Amendment). Although key to the development of the Fourth Amendment, the *Writs of Assistance Case* was at least as much political maneuvering among factions in Massachusetts as a principled stance for civil rights. See CUDDIHY, *supra* note 18, at 397–405 (detailing the rivalries and corruption that provide context for that case).

75. CUDDIHY, *supra* note 18, at 397–405, 447–49, 453–56. This description is a broad one, emphasizing the character of the searches that occurred in those cases and the authority possessed by the searchers. A more technical explanation would distinguish between the general warrants granted in the English cases from the writs of assistance used in the American colonies that enabled authorities to execute general searches.

76. *Id.* at 28–37. According to Cuddihy, a fourth category of searches—debt searches—was on the wane by this time as common law courts began requiring a public interest or purpose to enter homes. See *id.* at 37–38; see also NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 23 (1937) (noting that English legislation allowed for general searches since the first half of the fourteenth century).

77. CUDDIHY, *supra* note 18, at 39. Cuddihy also describes the lack of court cases challenging searches and seizures during this early period, as well as the absence of critique against these practices in legal treatises during this time. See *id.* at 4–7.

It was not until the Tudor period began in 1485 that searches and seizures gradually became more commonplace and, consequently, more resented.<sup>78</sup> Still, the critique against these practices developed slowly and inconsistently, and serious social protest against them grew only in the late sixteenth century, largely among Catholic and Protestant leaders, who were persecuted in turns by changing government.<sup>79</sup> For example, in what Cuddihy describes as likely “the first published objection to a search,” a Catholic squire in 1577 denounced a sheriff’s search to find a fugitive Jesuit priest, arguing that the “search was ‘a great discourtosie for that he was a gentleman . . . [and] did account his house as his castel.’”<sup>80</sup> Another protestor in 1582 complained that officials would forcibly enter Catholic households at night:

[T]hey searche every chamber, even the bedchambers of wives and maidens: aboute they goe through all the house from place to place, veweing, tossing, & refeling in every corner, chests, coffers, boxes, caskets, and closetts. . . . [A]nd lest anye thing els should be lost by negligence, they stick not to ryfle the bosomes, purses, and coffers of honest matrons, yea and to uncover their verie innermost garments, & oftentimes to teare & retthe a sunder with violence, to see yf anye Agnus dei, crucifix, medals, beads or anie halowed things do lye hydd there.<sup>81</sup>

Protestant victims of religious conformity searches also criticized the practice, highlighting the frightening entries at night, damage done to dwellings, and seizures of books.<sup>82</sup> John Penry, in 1593, reported that “bishops’ men ‘break open and rifle our houses in a privy, dark, unbri-dled, violent, unchristian, and lawless sort. You drive us from our families, trades, wives, [and] children. . . .’”<sup>83</sup> Protestant protest against searches and seizures intensified in the seventeenth century, led by William Prynne, Henry Burton, and John Bastwick.<sup>84</sup> All three filed petitions to the House of Commons objecting to searches and seizures instigated by Archbishop William Laud, describing the taking of numerous books, surveillance of homes, and violent entries that caused miscarriages in women due to fright.<sup>85</sup>

78. *See id.* at 44. After 1485, the three types of searches multiplied to fifteen with general searches authorized to also address vagrancy, recreation, clothing, pursuit of accused persons, recovery of stolen property, poaching, economic regulation, sumptuary laws, bankruptcy, weapons, censorship, and religious and political dissent. *See id.*

79. *See id.* at 7–9; *see also* *Marcus v. Search Warrants*, 367 U.S. 717, 724–27 (1961) (recounting the English history of searches and seizures aimed at censorship against various dissenters). According to Cuddihy, another reason for the delay in the development of protest against general searches and seizures was that most of them were executed against the lower classes, and often in public places like taverns and ships. *See CUDDIHY, supra* note 18, at 96.

80. CUDDIHY, *supra* note 18, at 7 (alteration in original).

81. *Id.* at 7–8.

82. *Id.* at 8.

83. *Id.* (alterations in original).

84. *Id.* at 9.

85. *Id.* Cuddihy writes that victimization of women and children was a common theme in protests against searches and seizures in England as well as in the American colonies *Id.*

Politically motivated searches and seizures also prompted protest in the seventeenth century, most notably within the English Parliament. Arrests of political adversaries by the Stuart kings led to a critique not only against the arrests but also against the searches that followed to belatedly find evidence that would justify such arrests.<sup>86</sup> Similar to the earlier religious protesters, who cited their status as a “gentleman” as a reason for the sheriff to desist, members of Parliament believed that such arrests and searches violated the “privileges of parliament.”<sup>87</sup> In contrast to the high status of these victims, who thereby thought themselves to be doubly victimized by the searches, the searchers were referred to as lowborn, “‘hungrye . . . beasts[,] . . . blood suckers[,] . . . bankrupts and needy fellows.’”<sup>88</sup> More than 150 years later in Massachusetts, James Otis would make a similar argument about class upheaval in his bid to prevent the renewal of the writs of assistance.<sup>89</sup>

Excise and impressment laws in the 1730s and 1740s were another significant trigger for protest, with critics lamenting that one’s home was no longer one’s castle.<sup>90</sup> The home-as-castle argument was already a well-worn but ultimately vague invocation, although some elaborated on their concerns by warning that excise officers “would demand daily entrance to

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at 9, 16, 184. These searches sometimes also led to the aged becoming literally frightened to death. *Id.* at 83.

86. *See id.* at 11–12; *see also id.* at 141 (quoting Sir Edward Coke explaining to the House of Commons that “if a man’s house could be searched while he was confined without being told the cause, ‘they will find cause enough.’”); Laura K. Donohue, *The Original Fourth Amendment*, 83 U. CHI. L. REV. 1181, 1219 (2016) (reporting concern at the House of Commons that papers can be “broken into parts and rejoined ‘so as to make of them engines capable of working the destruction of the most innocent persons.’” (quoting *Debate in the Commons on General Warrants*, in WILLIAM COBBETT, 16 THE PARLIAMENTARY HISTORY OF ENGLAND, FROM THE EARLIEST PERIOD TO THE YEAR 1803, at 6, 10 (Hansard 1813))).

87. CUDDIHY, *supra* note 18, at 11. In 1642, after King Charles I ordered a series of searches and seizures against members of the House of Commons, one legislator argued that such searches were a breach of privilege unless there was “‘consent or warrant of the whole Parliament.’” *Id.* at 13. One of the arguments that Lord Coke used against general warrants was that not just the “poore and base” but also the “great” may be searched under them. *See* Donohue, *supra* note 86, at 1215.

88. CUDDIHY, *supra* note 18, at 17.

89. James Otis, *Against Writs of Assistance* (Feb. 24, 1761), <https://wisc.pb.unizin.org/adebillofrights/chapter/james-otis-on-writs-of-assistance/> [https://perma.cc/V32N-MPW2] (objecting that “not only deputies . . . but even their menial servants, are allowed to lord [the writ] over us”); *see also* Davies, *supra* note 73, at 577–78. Such class-based prejudice against searchers may have existed even in Roman Law. LASSON, *supra* note 76, at 18 (explaining that under Roman law, to recover stolen property, a “community slave” would accompany the searchers to “br[eak] open doors whenever necessary”). Perhaps another reason for the class-based antipathy toward searchers was that they were sometimes rewarded with a cut of the items successfully seized. *Id.* at 23. That searchers were ordinary persons paid to do this work was suggested to be problematic by counsel in *Entick* as well. *Entick v. Carrington* (1765) 95 Eng. Rep. 807, 812 (KB), 19 Howell’s State Trials 1029, 1037 (“The office of these defendants is a place of considerable profit, and as unlike that of a constable and tithingman as can be, which is an office of burthen and expence . . .”). Lord Camden also questioned the honesty of searchers who may “be disposed to carry off a bank-bill . . . with impunity.” *Id.* 19 Howell’s State Trials at 1065.

90. *See* CUDDIHY, *supra* note 18, at 289.



search daughters in their beds and wives in childbirth”<sup>91</sup> or that such searches would be used to attack political enemies and discover “personal and business secrets.”<sup>92</sup> One opponent of excise searches argued that “no gentleman that puts any value either upon his liberty or his property” would tolerate them.<sup>93</sup>

English jurists took varying positions on searches and seizures. The most prominent critic of government-backed searches and seizures was Sir Edward Coke in his *Institutes* (1642), although Cuddihy points out that Coke was somewhat vague on the matter because he attacked both the general nature of the searches of that time as well as the lack of foundational facts for them.<sup>94</sup> Although Coke marshaled the Magna Carta and common law cases to attack general searches and proclaim that a man’s home is his castle,<sup>95</sup> it has been widely acknowledged that neither source supports his claims.<sup>96</sup> Regardless, many other influential treatise writers followed Coke, including Matthew Hale, William Hawkins, and William Blackstone.<sup>97</sup>

Dissatisfaction with searches and seizures also developed in the American colonies before the 1760s, but colonists accepted general searches and seizures more readily than their English counterparts.<sup>98</sup> According to Cuddihy, this was in part because searches and seizures were rarer, as there were fewer religious and political conformity laws and no High

91. *Id.*

92. *Id.* at 289–90.

93. *Id.* at 292.

94. *See id.* at 107–08. This section of Coke also could be read to question the authority of justices of the peace to issue warrants. *See* EDWARD COKE, *THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; CONCERNING THE JURISDICTION OF COURTS* 176–77 (Lawbook Exch., Ltd. 5th prtg. 2009) (1817). Indeed, there are so many conditions named (e.g., searches at nighttime, refusal of entry by householder, open versus closed doors, the existence of a public interest) in this section that it is difficult to pin down what kind of warrant-based searches would satisfy Coke. *See id.*

95. *See* Donohue, *supra* note 86, at 1207–08.

96. *See, e.g.,* CUDDIHY, *supra* note 18, at 109–15 (explaining English thinkers’ inaccurate, but common, reliance on the Magna Carta to assert new rights); *id.* at 115–20 (discussing Coke’s misleading use of common law); *see also* SAMUEL DASH, *THE INTRUDERS: UNREASONABLE SEARCHES AND SEIZURES FROM KING JOHN TO JOHN ASHCROFT* 17 (2004) (noting that the Magna Carta underwent both a “revival and . . . reinvention” during the seventeenth century). The Magna Carta does, however, seek to restrain the King’s power to arrest and punish persons arbitrarily. *See* CUDDIHY, *supra* note 18, at 110 (reproducing the language of Article 39 of the Magna Carta, upon which Coke relied); JILL LEPORE, *THESE TRUTHS: A HISTORY OF THE UNITED STATES* 41 (2018) (indicating that Coke’s reliance on the then-moribund Magna Carta was a political, rather than legal, move to deny King James absolute power); LASSON, *supra* note 76, at 21 (observing that “these very errors of Coke . . . were of incalculable service to the cause of constitutional progress”).

97. *See* LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* 152 (1999). Dash writes that Coke also influenced John Wilkes, James Otis, Thomas Jefferson, and James Madison—all important players in the development of the Fourth Amendment. *See* DASH, *supra* note 96, at 22–23. Thomas Davies asserts that John Adams was also influenced by Coke when he included the phrase “unreasonable searches and seizures” in the Massachusetts state constitution. *See* Davies, *supra* note 73, at 554–55. According to Davies, Coke used the term “against reason” to describe laws that were void because they violated the principles of common law. *See id.* at 555.

98. *See* CUDDIHY, *supra* note 18, at 176.

Commission or Star Chamber to enforce them.<sup>99</sup> Objections against searches and seizures among colonists often focused on the violence involved,<sup>100</sup> as well as on the maxim that one's house is one's castle.<sup>101</sup> Overall, Cuddihy's account of the American resistance to searches and seizures shows it was significantly less nuanced than the objections in England.<sup>102</sup> Many American colonists appeared to have believed that their homes (as well as their ships and their persons) were absolutely immune to searches and seizures,<sup>103</sup> and their violent resistance tended to suggest that the issue was deeply felt, though less than fully articulated.

Nonetheless, it is in Cuddihy's recounting of colonial resistance in Massachusetts that familiar Fourth Amendment terms begin to appear. He writes that a "typical objection" to the Excise Act of 1754 (which also authorized interrogation) was that the law would force an individual "to reveal 'innocent Transactions . . . of his *private* Oeconomy in his Family'" and thereby "demolish[ ] the constitutional sanctity of his house as a castle and sanctuary."<sup>104</sup> About that same law, one essayist warned: "'Doors and Locks, and Bolts, and Bars would be no *Security* against [the excise collector]. He . . . would find us out[,] . . . drag us into Day Light, and gorge himself with our mangled Carcasses."<sup>105</sup> The growing protest in the Massachusetts Colony was particularly significant because (1) the colony led the way in adopting specific warrants to limit government searches and seizures,<sup>106</sup> (2) the *Writs of Assistance Case* was argued there,<sup>107</sup> and (3) the search and seizure provision of the Massachusetts state constitution would eventually serve as the model for the Fourth Amendment.<sup>108</sup>

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99. *See id.* at 192.

100. *See id.* at 184.

101. *See id.* at 185.

102. Indeed, in contrast to the petitions and other written complaints of the religious protestors in England, American colonists appear to have often resorted to threats and actual violence to resist searches and seizures. *See id.* at 185–88.

103. *See id.* at 188.

104. *Id.* at 356 (emphasis added). The theme of familial sanctity and intimacy was even pursued by a defender of the excise, who admitted that house searches "would be striking at the natural Rights of Mankind, when the internal State of . . . Familys should come to be exposed to the View of others." *See id.* at 357.

105. *Id.* at 357 (emphasis added); *see also id.* at 356 (quoting several pamphlets that characterized the interrogation clause as destroying "that *Security* which every man enjoys in his own House." (emphasis added)). Cuddihy writes that protests against the Excise Act were often "lurid," imagining that the searches of houses would lead to a check of "women's petticoats," and characterizing collection officials as "Imps at the Teats of Witches." *Id.* at 357. Although such florid language may have been used as merely a rhetorical device, Cuddihy explains that the interrogation clause was in fact the "last straw" in a series of wide-ranging general searches of homes and businesses relating to customs, the containment of smallpox, and naval impressment among others, that inflamed the population of Massachusetts starting in the 1720s. *Id.*

106. By 1764, Massachusetts was the only colony routinely using specific, rather than general, warrants. *See id.* at 332. Even before 1764, however, by allowing victims of searches and seizures to sue officers and informants, Massachusetts had turned a legally general authority into a de facto particular one. *See id.* at 333–34.

107. *See infra* text accompanying notes 109–13.

108. *See infra* text accompanying notes 133–136. Phillip Hubbart notes that James Madison relied on the recommendations of Virginia during the ratification process as "the immediate model" for the Fourth Amendment. PHILLIP A. HUBBART, MAKING SENSE OF

A key step on the path to the Fourth Amendment was taken in January of 1761, when members of the Society for Promoting Trade and Commerce Within the Province in Boston and Salem filed a petition in opposition to the issuance of new writs of assistance upon expiration of the previous writs.<sup>109</sup> The *Writs of Assistance Case* was led by James Otis Jr., who argued that English statutory and constitutional law required warrants to be specific.<sup>110</sup> Complaining that any “petty officer” in possession of a writ may be “a tyrant in a legal manner, . . . may control, imprison, or murder any one within the realm. . . [and] enter all houses, shops, etc., at will,”<sup>111</sup> Otis condemned the writ as an “instrument[ ] of slavery on the one hand and villainy on the other.”<sup>112</sup> To Otis, the greatest infringement of rights under the writs concerned the “freedom of one’s house” in which a man “is as well guarded as a prince in his castle.”<sup>113</sup> Otis lost,<sup>114</sup>

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SEARCH AND SEIZURE LAW: A FOURTH AMENDMENT HANDBOOK 65, 69 (2005). It is clear, however, that Virginia’s recommended language more closely tracks the Massachusetts constitutional provision rather than its own. *See id.* at 56 (quoting Article 14 of the Massachusetts Declaration of Rights); *id.* at 69 (quoting the recommendation of the Virginia ratification convention); *see also* ROBERT M. BLOOM, SEARCHES, SEIZURES, AND WARRANTS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 6 (2003) (describing Article 14 as the model for the Fourth Amendment); Brian Sawers, *Original Misunderstandings: The Implications of Misreading History in Jones*, 31 GA. ST. U. L. REV. 471, 479 (2015) (observing that the Fourth Amendment is really the work of John Adams rather than James Madison). Moreover, there are significant differences between Virginia’s recommendation and the final Fourth Amendment. For example, Virginia’s wording asserted that “a right to be secure” inheres in “every freeman” rather than “the people.” HUBBART, *supra*, at 65. It also omits “houses” and refers instead more broadly to searches of “suspected places.” *Id.* In contrast, Massachusetts referred to “every subject” and did include houses in its enumeration clause. Davies, *supra* note 73, at 684; *see infra* text accompanying note 135.

109. *See* CUDDIHY, *supra* note 18, at 380–81. Writs of assistance expired six months after the death of the reigning king, and George II died in October 1760. *Id.* These writs authorized general searches and were routinely issued to customs officials. *See id.* at 380. As Lasson explained, the writs “were even more arbitrary in their nature and more open to abuse than the general warrants of the *North Briton* cases” because they were a “continuous license and authority during the whole lifetime of the reigning sovereign.” LASSON, *supra* note 76, at 54.

110. *See* CUDDIHY, *supra* note 18, at 385–88. Like Coke on the Magna Carta and English common law, Otis was apparently also somewhat loose with his interpretations of the existing law on searches and seizures. *See id.* at 385–94. For example, Otis argued that general warrants were antiquated instruments, and that modern law books in England provided for “special warrants to search such and such houses, specially named, in which the complainant has before sworn that he suspects his goods are concealed.” Otis, *supra* note 89. While it is true that warrants for stolen property were specific in England, “modern” eighteenth-century searches still relied largely on general warrants. *See supra* text accompanying notes 90–93.

111. Otis, *supra* note 89. Davies has argued that Otis’s argument only protected the home, but Otis clearly included protection of places of business; indeed, it seems logical that he do so given the fact that he was representing a society of merchants. *See* Davies, *supra* note 73, at 601–02. Contemporaneous commentary about the *Writs of Assistance Case* also condemned searches of places other than homes. *See* CUDDIHY, *supra* note 18, at 396.

112. Otis, *supra* note 89.

113. *Id.*

114. *See* HUBBART, *supra* note 108, at 29. According to Hubbard, Otis may have lost the legal case, but the English customs officials did not win either because public sentiment against the writs was so intense that they became “virtually unenforceable.” *Id.* at 31; *see*

but his arguments inspired John Adams, who famously declared upon hearing Otis that “[t]hen and there, the child Independence was born.”<sup>115</sup> Approximately two decades later, Adams would draft the Massachusetts Declaration of Rights and its influential search and seizure provision.<sup>116</sup>

Any disappointment the colonists may have felt over the outcome of the *Writs of Assistance Case* was likely diminished by reports from England regarding the tort claims brought by John Wilkes, a Parliamentarian whose authorship of the *North Briton No. 45 (NB45)* prompted a series of searches to collect evidence of seditious libel.<sup>117</sup> Wilkes, along with others whose homes and shops had been searched in connection with *NB45*, successfully sued the “messengers” who executed the searches, along with Lord Halifax, the Secretary of State who issued the general warrants.<sup>118</sup> According to Cuddihy, colonists watching the case were “overwhelmingly sympathetic to Wilkes,” and the newspapers of the day considered the cases to “affect[ ] the most sacred and valuable rights.”<sup>119</sup> Lord Camden (then Chief Justice Pratt), who directed the verdict in these cases, was also hailed as a hero and became the namesake of many towns and avenues in the colonies.<sup>120</sup>

The success of the *Wilkes* set of cases prompted John Entick, who had been the victim of an earlier house search for seditious libel published in *The Monitor*, to sue for damages as well.<sup>121</sup> Lord Camden’s opinion in *Entick v. Carrington* has been quoted frequently, its most famous passage being the following:

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*also* LASSON, *supra* note 76, at 68–69 (describing the resistance against enforcement of the writs). In other colonies, courts tended to deny, delay, or limit the writs, often citing to Otis’s arguments. *See* HUBBART, *supra* note 108, at 32.

115. *See* Frank v. Maryland, 359 U.S. 360, 364 n.3 (1959) (quoting WILLIAM TUDOR, *THE LIFE OF JAMES OTIS* 61 (1823)). There is wide consensus that general searches were an important cause of the American Revolution. *See* LASSON, *supra* note 76, at 51; HUBBART, *supra* note 108, at 28.

116. *See* BLOOM, *supra* note 108, at 6.

117. *See* CUDDIHY, *supra* note 18, at 440–43; *see also* HUBBART, *supra* note 108, at 41–43 (discussing the related cases involving Wilkes and the printers Leach and Huckle).

118. The liability (compensatory and punitive) for trespass and false imprisonment in these cases amounted to more than £100,000, whereas only Wilkes was tried and convicted of seditious libel. *See* HUBBART, *supra* note 108, at 41–42.

119. CUDDIHY, *supra* note 18, at 538–39.

120. *See* Davies, *supra* note 73, at 586 & n.96. Despite the seminal nature of the *Wilkes* set of cases, Cuddihy has criticized Lord Camden’s opinion as “fictional” and “def[y]ing evidence, logic, and judicial propriety” to reach a desired result. CUDDIHY, *supra* note 18, at 448–49.

121. *See* CUDDIHY, *supra* note 18, at 451. The warrant against Entick was general in the sense that it did not specify the place to be searched nor which books and papers were to be seized. *See* Entick v. Carrington (1765) 95 Eng. Rep. 807, 808 (KB), 19 Howell’s State Trials 1029, 1034. It did, however, name Entick as the target (unlike the warrant in *Wilkes*, which had been issued three days prior to identifying Wilkes as the author of *NB45* and had sought generally the authors, printers, and publishers of the pamphlet), specified that he, along with his books and papers, was to be seized, and set forth the offense for which he was accused. *See id.* The fact that the warrant in *Entick* authorized the seizure of all papers, and not just those that contained seditious libel, was particularly troubling to Lord Camden. 19 Howell’s State Trials at 1064–65, 1070 (criticizing the broadness of the seizure).

The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. . . . By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing . . . .

Papers are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect.<sup>122</sup>

Despite Lord Camden's stirring language on the inviolability of property rights under the common law, the holding in *Entick* was narrower than perceived by the colonists.<sup>123</sup> For one thing, the opinion rejected only the authority of the Secretary of State to issue a general warrant to seize papers in cases of seditious libel.<sup>124</sup> Moreover, Lord Camden suggested that legislation authorizing such warrants would render the practice legal.<sup>125</sup>

Regardless, the outcomes of *Wilkes* and *Entick* were taken to confirm for many colonists what they had already come to believe: that general warrants were absolutely illegal under English constitutional law. In the late 1760s, John Dickenson's *Letters from a Pennsylvania Farmer* insisted that general warrants are "expressly contrary to the common law which ever regarded a man's house as his castle or a place of perfect security. . . . [and] utterly destructive to liberty [in the colonies]."<sup>126</sup> In 1772, the Boston Committee of Correspondence (of which Otis was chair) wrote and published *The Rights of the Colonists and a List of Infringements and Violations of Rights*, which condemned the writs of assistance that "exposed . . . [homes to] wretches, whom no prudent man would venture to employ even as menial servants. . . . [and] cut off . . . that domestik security which renders the lives of the most unhappy in some measure agreeable."<sup>127</sup> Another American writer wrote in 1773: "What are the pleasures of the social table, the enlivening countenances of our family and neighbors in the fire circle or any domestic enjoyment if not only Custom House Officers but their very servants may break in upon

122. *Entick*, 19 Howell's State Trials at 1066.

123. As Davies points out, the case reports for *Wilkes* and *Entick* were not published until years later. Davies, *supra* note 73, at 565. The colonists initially became familiar with them through newspaper accounts and pamphlets. *See id.* at 563–65.

124. *Entick*, 95 Eng. Rep. at 818, 19 Howell's State Trials at 1064–65.

125. *See id.* 19 Howell's State Trials at 1073.

126. *See* HUBBART, *supra* note 108, at 34–35 (quoting John Dickenson, *Letters From a Farmer in Pennsylvania to the Inhabitants of the British Colonies*, in *EMPIRE AND NATION* 54 (Forrest McDonald ed., 2d ed. 1999)).

127. *Id.* at 36.

and disturb them?”<sup>128</sup>

The growing consensus around the illegality of general searches is reflected in the fact that there was widespread adoption of search and seizure provisions in state constitutions starting in 1776.<sup>129</sup> Many of these provisions focused on restricting the issuance of the hated general warrant. For example, Virginia was the first to adopt a constitution in 1776, and section 10 of its Declaration of Rights provided: “That general warrants whereby an officer may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive and ought not to be granted.”<sup>130</sup> Several other colonies adopted identical or nearly identical language to formalize their own restrictions against the use of general warrants.<sup>131</sup> Pennsylvania was the first to include the more general introductory language regarding the people’s “right to hold themselves, their houses, papers, and possessions free from search or seizure” before continuing on to the general warrant restriction.<sup>132</sup> But historians highlight the significance of the Massachusetts Declaration of Rights (1780), which used the phrase “unreasonable searches, and seizures” and grounded the protection in a

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128. CUDDIHY, *supra* note 18, at 548.

129. See HUBBART, *supra* note 108, at 51 (naming eight of the thirteen original colonies that adopted the provision); Davies, *supra* note 73, at 668 (adding “Franklin, the protostate of Tennessee,” to the list to make nine that adopted the right).

130. CUDDIHY, *supra* note 18, at 604. As Cuddihy notes, the language of Virginia’s provision qualifies its rejection of the general warrant to search with the proviso “without evidence of a fact committed.” *Id.* Moreover, it appears merely hortatory in its use of the phrase “ought not to be granted.” *Id.* In contrast, Donohue asserts that despite the narrow language in the Virginia Declaration of Rights, Virginia was actually establishing “a written, guaranteed right, as held against the government.” See Donohue, *supra* note 86, at 1267.

131. These include North Carolina, which expressed a similarly qualified rejection of general warrants. See HUBBART, *supra* note 108, at 52–53; CUDDIHY, *supra* note 18, at 611.

132. Davies, *supra* note 73, at 677. The full text is as follows:

That the people have a right to hold themselves, their houses, papers, and possessions free from search or seizure; and therefore warrants without oaths or affirmations first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are contrary to that right, and ought not to be granted.

*Id.* Davies observes that the introductory assertion of the right was intended as an explanation for the general warrant prohibition, and that this was merely a drafting style that was repeated throughout the Pennsylvania Declaration of Rights. See *id.* at 679–80. Moreover, he argues that the language was not attempting to broaden the right against searches and seizures but rather to limit it to the enumerated list of self, house, papers, and possessions. *Id.* at 680–81. This interpretation is contradicted by historians like Levy, who describes the Pennsylvania bill of rights as “more comprehensive,” noting in particular its wording on searches and seizures. LEVY, *supra* note 97, at 9–10; see also LEPORE, *supra* note 96, at 112–13 (observing that Pennsylvania tended to be more radical than others in its commitment to maximizing democracy and adherence to the language and spirit of the Declaration of Independence); cf. Donohue, *supra* note 86, at 1267–68 (asserting that the Virginia constitution covered more than general warrants, but reading no difference between the Virginia and Pennsylvania provisions).

person's "right to be secure."<sup>133</sup> These phrases, of course, are found in the Fourth Amendment we know today.<sup>134</sup> The Massachusetts provision read as follows:

Every subject has a right to be secure from all unreasonable searches and seizures of his person, his house, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the person or objects of search, arrest, or seizure: And no warrant ought to be issued, but in cases, and with the formalities, prescribed by the laws.<sup>135</sup>

Similar to Pennsylvania's search and seizure clause, the language of the Massachusetts provision posits a grander individual right to be secure beyond merely the freedom from general warrants.<sup>136</sup>

After the American Revolution, when the Constitutional Convention of 1787 was about to close, the issue of a bill of rights was raised by George Mason, an Anti-Federalist from Virginia. Mason's proposal for a bill of rights was unanimously rejected by delegates from the other states.<sup>137</sup> Within the confederation congress, Richard Henry Lee of Virginia also submitted a draft provision as follows: "That the Citizens shall not be exposed to unreasonable searches, seizure of their persons, houses, papers or property."<sup>138</sup> This, too, was defeated.<sup>139</sup> The Bill of Rights would be resurrected, however, during the ratification process as a num-

133. HUBBART, *supra* note 108, at 56; Davies, *supra* note 73, at 684–85; CUDDIHY, *supra* note 18, at 605–06.

134. U.S. CONST. amend. IV.

135. Davies, *supra* note 73, at 684.

136. See CUDDIHY, *supra* note 18, at 605; Harris v. United States, 331 U.S. 145, 158 (1947) (Frankfurter, J., dissenting) (observing that James Madison's decision to model the Fourth Amendment after the Massachusetts constitution rather than Virginia's demonstrates the intent "to give wide . . . scope to this protection against police intrusion."). *But see* Davies, *supra* note 73, at 590 (arguing that the Framers sought to prevent general warrants and not to establish "a diffuse" right to be secure). Despite the adoption of these provisions among the states, they continued to use general warrants during the revolutionary period for both wartime and ordinary purposes. See CUDDIHY, *supra* note 18, at 623–30.

137. See LEPORE *supra* note 96, at 127. Lepore explains that this was due to both the fact that states had their own bill of rights and the fact that "the delegates were exhausted and eager to go home." *Id.* Whatever Mason may have thought about the other provisions of the Bill of Rights, Lasson tells us that Mason did not think much of restraining searches and seizures when he drafted the Virginia Declaration of Rights in 1776. See LASSON, *supra* note 76, at 79.

138. HUBBART, *supra* note 108, at 59.

139. *Id.* After the defeat of his proposed amendments, Lee published a series of letters criticizing the Constitution for, among other things, the lack of a search and seizure clause that would guarantee "freedom from hasty and unreasonable search warrants, warrants not founded on oath, and not issued with due caution, for searching and seizing men's papers, property, and persons." *Id.* at 59 & n.17. Interestingly, he does not specify "houses" here, and "houses" was left out in the enumerations set forth in the recommending amendments of Virginia, New York, and North Carolina. See *id.* at 65–67.

ber of states either recommended a bill of rights or conditioned ratification on them.<sup>140</sup>

Historians believe that much of the debate over the Bill of Rights reflected political wrangling between the Federalists and Anti-Federalists, rather than a sincere desire to see certain principles enshrined in the Constitution.<sup>141</sup> Nevertheless, by the time James Madison began work on the Bill of Rights in 1789, he came to see it as important to the success of the Constitution and its framework.<sup>142</sup> Madison's first draft incorporated the broader language of the Massachusetts search and seizure provision:

The rights of the people to be secured in their persons; their houses, their papers and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.<sup>143</sup>

When this proposed language went to committee, the provision's wording was slightly changed—most notably, “their other property” was replaced with “effects” and the reference to “unreasonable searches and seizures” was deleted.<sup>144</sup> The latter phrase was added back by the full Congress, and a subsequent committee restructured the Amendment into two clauses.<sup>145</sup> Thus, the final approved wording became:

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140. *See id.* at 60.

141. *See, e.g.,* CUDDIHY, *supra* note 18, at 698–99, 708–10 (describing the political maneuvering between Richard Henry Lee and James Madison); HUBBART, *supra* note 108, at 60 (“It was not the Framers, then, but the opponents of the Constitution who initially led the fight for a bill of rights.”). According to Levy, George Mason opposed the Constitution because of its threat to states' rights, an issue that would not have been addressed through a bill of rights protecting individual rights. *See* LEVY, *supra* note 97, at 14. In other words, Anti-Federalists used the Bill of Rights to try to kill the Constitution, and Federalists supported it to kill the opposition. *See id.* at 43.

142. *See* HUBBART, *supra* note 108, at 68–70 (explaining that Madison believed the Fourth Amendment would empower the judiciary to curb any legislative or executive abuses); LASSON, *supra* note 76, at 98 (noting that Madison believed a bill of rights “would serve the double purpose of satisfying the minds of well-meaning opponents and of providing additional guards in favor of liberty”); LEPORE, *supra* note 96, at 119 (discussing Madison's desire to restrain the power of the majority to oppress the minority); LEVY, *supra* note 97, at 32–34 (describing Madison's change of heart in his correspondences with Jefferson).

143. HUBBART, *supra* note 108, at 69. Cuddihy has argued that Madison's decision to follow the Massachusetts provision rather than that of his own state demonstrates a conscious intent to capture a broader right to privacy that goes beyond the prohibition of general warrants. *See* CUDDIHY, *supra* note 18, at 726; *see also* LEVY, *supra* note 97, at 176 (observing that in drafting the Fourth Amendment, “Madison chose the maximum protection conceivable at the time”). This interpretation is in tension with Davies's, who has forcefully maintained that the Fourth Amendment was intended only to prevent the issuance of general search warrants. *See* Davies, *supra* note 73, at 551.

144. *See* HUBBART, *supra* note 108, at 71. The revised provision said: “The right of the people to be secured in their persons, houses, papers and effects, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched, and the persons or things to be seized.” *Id.*

145. According to Lasson, Congressman Benson proposed the two-clause structure during debates, arguing that the original one-clause structure “was not sufficient.” Lasson, *supra* note 76, at 101 (quoting 1 ANNALS OF CONG. 738 (1789)). This proposal was rejected,



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.<sup>146</sup>

Ratification of the Fourth Amendment would occur two years later when Virginia became the eleventh state to approve the Bill of Rights.<sup>147</sup>

Once this lengthier history leading up to the Fourth Amendment is considered, it is clear that the Amendment's adoption in 1791 did not mark the birth of a new right but the culmination and apotheosis of a centuries-long debate about the power of government to search and seize. In other words, the Fourth Amendment did not create *a* right to be secure but instead memorialized “[t]he right of the people to be secure,”<sup>148</sup> which was so obvious at that time as to almost merit no mention in the Constitution.<sup>149</sup> Thus, the lack of historical records on the congressional debates over the Fourth Amendment is neither surprising nor problematic, for there are other records, as seen above, that already shaped the contours of that right.<sup>150</sup>

The right to be secure against unreasonable searches and seizures clearly contemplated limitations on the government's ability to violate property rights. Arbitrary entry into homes, shops, and ships, as well as the breaking and taking away of possessions, was obviously offensive to the colonists and their English counterparts. Although *Entick* recognized that even harmless property violations were legally problematic, the actual victims of government searches and seizures identified and decried the substantial harms that flowed from such intrusions. As discussed above, such harms included disruption of family life and the household

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but Benson made the change anyway as Chair of the Committee of Three tasked with arranging the amendments. *Id.* While this process may sound questionable, the final version was ultimately approved by the Senate and ratified by the states. *Id.* at 101–03. This history, Lasson argues, shows that the Amendment as it stands today is not only legitimate, but had been “intentionally given a broader scope.” *Id.* at 103.

146. U.S. CONST. amend. IV.

147. HUBBART, *supra* note 108, at 73.

148. U.S. CONST. amend. IV (emphasis added).

149. Indeed, Federalists argued that the right would be diminished by including it in the Constitution, as that would implicitly suggest that the federal government would otherwise have the power to abridge it. *See* HUBBART, *supra* note 108, at 57 (citing to Alexander Hamilton's argument in THE FEDERALIST No. 84, at 555–61 (Alexander Hamilton) (Modern Library ed. 1937)); Davies, *supra* note 73, at 669 (observing that the Framers did not think they could capture the full panoply of individual rights in a single document); *cf.* LASSON, *supra* note 76, at 86 (quoting James Wilson's admission that including a Bill of Rights to the Constitution simply did not occur to the members of the convention). In contrast, the inclusion of the provision in the early state constitutions was telling, as they were not only documents of self-government but also of rebellion against England's infringement of individual rights.

150. *See* HUBBART, *supra* note 108, at 71–72 (noting that the House delayed discussion on the Bill of Rights multiple times and that the debates on the Fourth Amendment were brief, and also reporting that the Senate approved the Fourth Amendment without any changes).

(especially wives and daughters)<sup>151</sup> insult and “discourtesy” toward upper classes by the lower,<sup>152</sup> attacks on religious and political freedom,<sup>153</sup> personal and property violence,<sup>154</sup> severe fright,<sup>155</sup> exposure of private or secret family and business affairs,<sup>156</sup> loss of political privileges,<sup>157</sup> and disturbance of the general sense of domestic security and happiness.<sup>158</sup> Indeed, *Entick* itself recognized that the real harm in the seizure of papers was the exposure of otherwise private or secret information contained in those papers—that is, the quality that makes this particular kind of property “dearest” to its owner.<sup>159</sup> Prioritizing the bare entry, or even dispossession of chattels, over so many other deeply felt concerns about selfhood and family integrity overlooks the thoughts and experiences of those who originally conceived of the Fourth Amendment right. It also confuses the mode of the violation with that which has been violated.

Of course, it is not impossible that the Framers, in drafting the Fourth Amendment, nonetheless chose to ignore these wide-ranging concerns in order to focus exclusively or primarily on property rights instead. But there is no evidence to indicate that this occurred, and neither the language nor subsequent interpretations of the Amendment support a property-only or even a property-first view. As to the Amendment’s wording, the protected right is explicitly identified as one of security, whose apparent capaciousness begins to make sense in light of the multiple interests that were believed to be at stake. It would have been relatively easy for Madison and others to have expressed a priority in property if they wished; indeed, the recommending amendments of both Pennsylvania and Maryland referred only to persons and property without asserting the broader right to be secure.<sup>160</sup> That the Fourth Amendment ended up speaking of the right of the people to be secure, rather than a person’s right to property, is telling.

Despite this, Justice Thomas has concluded that the enumerated “persons, houses, papers, and effects” indicate, without expressly saying so, that property rights were at the heart of the Fourth Amendment.<sup>161</sup> But this reading of the text is both strained and somewhat unprincipled. It is strained because Justice Thomas reduces all four to “things,” i.e., property.<sup>162</sup> A person, however, is clearly not a thing, and even if by “person” the Framers were referring to only the physical body, which may arguably be reduced to a thing, people do not ordinarily talk about their body in

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151. See *supra* text accompanying notes 81–83, 85, 91.

152. See *supra* text accompanying notes 80, 87–89, 127.

153. See *supra* text accompanying notes 80–86.

154. See *supra* text accompanying notes 81–83, 85, 90.

155. See *supra* text accompanying note 85.

156. See *supra* text accompanying note 92, 104, 122.

157. See *supra* text accompanying notes 86–87.

158. See *supra* text accompanying notes 104, 126–28.

159. *Entick v. Carrington* (1765) 95 Eng. Rep. 807, 818 (KB), 19 Howell’s State Trials 1029, 1066.

160. See HUBBART, *supra* note 108, at 61–62.

161. *Carpenter v. United States*, 138 S. Ct. 2206, 2239 (2018) (Thomas, J., dissenting).

162. See *id.* at 2239, 2241 (referring to “persons” as “objects” and “things”).

terms of it being their property.<sup>163</sup> “Theirs,” to be sure, but not “their property.”

Justice Thomas is correct that houses, papers, and effects are all things that people can ordinarily own or possess, so there is an implicit invocation of property rights here. But it is an odd invocation, for papers are seemingly an “effect,” so there is, at the very least, a redundancy that must be explained.<sup>164</sup> One approach to resolving it is to ignore the problem by treating the three items as mere examples of a more general concern. Accordingly, Justice Thomas argued in *Carpenter* that the enumeration of three types of property is evidence that the Fourth Amendment is property-based.<sup>165</sup> But this reading appears severely flawed. For one thing, as noted before, the Framers would have been quite capable of directly expressing their desire to safeguard property rights without doing so in such an oblique fashion.<sup>166</sup> For another, this reading imposes erasure and redundancy across all three enumerated items; it is as if the Framers had essentially said that there is a right to be

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163. Ownership of the body and its parts is a thorny issue in property law, which has thus far been reluctant to recognize ordinary property rights in the body. *See generally* JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 88–94 (4th ed. 2017). That said, the Framers unfortunately did recognize property interests in others’ bodies—those of slaves. However, there is no reason to believe that such views translated into thinking of their own bodies as property that may be owned or possessed, even by themselves. Today, of course, according respect to a person’s right to their body explicitly relies on principles of control rather than ownership—privacy and autonomy, not property. *But see* Kerr, *supra* note 17, at 75 (suggesting, without explaining, that ownership rights can be enjoyed over “persons” as well as “houses, papers, and effects”).

164. James Madison’s original draft of the Fourth Amendment referred to houses, papers, and “other property” rather than “effects,” thereby avoiding this apparent problem. *See supra* text accompanying note 143. (Notably, though unsurprisingly, the right of the people to be secure “in their persons” was also set off from “their houses, their papers, and their other property” by a semi-colon, indicating the recognition that persons and property are distinct. *See id.*) Dictionaries from the eighteenth century define “effect” as “goods,” “chattels,” and “moveables.” *See* 1 JOHN ASH, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE 317 (1775); SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 304 (10th ed. 1792). One could also avoid this redundancy by following Donohue’s conclusion that effects refer to commercial goods, as opposed to personal property. *See* Donohue, *supra* note 86, at 1301. But this would lead to an awkward reading, for the Fourth Amendment would now protect all commercial goods but only one type of personal property: papers. It is also noteworthy that in *Entick*, Lord Camden refers to private papers as “goods and chattels” and uses those terms interchangeably with “property.” *Compare Entick*, 95 Eng. Rep. at 818, 19 Howell’s State Trials at 1066, *with* *Olmstead v. United States*, 277 U.S. 438, 464 (1928) (referring to letters as “a paper, an effect”), *overruled by* *Katz v. United States*, 389 U.S. 347 (1967). Accordingly, the distinction Donohue makes between property and effects is rather dubious. Not all dictionaries from that time period include the word. *See, e.g.*, 2 N. BAILEY, THE NEW UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY 173 (4th ed. 1756) (omitting the word completely); THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY 251 (16th ed. 1777) (including the word but not the relevant definition). “Effect” was not included in any of the legal dictionaries I consulted from that time and was not used to define other similar legal terms, such as “chattel.” *See* 1 RICHARD BURN & JOHN BURN, A NEW LAW DICTIONARY 302–03 (1792); 1 T. CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY 695 (1764); GILES JACOB, A NEW LAW-DICTIONARY 244 (1729).

165. *See Carpenter*, 138 S. Ct. at 2239 (Thomas, J., dissenting).

166. *See supra* text accompanying note 160.

secure in one's "person, property, property, and other property."<sup>167</sup>

To give effect to each term, as well as to avoid the redundancy between papers and effects, one must instead ask why the Framers chose this particular formulation. Again, the history of the Amendment offers insight. House searches were particularly odious to protesters of government searches and seizures because of the significant intrusions that they entailed. This was no ordinary property trespass, as against, say, a privately owned field; home incursions disrupted familial tranquility and exposed the personal details of one's life.<sup>168</sup> Moreover, colonists most often associated security with domesticity; the home being a place of refuge and solace.<sup>169</sup> But perhaps the most compelling reason for the emphasis on houses was rhetorical, for both the English and the colonists often insisted on, and exaggerated, the maxim that one's house is one's castle under the law.<sup>170</sup> Given both the actual harms involved in the invasion of the home and the political resonance of the house-as-castle claim, it is no wonder that houses were specifically named.

Like houses, papers also came to acquire a special status in the debates about searches and seizures. As noted above, some of the earliest organized protests were made by victims of religious and political searches, whose books and other papers were confiscated and used in evidence against them.<sup>171</sup> More immediately for the Framers, the search and seizure of papers was condemned in *Wilkes* and *Entick*.<sup>172</sup> Given the dramatic impact that *Wilkes* and *Entick* had on colonial thinking about the legality of general warrants, it is unsurprising that the Framers distinguished papers from the catch-all "effects" that follow in the Amend-

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167. Or, put another way, Justice Thomas's reading would lead to the same end had the enumeration been "barns, trunks, and purses," for these are also three types of property. To avoid reducing "houses, papers, and effects" to either fungible or arbitrary types of property, we must acknowledge that the pertinent question is not *what* "houses, papers, and effects" are, but *why* "houses, papers, and effects."

168. See *supra* text accompanying notes 81–82, 104, 126–28; see also HUBBART, *supra* note 108, at 64 (reporting that Virginia's Anti-Federalists insisted on a Bill of Rights to restrain the government from "go[ing] into your cellars and rooms, and search, ransack, and measure, every thing you eat, drink and wear").

169. See, e.g., *supra* text accompanying notes 126–28; Davies, *supra* note 73, at 602, 642 n.260 (reporting that Samuel Adams complained that searches robbed people of "domestic security which renders [life agreeable]" and noting that John Adams also sought to preserve the "security, safety and Peace and Tranquility" of the home "especially in the Night" (alteration in original) (quoting 1 LEGAL PAPERS OF JOHN ADAMS 137 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965))).

170. See *supra* text accompanying notes 90, 95, 101, 105, 113, 126; see also HUBBART, *supra* note 108, at 62 (quoting Maryland's argument that general warrants expose "our dwelling houses, those castles considered so sacred by the English law"). Cuddihy writes that many Americans also believed ships were their castles as well, but that claim did not carry the same rhetorical power. See CUDDIHY, *supra* note 18, at 591.

171. See *supra* text accompanying notes 79–87. Searches of papers began after the invention by Gutenberg of the printing press and intensified during the sixteenth century. See CUDDIHY, *supra* note 18, at 55. In *Entick*, Lord Camden noted that the Star Chamber in particular utilized general search warrants to root out libel against church and state. *Entick v. Carrington*, 19 Howell's State Trials 1029, 1069 (1765).

172. See *supra* text accompanying notes 117–125.

ment's enumeration.<sup>173</sup>

The foregoing analysis illustrates the reason why houses and papers were thought to be special. They were not ordinary property but property of the dearest nature, the most personal of spaces where the family dwelled, children were born, business plans were made, and one's innermost thoughts, feelings, and ambitions could be freely expressed without risking exposure, shame, or punishment. Whereas *Entick* established the importance of such security in papers, the colonists routinely argued for the right to enjoy the same security in homes.<sup>174</sup> Thus, houses and papers were not enumerated because they happened to be one's property; instead, they were enumerated because of their close association with security, which encompassed quintessentially personal interests such as privacy and autonomy, as well as property. Such a reading offers greater coherence between text and history, and within the enumeration itself, which leads with "persons," whose need for this broader understanding of security is both patent and urgent. To interpret "persons, houses, papers and effects" without recognizing these underlying values is a shallow reading of the text indeed.

Several Justices in *Carpenter* grounded their property-based interpretation of the Fourth Amendment not on its enumeration but on the word "their" that modifies it.<sup>175</sup> Arguing that "*their* persons, houses, papers

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173. See U.S. CONST. amend. IV.

174. These were, to the colonists, the rights they had as "Englishmen" that were denied to them by virtue of being colonists. See CUDDIHY, *supra* note 18, at 392 (noting that James Otis was mistaken on the English use of general searches). As Hubbard observes, the colonists believed that the searches and seizures they were subject to were not only "unconstitutional" but discriminatory because they (incorrectly) believed that the English in England enjoyed rights they did not. See HUBBART, *supra* note 108, at 27; ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789–1868, at 17 (2006) (calling the Framing Era view of the rights of Englishmen "fictionalized"); LEVY, *supra* note 97, at 2–6 (observing that the colonists enjoyed many more freedoms than their counterparts in England). The colonists felt discriminated against in other areas as well, including the payment of taxes. Opposing Parliament's 1765 Stamp Act, John Adams protested: "We won't be their negroes." LEPORE, *supra* note 96, at 82. With an astounding lack of self-consciousness, colonists often described themselves as enslaved under England's policies. See, e.g., Otis, *supra* note 89 (calling the writs of assistance "instruments of slavery"); LASSON, *supra* note 76, at 39 (noting that the statute abolishing the seventeenth century hearth-money tax in England referred to the exposure of the home to the tax collector as a "badge of slavery").

175. See *Carpenter v. United States*, 138 S. Ct. 2206 (2018). The analysis of "their" originates from Justice Scalia's concurrence in *Minnesota v. Carter*, 525 U.S. 83, 92 (1998) (Scalia, J., concurring), where he argued that while the word was ambiguous in meaning, the Framers could only have meant to confer a right over one's "own" person, house, papers, and effects because to do otherwise would lead to absurd results (e.g., my claiming a right not to have your person searched). However, Justice Scalia's reasoning did not explicitly, nor exclusively, associate "their" or "own" with property rights in the way that the *Carpenter* dissenters demanded. See *id.* at 95–97 (recognizing standing not only for those who hold property in fee simple and leaseholders but also for anyone who happens to live on the premises or is an overnight guest). Moreover, in contrast to the simplistic example of the third-party body search Justice Scalia offered, it is not so patently absurd for *Carpenter* to object to the search of *his* location information. See *id.* at 92. Following Justice Scalia's logical reading of "their," *Carpenter* would be barred only from claiming a protection over someone else's location information, but he should be able to assert a right over his own.

and effects” must mean that one must have a legitimate property interest in order to assert a Fourth Amendment right, Justices Kennedy, Thomas, Alito, and Gorsuch all required the defendant to establish such an interest in the location information at issue in that case.<sup>176</sup> Although it is true that “their” could refer to a property interest, that is not the only possible reading of that word. As discussed above, establishing a property interest in a person is at best awkward and at worst demeaning.<sup>177</sup> It seems highly implausible that the Framers, who sought to free themselves from “enslavement” by the British government, would have characterized their own persons in this manner.<sup>178</sup> Thus, the “their” is unlikely to refer to a property interest when it comes to “persons,” which tends to undermine the Justices’ unqualified reading of that phrase.

Possessive adjectives like “their” do refer to a relationship between the subject and object, but that relationship need not be grounded in property. For example, the phrase “their daughter” does not express parents’ property interest in a daughter but denotes a filial relationship instead. Even if the relevant object is not a person but a place or thing capable of being owned—e.g., “her office,” or “his location information”—it is still not the case that the possessive adjective must necessarily indicate a property interest.<sup>179</sup> Those phrases are perfectly intelligible where “her office” is just the space where she works during the day, and “his location information” is his by virtue of referring to his own and not some other person’s whereabouts. Until recently, the Supreme Court implicitly recognized this ambiguity in their “standing” line of cases by requiring that the defendant seeking a remedy for a Fourth Amendment violation must show that it is “their” own right and not someone else’s that has been violated.<sup>180</sup> The “their” in this set of precedents emphasized the personal nature of the right, whatever the content of that right happens to be, rather than the defendant’s ability to assert a specifically property-based

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176. See *Carpenter*, 138 S. Ct. at 2227–29 (Kennedy, J., dissenting); *id.* at 2272 (Gorsuch, J., dissenting). Justice Thomas, who relied on the Fourth Amendment’s enumeration for his property-only position, was not joined by any other Justice in his dissent. See *id.* at 2239 (Thomas, J., dissenting). He did, however, join the opinions of Justices Kennedy and Alito, both of whom focused on the word “their” in the Amendment. See *id.* at 2227–29 (Kennedy, J., dissenting); *id.* at 2257–59 (Alito, J., dissenting).

177. See *supra* text accompanying notes 162–63.

178. See *supra* text accompanying notes 112, 174.

179. The word “their” is used many times in the Constitution without regard to property, from apportioning representation among states according to “their respective Numbers,” U.S. CONST. art. I, § 2, cl. 3, to requiring that the President’s veto of a bill be recorded by the House in “their Journal,” *id.* art. I, § 7, cl. 2. In other places, “their” does suggest a property relation. See, e.g., *id.* art. I, § 8, cl. 8 (empowering Congress to grant intellectual property rights to authors and inventors for “their respective Writings and Discoveries”).

180. See, e.g., *Rakas v. Illinois*, 439 U.S. 128, 140 (1978) (holding that Fourth Amendment standing should be decided under substantive Fourth Amendment doctrine). Based on *Rakas*, the Court conferred standing to an overnight guest with presumably no property interest in a third party’s home in *Minnesota v. Olson*, 495 U.S. 91, 99–100 (1990), finding that the guest nonetheless had a personal expectation of privacy. Similarly, in *Minnesota v. Carter*, 525 U.S. 83, 90–91 (1998), the Court denied standing to a business guest in a third party’s home based on the lack of a legitimate expectation of privacy of his own.

claim in the place searched or the thing seized.<sup>181</sup>

In sum, a fuller history of the Fourth Amendment reveals that there was an impressive array of values—personal privacy, integrity of familial relations, physical safety, preservation of business secrets, protection of the innocent, religious and political freedom, class and political privilege, as well as property—that animated the protest against government searches and seizures.<sup>182</sup> Although not all of these concerns held the same degree of significance, and some indeed were jettisoned over time (e.g., class and political privilege),<sup>183</sup> there is little to no evidence that all but property survived this culling. Nor does the text provide strong support for such a thin interpretation of the Fourth Amendment, either through its enumeration or by the single, ambiguous word “their.” The most coherent reading of the history and text of the Amendment indicates that the right to be secure meant much more than the protection of property rights in the Framing Era.

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181. See, e.g., *Rawlings v. Kentucky*, 448 U.S. 98, 105–06 (1980) (holding that ownership of the evidence is insufficient to trigger the Amendment’s protections). To be sure, one is more likely to expect privacy in a place or thing that one owns. In that sense, Justice Thomas was correct when he wrote that “the founding generation understood that, by securing their property, the Fourth Amendment would often protect their privacy as well.” *Carpenter v. United States*, 138 S. Ct. 2206, 2240 (Thomas, J., dissenting). However, privacy does not always require ownership, as the Supreme Court recognized long ago, even before *Katz*. See *infra* cases in Part V. In any case, it is unclear why the Court should develop a Fourth Amendment test based on the means by which certain interests are secured rather than the interests themselves.

182. We often assume that people in the past were simpler, and their ideas more rudimentary, than they are now. Justice Thomas, for example, suggests that those in the Framing Era did not yet recognize privacy and liberty as stand-alone values, but only through the mediating framework of property. See *Carpenter*, 138 S. Ct. at 2239–40 (Thomas, J., dissenting). The evidence of the writings included in this Article from the eighteenth century and prior show the contrary: the people of that time were well able to, and passionately did, express these “abstract” concerns that were at the heart of their protests against government searches and seizures. See, e.g., LEVY, *supra* note 97, at 166 (“Americans never spoke of a right to privacy as such, although they understood the concept and, like their British counterparts, expressed outrage over the possibility that customs agents might ‘break the rights of domicil,’ ‘ransack houses,’ and ‘enter private cabinets’ or ‘secret repositories.’”). It is true that many of these concerns did have to be mediated in the law because the causes of action available at the time were more limited. Hence, these various personal security concerns were often aired in established types of trespass claims. See Sacharoff, *supra* note 7, at 896. Such limitations should not cabin the interpretation of the Fourth Amendment, however, which was written primarily to assuage the worries of the people that the Constitution would establish an over-powerful government. It was not written in legal terminology (somewhat inconveniently for us lawyers trying to interpret it today), and there is nothing within it to suggest that then-existing legal causes of action impose constraints on the scope of the right.

183. Although class and political privilege were rejected by the Fourth Amendment’s declaration of the right of the *people* to be secure, there is no gainsaying that one class of people—slaves—were not expected to enjoy that right. See, e.g., TASLITZ, *supra* note 174, at 12 (explaining the role of search and seizure practices in the maintenance of slavery).

#### IV. NINETEENTH-CENTURY INTERPRETATIONS OF THE FOURTH AMENDMENT

In addition to citing founding history and text, some Supreme Court Justices have argued that Fourth Amendment search analysis prior to *Katz* turned exclusively on property and that we should now return to that earlier regime. This Part and the next examine this claim to determine whether early Supreme Court cases (this Part) and more modern ones (Part V) indeed took a property-only, or a property-first, approach to Fourth Amendment searches. As will be made clear below, these cases reveal that, more often than not, the Supreme Court identified privacy, not property, as the primary interest under the Fourth Amendment long before *Katz* was decided.

Scholarly examination of early Fourth Amendment jurisprudence tends to abruptly fast-forward more than one hundred years from the precursor English cases of *Entick* and *Wilkes* to the landmark Supreme Court case of *Boyd v. United States*<sup>184</sup> in 1886. This is because, until *Boyd*, the Court decided only a handful of cases that touched on the Amendment, none of which seriously grappled with the scope of the government's authority or the breadth of the individual right.<sup>185</sup> Of these, *Ex parte Jackson* contained the most significant analysis. That case involved a defendant convicted of mail fraud for using the postal service to transmit lottery papers.<sup>186</sup> Although the Court ultimately denied the defendant's habeas petition, it did declare that letters and packages sent by mail were "as fully guarded" under the Fourth Amendment "as if they were retained by the parties forwarding them in their own domiciles."<sup>187</sup> Accordingly, the Court concluded that papers were protected "wherever they may be," and the government was required to obtain a warrant to comply with the Fourth Amendment.<sup>188</sup>

At first blush, the holding in *Ex parte Jackson* appears to be based on property rights given the reference to the domicile and the defendant's fictitious retention of the papers sent by mail. But the Court's reasoning did not rely on property law.<sup>189</sup> The reasoning in *Ex parte Jackson* focused instead on the fact that mailed items were often sealed, equating such sealed letters and packages in the mail to items still kept within the

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184. 116 U.S. 616 (1886).

185. These cases include *Ex parte Jackson*, 96 U.S. 727 (1877), *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), *Murray v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855), *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), *Livingston's Lessee v. Moore*, 32 U.S. (7 Pet.) 469 (1833), and *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807). The case of *Kilbourn v. Thompson*, 103 U.S. 168, 200 (1880), might be included in this list as the Court did mention in passing some aspects of the Fourth Amendment, such as the probable cause requirement for a valid warrant.

186. *Ex parte Jackson*, 96 U.S. at 727.

187. *Id.* at 733.

188. *Id.*

189. Justice Gorsuch in *Carpenter* suggested another form of property claim, arguing that putting letters in the mail is a bailment. *Carpenter v. United States*, 138 S. Ct. 2206, 2269 (2018); cf. *Burrus & Knight*, *supra* note 19, at 82–83 (noting, without fully explaining, that *Ex parte Jackson* was a property-based decision).



sender's domicile.<sup>190</sup> The Court went on to note that no warrant was needed for items sent by mail whose contents were open to inspection, such as a newspaper or pamphlet.<sup>191</sup> Thus, in its first significant foray into the substantive protections of the Fourth Amendment, the Court in *Ex parte Jackson* ultimately relied on the privacy established (or at least expected) by the sender in the act of sealing the papers, rather than on a constructive house trespass or bailment of property rationale.

The Court provided a far more robust elaboration of the Fourth Amendment nine years later in *Boyd*. In that case, the federal government instituted a forfeiture proceeding under an 1874 customs act against Boyd and others for failure to pay customs on thirty-five cases of plate glass.<sup>192</sup> In an attempt to establish the quantity and quality of the glass, the government obtained an order from a district court judge requiring Boyd to produce for inspection an invoice of plate glass cases that had been imported previously.<sup>193</sup> The 1874 Act provided that a failure to comply with the order, absent a satisfactory excuse, would be treated as an admission of the government's allegation.<sup>194</sup> Boyd objected to the order and the statute as violating his Fourth and Fifth Amendment rights, and the Court agreed.<sup>195</sup>

Observing that the case raised "a very grave question of constitutional law, involving the personal security, and privileges and immunities of the citizen," Justice Bradley began by holding that the judicial order operated as a search and seizure for Fourth Amendment purposes.<sup>196</sup> While compliance with the order obviated the need for a "literal" search and seizure of evidence, Justice Bradley found that the Amendment was nonetheless implicated because the order accomplished the same purpose.<sup>197</sup> To explain the functional equivalence of the two methods of acquiring evidence, Justice Bradley noted that the 1874 Act had replaced two earlier customs acts (of 1867 and 1863), both of which empowered government agents to "enter any premises . . . and take possession" of evidence.<sup>198</sup> That the 1874 Act no longer allowed that precise government conduct was immaterial to the majority; the method of obtaining the evidence sought via court order minimized the aggravating circumstances of breaking, rummaging, taking, etc., but did not affect the core invasion into "the sanctity of a man's home and the privacies of life."<sup>199</sup>

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190. *Ex parte Jackson*, 96 U.S. at 733.

191. *Id.* Because the evidence did not show that the defendant's papers were sealed, the Court ultimately denied habeas. *Id.* at 737.

192. *Boyd v. United States*, 116 U.S. 616, 617 (1886).

193. *Id.* at 618.

194. *Id.* at 619–20.

195. *Id.* at 638.

196. *Id.* at 618.

197. *Id.* at 634–35. In subsequent cases, the Court would come to refer to subpoenas for papers as "figurative" or "constructive" searches. *See, e.g., Okla. Press Pub. Co. v. Walling*, 327 U.S. 186, 202 (1946).

198. *Boyd*, 116 U.S. at 620–21.

199. *Id.* at 630. This mode of analysis is the inverse of *Entick*, where Lord Camden—in the absence of a Fourth Amendment to apply—characterized the privacy invasion as an

Thus finding that a search occurred, Justice Bradley next turned to the question of reasonableness.<sup>200</sup> Although the customs act required the government to describe with particularity the evidence sought and the allegations made, and notwithstanding that a presumably neutral district court judge issued the order to produce the invoice, Justice Bradley held that the search and seizure were unreasonable.<sup>201</sup> Observing that the order in this case extended beyond even the “obnoxious writs of assistance” which were directed toward searches and seizures of commercial goods on ships,<sup>202</sup> Justice Bradley determined that the paper search in *Boyd* undermined the principles of *Entick*, from which the Fourth Amendment was born.<sup>203</sup> Quoting *Entick* liberally, Justice Bradley also drew a connection between the prohibition within the Fourth Amendment and the protection against compelled self-incrimination under the Fifth Amendment, just as Lord Camden had done when he condemned the search and seizure of Entick’s papers because “the law obligeth no man to accuse himself.”<sup>204</sup> Accordingly, Justice Bradley concluded that the search for, and use of, private papers to convict Boyd was precisely what *Entick* condemned.<sup>205</sup>

Many commentators, as well as Supreme Court Justices, have argued that *Boyd* established property rights as the primary concern of the Fourth Amendment.<sup>206</sup> To be sure, there is support for this position. For example, in discussing the scope of the government’s legitimate search and seizure powers, Justice Bradley noted that the government historically was allowed to enter premises and seize items such as contraband, stolen property, or other goods over which it had a right of possession (e.g., imported merchandise for which duties had not been paid).<sup>207</sup> This list suggests that the Fourth Amendment protects against government

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aggravating factor to the underlying property trespass. *See supra* text accompanying note 122. Christian Halliburton suggests, however, that *Boyd* and *Entick* saw the relationship between privacy and property in the same way. Halliburton, *supra* note 6, at 817–19.

200. *Boyd*, 116 U.S. at 622. In this way, *Boyd* appears to have been the earliest Supreme Court case to explicitly use the two-step analysis that is followed by the Court today.

201. *Id.* at 638.

202. *Id.* at 623. This limitation on the writs of assistance must have been observed merely in practice; Levy describes the writs as authorizing customs officials to “enter ‘any House, shop, Cellar, Warehouse or Room or other Place.’” LEVY, *supra* note 97, at 156–57.

203. *See Boyd*, 116 U.S. at 626–27.

204. *Entick v. Carrington*, 19 Howell’s State Trials 1029, 1073 (1765); *see Boyd*, 116 U.S. at 630.

205. *Boyd*, 116 U.S. at 630.

206. *See, e.g.,* *Carpenter v. United States*, 138 S. Ct. 2206, 2239 (2018) (Thomas, J., dissenting); Halliburton, *supra* note 6, at 819–20 (stating that there was “an unbroken and unequivocal resort to property rights” between *Boyd* and *Katz*); Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 312 (1998) (“Beginning with *Boyd v. United States*, and extending to the latter third of the twentieth century, the Supreme Court defined the interest secured by the Fourth Amendment largely in terms of property rights.”).

207. *Boyd*, 116 U.S. at 624. Other instances of acceptable searches and seizures were as follows: entry to inspect required records; entry to effectuate an attachment, sequestration, or execution under a judicial writ; and examination, under oath, of an individual after ineffectual execution to discover the whereabouts of property to pay off a judgment. *See id.*

trespass where the individual has a full and legitimate property interest in the item to be seized, but not otherwise. Justice Bradley also relied heavily on *Entick*, which was a trespass case that broadly invoked the preservation of property rights as the *raison d'être* of organized society.<sup>208</sup>

But these rationales form only part of the *Boyd* reasoning, and arguably they are less significant than one might suppose. For one thing, a close reader of the opinion may be surprised to discover that property interests formed no part of the basis for finding that the Fourth Amendment applied, i.e., that a search or seizure had occurred. Justice Bradley did not conclude that a search took place because the government's actions were tantamount to a trespass to property (the approach our current Supreme Court would take after the *Jones* decision); he held that it occurred because the government's *purpose* in enforcing the court order was the same as when it undertakes a literal search: to find inculpatory evidence.<sup>209</sup>

Justice Bradley's discussion of property rights actually occurred at the second step of Fourth Amendment analysis, i.e., whether the search or seizure was unreasonable.<sup>210</sup> Here, Justice Bradley considered the original meaning of "unreasonable," noting that its definition can be gleaned by applying two legal maxims: "*consuetudo est optimus interpres legum*" (custom is the best expounder of law) and "*contemporanea expositio est optima et fortissima in lege*" (a contemporaneous exposition is the best and strongest in the law).<sup>211</sup> Applying these maxims, Justice Bradley noted that the search and seizure of private books and papers authorized by the original 1863 version of the statute at issue in *Boyd* was unprecedented; thus, the government could not rely on "long usage" to show reasonableness.<sup>212</sup> Customs-related searches and seizures that did enjoy long usage, as well as the approval of the same Congress that proposed the adoption of the Fourth Amendment,<sup>213</sup> were those that involved searches and seizures for goods over which "the government is entitled to the pos-

208. *See id.* at 626–29; *supra* text accompanying notes 121–25.

209. *See Boyd*, 116 U.S. at 622. This analysis supports Justice Thomas's assertion in *Carpenter* that the word "search" had no special legal meaning but must have been used in an ordinary sense in the Fourth Amendment. *See Carpenter*, 138 S. Ct. at 2238 (Thomas, J., dissenting). Law dictionaries from the eighteenth century did not typically include an entry for "search," although the word "searchers" was defined in one as "[a]n Officer of the Customs whose Business it is to search and examine Ships outward bound, if they have any prohibited or uncustomed Goods on board, etc." JACOB, *supra* note 164; *see also* CUNNINGHAM, *supra* note 164 (listing under the definition of "Customs," laws that address "[a] warrant of assistance to be granted to search for uncustomed goods," the "search" of ships, and the regulation of "searchers").

210. *See Boyd*, 116 U.S. at 622.

211. *Id.* Law dictionaries of the eighteenth century did not define "unreasonable," but did sometimes include a definition for "reason" as "the very life of the law," noting that "what is contrary to it is unlawful." *See* CUNNINGHAM, *supra* note 164; JACOB, *supra* note 164 (defining "reason" in a similar way).

212. *Boyd*, 116 U.S. at 622–23.

213. Here, Justice Bradley noted that that Congress passed a customs act in 1789 that authorized searches and seizures for revenue collection. *See id.* 623–24.

session of the property.”<sup>214</sup> Justice Bradley asserted the search and seizure of books and papers would be abhorrent to that same Congress because of the Framers’ well-known resistance against general warrants and writs of assistance, as well as their approval of the *Entick* case.<sup>215</sup>

Given the foregoing, it seems sensible to interpret *Boyd* to say that Fourth Amendment reasonableness (again, not the definition of a “search”) depends on property principles. But Justice Bradley did not stop there. Much like Lord Camden’s opinion in *Entick*, the *Boyd* opinion began with a property discussion but then took a decidedly sweeping turn toward giving greater scope to the Fourth Amendment.<sup>216</sup> Justice Bradley made clear that the Court’s interpretation of the Amendment would be bound neither by the “adventitious circumstances” of this particular case nor a narrow reading of *Entick*.<sup>217</sup> Accordingly, he rejected any property-only view of the Fourth Amendment with the following:

It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden’s judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation;[<sup>218</sup>] but any forcible and compulsory extortion of a man’s own testimony, or of his private papers to be used as evidence to convict him of crime, or to forfeit his goods, is within the condemnation of that judgment. In this regard the fourth and fifth amendments run almost into each other. Can we doubt that when

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214. *Id.* at 623.

215. *Id.* at 625–27, 630.

216. *See id.* at 630.

217. *Id.*; *see also* William C. Heffernan, *Property, Privacy, and the Fourth Amendment*, 60 BROOKLYN L. REV. 633, 644 (1994) (“[I]t is obvious that Camden and the Fourth Amendment’s framers were vitally concerned with informational privacy.”).

218. This clause in particular represents an interesting counterpoint to *Entick*, where Lord Camden argued that the privacy invasion (i.e., the inspection of papers) was the circumstance of aggravation rather than the essence of the violation. *See Entick v. Carrington* (1765) 95 Eng. Rep. 807, 818 (KB), 19 Howell’s State Trials 1029, 1066. It makes logical sense for Lord Camden to have viewed the case in this way, since Entick’s claim was made under an action for property trespass and legal challenges against searches and seizures were still relatively novel in England at that time. *See id.* 95 Eng. Rep. at 807, 19 Howell’s State Trials at 1030. Thus, Entick (and Lord Camden) had no choice but to ground their legal arguments in property law (i.e., “trespass . . . with force and arms” (*vi et armis*) in breaking and entering his dwelling, along with “disturb[ing] him in the peaceable possession thereof” and the seizure of his papers) as at least the entry point to a discussion of other interests at stake in the case. *See id.* In fact, Entick did not actually confine his arguments to his property rights; his counsel also argued the privilege against self-incrimination, family and business privacy, the strength of evidence required for a valid warrant, as well as public policy. *See id.* 95 Eng. Rep. at 812, 19 Howell’s State Trials at 1038–39. The context, of course, was quite different for Boyd and Justice Bradley, who could upend the analytical structure of *Entick* because they could appeal more specifically to the Fourth Amendment rather than the general principles of the common law. In doing so, Justice Bradley appears to have recognized the legal constraints that *Entick* operated under and gave a fuller airing of the concerns over privacy that troubled Lord Camden. *See Boyd*, 116 U.S. at 630.

the fourth and fifth amendments to the constitution of the United States were penned and adopted, the language of Lord Camden was relied on as expressing the true doctrine on the subject of searches and seizures, and as furnishing the true *criteria* of the reasonable and “unreasonable” character of such seizures?<sup>219</sup>

Far from making property rights central to the Fourth Amendment, this portion of the *Boyd* opinion rendered them somewhat peripheral, as incidental to, or an aggravation of, the essential problem, which Justice Bradley described as “all invasions on the part of the government and its employees of the sanctity of a man’s home and the privacies of life.”<sup>220</sup>

Thus, the Supreme Court’s first major attempt to interpret the Fourth Amendment was one that took a broad approach based on multiple interests rather than a single one. For Justice Bradley, the Amendment’s at once grand and basic purpose was to stop government intrusion into “the sanctity of a man’s home and the privacies of life,” which were so important as to be safeguarded by the Fifth Amendment as well.<sup>221</sup> This language spoke less to unpermitted entries and dispossessions of belongings than to an individual’s profound sense of personal security—yes, to have undisturbed rights in one’s property, but also to enjoy privacy and to be free from government compulsion.

After such lofty words, it is interesting to see that the Supreme Court returned to issuing rather cursory opinions on the Fourth Amendment. For nearly thirty years afterward, the Court decided cases that relied heavily on *Boyd*, but with little elaboration. Though it is difficult to make much of these cases given the thinness of their reasoning, it does appear that the Court tended to emphasize privacy rather than property as the foundational value of the Fourth Amendment. For example, in *In re Chapman*, a case involving the government’s attempt to compel testimony with transactional immunity, the Court noted that the Fourth Amendment did not shield the defendant from contempt charges because the testimony sought was not of a private nature.<sup>222</sup> In *Interstate Commerce Commission v. Baird*, the Court rejected the defendant’s Fourth Amendment claim while observing that he was objecting not to the “inspection” of his papers but to their relevance in the case against him.<sup>223</sup> Several other cases followed in this vein, where the Court’s discussion of *Boyd* highlighted the value of privacy rather than property.<sup>224</sup>

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219. *Boyd*, 116 U.S. at 630 (emphasis in original).

220. *Id.* This reading stands in contrast with Justice Thomas’s argument in *Carpenter* that privacy protection is incidental to the property protection offered by *Boyd*. See *Carpenter v. United States*, 138 U.S. 2206, 2240 (2018) (Thomas, J., dissenting); cf. Heffernan, *supra* note 217, at 643–44 (“[T]o eighteenth-century minds, one enjoyed privacy by exerting control over tangible objects such as one’s house or one’s papers.”).

221. *Boyd*, 116 U.S. at 630.

222. *In re Chapman*, 166 U.S. 661, 668–69 (1897).

223. *Interstate Com. Comm’n v. Baird*, 194 U.S. 25, 45–46 (1904).

224. See, e.g., *Flint v. Stone Tracy Co.*, 220 U.S. 107, 174 (1911) (“This amendment was adopted to protect against abuses in judicial procedure under the guise of law, which invade the *privacy of persons* in their homes, papers, and effects . . .” (emphasis added)); *Wilson v. United States*, 221 U.S. 361, 375–76 (1911) (rejecting the defendant’s Fourth and

In sum, the Supreme Court's Fourth Amendment decisions did not exclusively rely on, or prioritize, property during the nineteenth and very early part of the twentieth centuries. The Court's approach to the Amendment was broad and multifaceted, envisioning a robust right that included protection of personal privacy and liberty as well as property. If anything, these early cases tended to emphasize privacy rather than property as the Court's Fourth Amendment jurisprudence slowly developed.

## V. TWENTIETH-CENTURY SEARCH CASES TO *KATZ*

The analysis so far of the history and language of the Fourth Amendment, along with early Supreme Court cases, demonstrates that property was not the only interest discussed when it came to restricting government searches. Other concerns—especially privacy—took on an important role. The Supreme Court's interpretations of the Amendment may be characterized as both vague and expansive. This was intentional, as the *Boyd* Court made clear; at that time, the Court saw itself as a bulwark against “any stealthy encroachments” by government against individual rights.<sup>225</sup> To fulfill this role effectively, Justice Bradley explained that “constitutional provisions for the security of person and property should be liberally construed.”<sup>226</sup>

This section continues the examination into the Court's search jurisprudence to determine whether, and when, it turned more decisively toward elevating property protection under the Amendment. Unlike in the eighteenth and nineteenth centuries, the Supreme Court engaged much more actively with the Fourth Amendment in the twentieth century, both in terms of the number of cases it heard as well as its substantive analyses of them. Despite this wealth of cases that should be both celebrated and closely read, much of this jurisprudence is overlooked, serving as mere footnotes to the conventional tale that property dominated until *Katz*. This Section reveals that the cases actually tell a much more complex story of the Amendment's development in the twentieth century—one that extends the Amendment's long-standing history of encompassing multiple values.

Arguably, the first significant property-focused decision after *Boyd* came in *Weeks v. United States*, the Supreme Court decision that established the exclusionary rule in federal cases.<sup>227</sup> In *Weeks*, a U.S. Marshal warrantlessly searched the defendant's home and found letters there that

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Fifth Amendment claims against a subpoena for corporate papers in his possession, holding that possession is not enough where the papers are not private); *Wheeler v. United States*, 226 U.S. 478, 489–90 (1913) (same). The case of *Adams v. New York* may have swept more broadly beyond privacy when it noted that the Fourth Amendment was “designed to prevent violations of private security in person and property and unlawful invasion of the sanctity of the home.” *Adams v. New York*, 192 U.S. 585, 598 (1904). The language here is rather ambiguous, however, and the Court did not elaborate further.

225. *Boyd*, 116 U.S. at 635.

226. *Id.*

227. *See Weeks v. United States*, 232 U.S. 383 (1914).

were used by the government to convict him for illegal use of the mails.<sup>228</sup> Prior to trial, Weeks petitioned for the return of all of the papers, and the court granted the petition except as to those that were “pertinent” to the prosecution.<sup>229</sup> The Supreme Court reversed the lower court’s denial of Weeks’s petition, observing that “[i]f letters and private documents can thus be seized and held and used in evidence . . . the protection of the [Fourth] Amendment . . . is of no value, and, . . . might as well be stricken from the Constitution.”<sup>230</sup> Clearly, the conduct that troubled the Court was the warrantless search; Justice Day’s opinion condemned the invasion of “the house and privacy of the accused” as contrary to the Fourth Amendment and the principles it vindicates.<sup>231</sup> Noting, however, that the particular “aspect” of the case the Court was asked to address dealt not with the entry and search but rather the retention and use of the letters seized,<sup>232</sup> Justice Day’s opinion naturally delved into the dispossession of property that occurred.<sup>233</sup> *Weeks* thus held that the seizure of the papers was a violation of the Fourth Amendment, the court’s retention of them a denial of the defendant’s right to have them returned, and the use of them at trial constituted prejudicial error.<sup>234</sup>

Following *Weeks* came a string of cases in which the Supreme Court identified an eclectic set of interests underlying the Fourth Amendment. In *Perlman v. United States*, the Court referred to the lack of force or threat, trespass on property, privacy invasion, and government extortion in denying suppression of evidence.<sup>235</sup> The evidence at issue was a number of exhibits the defendant filed with a court pursuant to an unrelated intellectual property case, and the Court repeatedly observed that the filing was voluntary and led to the exhibits’ “exposition” and “publicity.”<sup>236</sup> Interestingly, the defendant’s continued ownership in the exhibits made no difference to the Court’s determination.<sup>237</sup> On the contrary, the Court described Perlman’s ownership-based claim to be “elusive of measurement” and observed that “the criterion of immunity [is] not the ownership of property but the ‘physical or moral compulsion’ exerted.”<sup>238</sup>

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228. *Id.* at 386.

229. *Id.* at 388.

230. *Id.* at 393.

231. *Id.* at 394.

232. *Id.* at 393.

233. *See id.* at 390.

234. *Id.* at 398.

235. *Perlman v. United States*, 247 U.S. 7, 13 (1918). It should be noted, however, that these grounds were identified by the Court only in response to the specific precedents that the defendant raised to support his position, which relied on both the Fourth and Fifth Amendments.

236. *Id.* at 14–15.

237. *See id.* at 15.

238. *Id.* As will be seen *infra*, the notion that property rights are too “elusive” to rely upon is a theme that would be revisited many times by the Court during the twentieth century. This characterization of property presents an interesting counterpoint against those who argue today that property would “ground” privacy. *See, e.g., supra* text accompanying notes 36–37.

The Court continued to broaden the scope of the Fourth Amendment in *Stroud v. United States*, where a prison inmate was refused Fourth Amendment protection over his letters because they were “voluntarily written” and obtained by prison officials in accordance with “established practice, reasonably designed to promote the discipline of the institution.”<sup>239</sup> Although the Court was not explicit about the purposes of the Amendment, this reasoning strongly suggested the possibility of both a lack of privacy expectation in the letters as well as relevant public policy grounds.<sup>240</sup>

The 1920 opinion in *Silverthorne Lumber Co. v. United States*, which expanded the exclusionary rule announced in *Weeks*, declared that the Fourth Amendment not only protected “physical possession” of papers but also protected against “any advantages” the government may enjoy through its illegal acts.<sup>241</sup> In this case involving the government’s attempt to subpoena papers that it had already once taken in a warrantless “clean sweep” of the defendant’s office, Justice Holmes appeared to acknowledge both property and procedural fairness as within the ambit of the Amendment.<sup>242</sup>

It was not until *Gouled v. United States* in 1921 that the Supreme Court more definitively turned to property to decide a Fourth Amendment search claim. That case involved the prosecution of Gouled and two others for conspiracy to defraud the United States.<sup>243</sup> The government obtained in evidence several papers, some of which were taken when an agent gained entry into Gouled’s office under false pretenses and others that were taken pursuant to a search warrant.<sup>244</sup> As to the first “surreptitious[ ]” search and seizure, Justice Holmes held that it was no different from a forcible entry since both equally invade the “security and privacy of the home or office.”<sup>245</sup> In this, the Court seemed to tread on very familiar ground; so much so that Justice Holmes cited no precedents and refused to even entertain discussion of any decisions to the contrary.<sup>246</sup>

It was in the discussion of the warrant-based searches and seizures that the question of property interests became crucial. Justice Holmes struck these down as well, finding that a search warrant cannot be used unless:

[A] primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property

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239. *Stroud v. United States*, 251 U.S. 15, 21–22 (1919).

240. The essential characteristic of the place—a penitentiary marked by surveillance and regulation—may also have been on the Court’s mind when it referred to the need for discipline. *See infra* text accompanying note 334 (discussing *Lanza v. New York*, 370 U.S. 139, 143 (1962)).

241. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 391–92 (1920).

242. *Id.* at 390.

243. *Gouled v. United States*, 255 U.S. 298, 302 (1921).

244. *Id.* at 303.

245. *Id.* at 305.

246. *Id.* at 306.



by the accused unlawful and provides that it may be taken.<sup>247</sup>

In support of this proposition, Justice Holmes relied on *Boyd's* enumeration of the kinds of searches and seizures that were historically accepted.<sup>248</sup>

While *Gouled* does establish property as a dispositive principle on the validity of the search warrant, it is still one of several principles that are utilized in the case. In striking down the first, warrantless, search of the office and its contents, the Court continued to refer to “security and privacy” to find a violation of the Fourth Amendment.<sup>249</sup> For our purpose, this is the more significant aspect of the case since it focuses on the question of the search rather than its justification. The Court held that this initial warrantless entry into *Gouled's* office was unconstitutional precisely because it was deemed to be a search under a “security and privacy” rationale.<sup>250</sup>

Moreover, the government’s possessory interest under *Gouled's* reasoning is a nontraditional one. While a defendant’s nonexistent or imperfect property interest in stolen items and contraband was a fairly conventional basis for the government’s justification to search and seize with a warrant, *Gouled* also contemplated that the government may establish a “primary right . . . when a valid exercise of the police power renders possession of the property by the accused unlawful and provides that it may be taken.”<sup>251</sup> *Gouled's* papers were neither stolen nor contraband, and Justice Holmes explained that the government was not able to successfully assert an interest over them on the basis that they would be an instrumentality used to injure the public in the future.<sup>252</sup> Thus, while the government’s “primary right” to possession of instrumentalities of crime may look like a property rule at first blush, it is actually a public-policy based rationale akin to a variation of what is now known as the “special needs doctrine,” which triggers the relaxation of usual reasonableness requirements based on non-law enforcement purposes such as public safety.<sup>253</sup> These decisions, including *Gouled*, demonstrate that the

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247. *Id.* at 309.

248. *See id.* For a list of the searches *Boyd* considered valid, see *supra* text accompanying note 207.

249. *Gouled*, 255 U.S. at 305–06.

250. *Id.*

251. *Id.* at 309.

252. *Id.* at 310–11.

253. Classic special needs include the use of checkpoints to address drunk driving, *see Mich. Dep't of State Police v. Sitz*, 496 U.S. 444 (1990), as well as compulsory drug testing to protect the health and well-being of schoolchildren, *see Bd. of Educ. v. Earls*, 536 U.S. 822 (2002). Indeed, Justice Holmes contrasted the government’s assertion of the right to possess the papers for purposes of preventing further injury to the public against its need to possess the papers for the ordinary purpose of using it as evidence at trial. *Gouled*, 255 U.S. at 310–11. He made it clear that the latter was insufficient to form the basis for a valid search and seizure. *Id.* This constraint on the government’s ability to seize certain property, known as the “mere evidence rule,” was formally rejected in *Warden v. Hayden*, 387 U.S. 294, 306 (1967), where the Court found that the rule requiring the government to have a superior property interest had “long been a fiction.”

Court was still adhering to a multi-interest analysis of the Fourth Amendment well into the twentieth century.

*Gouled* was quickly followed by *Burdeau v. McDowell*, where the defendant objected to the use of evidence stolen by his former employer in pursuit of a fraud case against him.<sup>254</sup> In discussing the claim, the Court observed that “it was *the* purpose of the Fourth Amendment to secure the citizen in the right of unmolested occupation of his dwelling and the possession of his property.”<sup>255</sup> Nonetheless, acknowledging that the government took no part in the theft, the Court allowed the evidence to be used against the defendant.<sup>256</sup> Thus, the Court’s sweeping declaration about the singular relationship between property rights and the Fourth Amendment did little work in the disposition of the case and was not further expounded upon.

If *Gouled* and *Burdeau* together signaled an impending turn toward property, it was lost by the time of *Hester v. United States*, in which the Court found that government trespass onto the defendant’s land was irrelevant where the defendant himself “disclosed” the evidence at issue.<sup>257</sup> That disclosure was apparently made when Hester transacted to sell illegal liquor to Henderson in front of his house, as seen by revenue officers who were hiding fifty to seventy-five yards away.<sup>258</sup> One officer also testified as to the contents of a broken jar of liquor discovered by the front door of the house as he was exiting the home.<sup>259</sup> Despite these various entries into land, home, and curtilage, Justice Holmes declared: “It is obvious that even if there had been a trespass, the . . . testimony [of the officers] was not obtained by an illegal search or seizure. The defendant’s own acts, and those of his associates, disclosed the jug, the jar and the bottle . . . .”<sup>260</sup>

The pendulum swung back toward property five years later in *Olmstead v. United States*, where the majority opinion appeared to focus more

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254. *Burdeau v. McDowell*, 256 U.S. 465, 470–71 (1921).

255. *Id.* at 475 (emphasis added).

256. *Id.* at 476.

257. *Hester v. United States*, 265 U.S. 57, 58 (1924).

258. *Id.* There was some dispute about whether the officers were on Hester’s land at the time they witnessed the transaction taking place. *Id.* Transcripts from the trial show that the officers themselves believed they were on Hester’s property in a fenced pasture by the barn when they witnessed the transaction. Transcript of Record at 16, 19–20, *Hester v. United States*, 265 U.S. 57 (1924) (No. 243). In any case, it is clear that officers did enter the property at some point, with one officer eventually going into the home to search it and then finding evidence within the curtilage. *Hester*, 265 U.S. at 58.

259. *Hester*, 265 U.S. at 58.

260. *Id.* At the end of his opinion, Justice Holmes also noted that trespass onto open fields was not protected under the Fourth Amendment. *Id.* at 59 (“The distinction between [open fields] and the house is as old as the common law.”). Unfortunately, he did not explicate this further as he believed this claim raised only “a shadow of a ground” for excluding the officers’ testimony. *Id.* Thus, Justice Holmes never differentiated among (1) the area fifty to seventy-five yards away from which the officers saw the illegal transaction, (2) the location by the front door where the broken jar was found, and (3) the place 200 yards from the house where the defendants discarded their jug and bottle of liquor after they had run from the officers. *See id.* While the first and the third could be characterized as open fields, the second was clearly not.

squarely on property principles to determine that the government's wire-tapping of the defendant's phone was not a violation of the Fourth Amendment.<sup>261</sup> *Olmstead* involved what Justice Taft described as "a conspiracy of amazing magnitude to import, possess and sell liquor unlawfully."<sup>262</sup> After a brief discussion of relevant precedents that began with *Boyd*, Justice Taft sought to distinguish this case from *Gouled*, which he observed "carried the inhibition against unreasonable searches and seizures to the extreme limit. . . . [and] is not to be enlarged by implication."<sup>263</sup> The common factor in *Olmstead* and *Gouled* was government stealth; in *Gouled*, the government gained entry into Gouled's office under false pretenses, whereas in *Olmstead*, the government secretly tapped Olmstead's telephone wire in order to overhear his conversations with co-conspirators.<sup>264</sup> On the other hand, an important distinction between the cases was the actual entry and taking away of tangible items in *Gouled* that was absent in *Olmstead* because the wiretap was made outside defendant's home and the government did not take anything tangible.<sup>265</sup>

Although *Olmstead* is widely viewed as one of the Court's strongest cases on the property basis for the Fourth Amendment, privacy lurked even in this decision.<sup>266</sup> Justice Taft likened the wires extending from the defendant's home to public highways; their connection to Olmstead's private residence did not make them a part of his house, so they fell outside the scope of the Fourth Amendment.<sup>267</sup> While this analogy could refer to either privacy or property, Justice Taft appeared to nod toward privacy when he went on to say: "The reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house and messages while passing over them are not within the protection of the

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261. See *Olmstead v. United States*, 277 U.S. 438 (1928), *overruled by* *Katz v. United States*, 389 U.S. 347 (1967).

262. *Id.* at 455. Justice Taft explained that *Olmstead* was the head of an illegal enterprise that involved fifty-plus persons, two ships that traveled back and forth from British Columbia as well as other smaller vessels, and several underground storage facilities in and around Seattle, Washington. *Id.* at 456. He speculated that the annual sales of illegal liquor amounted to over \$2 million, which is worth about \$30 million today. *Id.*

263. *Id.* at 463.

264. See *id.* at 456–57; *Gouled v. United States*, 225 U.S. 298, 304–05 (1921).

265. *Olmstead*, 438 U.S. at 456–57, 463–64.

266. See, e.g., Clancy, *supra* note 206, at 312 (observing that *Olmstead* marked the start of a process of defining "constitutionally protected areas"); see also *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (citing to *Olmstead* as one of three Supreme Court cases that tie Fourth Amendment protections to common law trespass). It is perhaps worth pausing here to observe that Justice Scalia's claim regarding the long-standing close relationship between trespass and the Fourth Amendment was supported by only three cases, the earliest of which is *Olmstead* (the others being *Goldman v. United States*, 316 U.S. 129 (1942), and *Silverman v. United States*, 365 U.S. 505 (1961)). See discussion *infra* accompanying notes 292–94, 318–25. Justice Scalia made a similar assertion in *United States v. Jones*, 565 U.S. 400, 405 (2012), citing only to *Kyllo*, *Olmstead*, and a 2004 article by Professor Orin Kerr. This speaks not only to the importance of *Olmstead* for a property based Fourth Amendment but also to the surprising dearth of explicit support for that position.

267. *Olmstead*, 277 U.S. at 465.

Fourth Amendment.”<sup>268</sup> One does not lose a right over their property by exposing it to the outside world; one does, however, lose privacy through such exposure.

Shortly after *Olmstead*, the Court decided *United States v. Lefkowitz*, where it simultaneously affirmed the privacy foundation of the Fourth Amendment while applying the property-based mere evidence rule to grant exclusion.<sup>269</sup> In that case, prohibition agents obtained an arrest warrant for the defendant and executed it at a location believed to be the office where he processed illegal liquor orders in violation of the National Prohibition Act.<sup>270</sup> Following the lawful arrest, the agents proceeded to search desks and wastebaskets to gather papers and books as evidence.<sup>271</sup> The Court held that the officers could not have greater authority to search than that granted by a magistrate under a search warrant, and here no warrant could have issued for the papers and books taken because they were merely evidentiary.<sup>272</sup> Once again, the Court seemed to be protecting Lefkowitz’s right to *keep* his private papers, yet Justice Butler’s analysis of the facts also began with the proposition that the Fourth Amendment must be “construed liberally to safeguard the right of *privacy*.”<sup>273</sup> There was little explanation of the relationship between the “right of privacy” invoked and the mere evidence rule that the Court continued to apply to limit searches.

Cases like *Lefkowitz*, where the Court broadly identified privacy as the purpose of the Fourth Amendment while applying rules that did not obviously or singularly rely on that purpose, were not uncommon.<sup>274</sup> In *Davis v. United States*, the Court finally seemed to address the persistent but confounding relationship between privacy and property in a case involving a defendant’s illegal possession of gasoline ration coupons during wartime.<sup>275</sup> There, undercover federal agents illegally purchased gasoline at the defendant’s gas station and arrested him thereafter.<sup>276</sup> The defendant then allowed the agents’ entry into the office where the coupons

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268. *Id.* at 466.

269. *See* *United States v. Lefkowitz*, 285 U.S. 452, 464–66 (1932).

270. *Id.* at 458–60.

271. *Id.*

272. *Id.* at 464–65. In an earlier Prohibition case called *Marron v. United States*, 275 U.S. 192, 199 (1927), the Court allowed the use of papers found in a closet after the arrest of the defendant. The Court in *Lefkowitz* distinguished the two cases by noting that while the *Marron* papers were taken incident to the arrest of a bartender who was actively selling illegal liquor, the *Lefkowitz* papers were taken incident to arrest from an office used only to solicit orders of illegal liquor. *Lefkowitz*, 285 U.S. at 465–66. I must admit that the difference in this distinction escapes me.

273. *Lefkowitz*, 285 U.S. at 464 (emphasis added).

274. *See, e.g.*, *Gouled v. United States*, 255 U.S. 298, 305–06 (1921) (expressing concern about the “security and privacy of the home or office and of the papers of the owner” and applying the mere evidence rule); *Zap v. United States*, 328 U.S. 624, 628–29 (1946) (referring to defendant’s Fourth Amendment claim as grounded in privacy, but finding relevant that government officials were not trespassers); *McDonald v. United States*, 335 U.S. 451, 453–56 (1948) (invoking privacy but not using it to explain how the search occurred).

275. *See* *Davis v. United States*, 328 U.S. 582, 583–85 (1946).

276. *Id.* at 585.

were kept after the agents allegedly threatened to break down the door.<sup>277</sup> The Supreme Court held that the government acted lawfully.<sup>278</sup> After noting that the Fourth Amendment protects privacy, the Court explained that the coupons were the property of the U.S. Government, over which it had the power to “inspect[ ]” and “recall.”<sup>279</sup> The government’s right of possession over the coupons thus weakened the defendant’s privacy right. The Court alluded to a second reason why the defendant’s privacy right must give way to the government’s property claim: the search here occurred in a place of business rather than a private residence.<sup>280</sup> Accordingly, the Court found that the warrantless entry to search the office was valid.<sup>281</sup> Nonetheless, the majority recognized that the government’s property-based right to inspect the coupons did not allow for a general or exploratory search of the premises.<sup>282</sup>

Based on the rationales of the *Davis* case, the Court seemed to suggest a sliding scale of protection where the government’s property interest in certain kinds of evidence would be measured against the individual’s privacy interest. In other words, *Davis* could be read to hold that the individual right protected by the Fourth Amendment is indeed privacy, but that right is neither monolithic nor absolute—the government’s (or a third party’s) property interest could overcome, in a limited way, the defendant’s privacy interest.<sup>283</sup> Accordingly, *Davis* allowed the government to invade the defendant’s privacy to inspect and recover its own property (the coupons) but implied that any broader search of the office would violate the Fourth Amendment.<sup>284</sup> If this is correct, the mere evidence rule does not support an interpretation of the Fourth Amendment that puts an individual’s property rights at the core; rather, it denotes the ab-

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277. *Id.* at 586.

278. *Id.* at 593–94. The Court ultimately found that the defendant gave lawful consent because the government’s right to the coupons allowed the agents to be more coercive than in other types of situations where the individual would have more robust privacy rights. *Id.* at 593. Along somewhat similar lines, the Court also indicated that there was an implied consent to government inspection of the coupons by anyone who took custody of them. *Id.* at 590.

279. *Id.* at 588.

280. *Id.* at 592. This distinction, among other aspects of the ruling, elicited a passionate dissent from Justice Frankfurter, who noted that such a “casual” downgrading of offices was inappropriate. *See id.* at 596 (Frankfurter, J., dissenting). *Davis* marked the first of a trio of dissents by Justice Frankfurter that condemned the erosion of the Fourth Amendment’s protections and focused particularly on the history that led to its adoption and the significant role that the specific warrant played in the Framers’ conception of reasonableness. *See also Zap v. United States*, 328 U.S. 624 (1946) (ratifying government’s search and seizure of a bank check based on a contractual agreement to allow inspection); *Harris v. United States*, 331 U.S. 145 (1947) (approving a search of defendant’s entire apartment supported by an arrest warrant only).

281. *Davis*, 328 U.S. at 593.

282. *Id.* at 592.

283. *See id.* at 593 (“And where one is seeking to reclaim his property which is unlawfully in the possession of another, the normal restraints against intrusion on one’s privacy, as we have seen, are relaxed.”). In *Davis*, the Court found that the government’s property interest over the ration coupons was absolute, while the defendant’s privacy interest in a business office was weak. *See id.* at 588, 592.

284. *See id.* at 591.

sence of a property-based justification *by government* to intrude on personal privacy.<sup>285</sup>

After *Davis*, the Court seemed to double down on privacy as the primary individual right protected by the Fourth Amendment. In *Johnson v. United States*, decided two years later, Justice Jackson declared that police entry into the defendant's hotel room without a warrant raised "a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance."<sup>286</sup> Whether a warrant was required to enter the room depended on "balancing the need for effective law enforcement against the right of privacy."<sup>287</sup> Later that same year, the Court in *Trupiano v. United States* invalidated a warrantless search of the defendant's illegal distillery, again on privacy grounds.<sup>288</sup> In finding a Fourth Amendment violation, Justice Murphy explained that the Framers required a warrant whenever possible "[t]o provide the necessary security against unreasonable intrusions upon the private lives of individuals."<sup>289</sup> A year later, in *Brinegar v. United States*, the Court upheld the warrantless stop and search of an automobile carrying illegal liquor.<sup>290</sup> This case focused on the probable cause standard, which the majority argued "seek[s] to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime."<sup>291</sup> Whereas in earlier cases the Supreme Court appeared to derive the privacy concern from the Fourth Amendment's history and its text regarding the right to be secure, this series of cases located privacy within both the warrant and probable cause requirements as well. Privacy thus came to pervade not only the determination of a search, but also its reasonableness.

This is not to say that property fell by the wayside during this time. In *Goldman v. United States*, the Supreme Court firmly relied on the lack of physical trespass to approve government eavesdropping.<sup>292</sup> Indeed, *Goldman* was in some ways a stronger property-based Fourth Amendment case than *Olmstead* because the Court dismissed as impractical *Olmstead's* privacy-based theory that there was no search based on the defendant's intent to project his conversation beyond the walls of his of-

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285. This accords with the analysis of property rights found in cases like *Boyd* and *Gouled*, which took place at the level of reasonableness or justification for the search rather than at the definition of the search itself. See *supra* text accompanying notes 200–05, 249–53; see also Carol S. Steiker, *Second Thoughts about First Principles*, 107 HARV. L. REV. 820, 829 (1994) (discussing how the mere evidence rule was an "expression[ ] of traditional notions of 'reasonableness'").

286. *Johnson v. United States*, 333 U.S. 10, 14 (1948). The warrantless entry was justified by the strong smell of burning opium emanating out into the hallway, which Justice Jackson said was more than sufficient to establish probable cause. *Id.* at 13.

287. *Id.* at 14–15.

288. See *Trupiano v. United States*, 334 U.S. 699, 709–10 (1948).

289. *Id.* at 705.

290. See *Brinegar v. United States*, 338 U.S. 160, 161, 177–78 (1949).

291. *Id.* at 176.

292. See *Goldman v. United States*, 316 U.S. 129, 134–35 (1942), *overruled by Katz v. United States*, 389 U.S. 347 (1967).

fice.<sup>293</sup> Instead, the Court focused solely on the fact that the sound-amplifying detectaphone the officers used was placed outside of the defendant's office so that no trespass or illegal entry had been made.<sup>294</sup> Thus, unlike *Olmstead*, *Goldman* appeared to reject outright the relevance of the defendant's privacy interest when speaking within the confines of his office.

After this strong showing, property once again receded from view until six years later when it resurfaced in *McDonald v. United States*, albeit in a concurring opinion.<sup>295</sup> In *McDonald*, the police had been investigating the defendant for operating an illegal lottery out of a rented room in a rooming house.<sup>296</sup> Following two months of surveillance, but without a warrant, officers climbed into the house through the landlady's open window and stood on a chair to look through the open transom above the defendant's door.<sup>297</sup> The majority broadly invoked the right of privacy to hold that the government violated the Fourth Amendment by failing to obtain a warrant.<sup>298</sup> In his concurring opinion, Justice Jackson observed that the majority omitted to explain exactly how the search occurred in the first place.<sup>299</sup> He went on to analyze the case according to what appeared to be property-based concepts. Noting that a tenant in a rooming house had no right to exclude persons from the common hallway, yet still retained "a personal and constitutionally protected interest in the integrity and security of the entire building against unlawful breaking and entry," Justice Jackson believed that the officers violated that interest by climbing into the landlady's bedroom.<sup>300</sup>

Despite these cases, there is no gainsaying that the Supreme Court more consistently asserted privacy as the central value of the Fourth Amendment throughout the first half of the twentieth century. Particularly noteworthy in this regard is the seminal 1949 case of *Wolf v. Colorado*, which incorporated the Fourth Amendment into the Due Process Clause of the Fourteenth Amendment.<sup>301</sup> In taking this important step

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293. *Id.* at 135.

294. *Id.* at 134–35. The majority found that a trespass may have occurred earlier when the government entered and "installed a listening apparatus in a small aperture in the partition wall" of the defendant's office. *Id.* at 131. However, the apparatus failed to work so the government used a detectaphone placed "against the partition wall" instead. *Id.* The Court accepted the lower courts' finding that there was no causal connection between the evidence gathered by the detectaphone and the installation of the listening apparatus. *Id.* at 135.

295. See *McDonald v. United States*, 335 U.S. 451, 457–61 (1948) (Jackson, J., concurring).

296. *Id.* at 452.

297. *Id.* at 453.

298. *Id.* at 455–56. Justice Douglas, who penned the majority opinion, declared that the Fourth Amendment "marks the right of privacy as one of the unique values of our civilization." *Id.* at 453.

299. *Id.* at 457 (Jackson, J., concurring).

300. *Id.* at 458–59. Justice Jackson was also troubled by the fact that the officers' "felonious . . . entry" was a more serious crime than the *malum prohibitum* offense of running numbers. *Id.* at 459–60.

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

toward broadening the application of the Fourth Amendment, the Court proclaimed: “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.”<sup>302</sup> It is clear that with *Wolf*, the Supreme Court understood itself to be extending a personal right of privacy against state, as well as the federal, governments.

Thus, it is somewhat surprising that the Court began to engage more frequently with property rules only a year later. In *United States v. Rabinowitz*, a case giving wide berth to officers conducting searches incident to arrest, the Court upheld an hour-and-a-half-long office search while observing that “[t]he right of the ‘people to be secure in their persons’ was certainly of as much concern to the Framers of the Constitution as the property of the person.”<sup>303</sup> While the Framers’ concern over property rights did not limit the search at issue in the case, *Rabinowitz* made clear that property remained an important, though perhaps lesser, Fourth Amendment value compared to security in one’s person.

The following year, in *United States v. Jeffers*, the Court held that ownership of the evidence sought to be excluded conferred Fourth Amendment standing to a defendant who lacked a privacy interest in the place searched.<sup>304</sup> This was followed by *On Lee v. United States*, in which the Court once again considered the trespass issue where the defendant sought to exclude evidence gained by a wired undercover agent.<sup>305</sup> Noting that the agent was given permission to enter the defendant’s premises, and no privacy rights were violated by the use of the wire, the Court denied exclusion.<sup>306</sup> Significantly, however, the *On Lee* Court did not necessarily subscribe to the defendant’s assumption that a showing of property trespass would advance his claim.<sup>307</sup> Noting that the trespass discussion in *Goldman* was mere dictum because, in fact, there was no relevant trespass in that case, the Court seemed to retreat again from

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302. *Id.* at 27.

303. *United States v. Rabinowitz*, 339 U.S. 56, 60 (1950), *overruled by* *Chimel v. California*, 395 U.S. 752, 768 (1969). This rationale was used to show that since searches of persons incident to lawful arrest were considered reasonable during the Framing era, searches of their property would also likely be approved. *Id.*

304. *United States v. Jeffers*, 342 U.S. 48, 53–54 (1951). In this interesting case, police entered Jeffers’s aunts’ hotel room without a warrant and seized the defendant’s cocaine. *Id.* at 49–50. Although the Court acknowledged that Jeffers could not have a property right to contraband, which would affect the legality of its *seizure*, the warrantless search remained a problem because search and seizure in the case could not be disentangled as they were “bound together by one sole purpose—to locate and seize the narcotics of [Jeffers].” *Id.* at 52. Accordingly, the Court concluded that while Jeffers was not entitled to a return of the contraband, his ownership of it was sufficient for purposes of applying the exclusionary rule. *Id.* at 54.

305. *See On Lee v. United States*, 343 U.S. 747, 748–49 (1952).

306. *Id.* at 751–54. The defendant in *On Lee* made the argument that despite the permission given to the agent, there was *trespass ab initio* because of the agent’s unlawful conduct post-entry and that the permission was gained through fraudulent misrepresentation. *Id.* at 751–52. Justice Jackson rejected the relevance of these “fine-spun doctrines” to the application of the exclusionary rule. *Id.* at 752.

307. *See id.* at 751–52.



relying on a property-oriented analysis of the Fourth Amendment.<sup>308</sup>

The next significant case that addressed the role of property under the Fourth Amendment was *Jones v. United States* in 1960, where the Court had occasion to consider the standing of a defendant convicted of narcotics possession.<sup>309</sup> In *Jones*, federal agents obtained a search warrant to enter an apartment that did not belong to the defendant and to seize drugs that the defendant denied were his.<sup>310</sup> When the defendant sought to challenge the validity of the warrant, the district judge found that he lacked standing, and the drugs were admitted into evidence at trial.<sup>311</sup> The Supreme Court unanimously reversed this decision on two grounds.<sup>312</sup> First, it observed that narcotics possession cases created a “special problem” for defendants because they could assert standing only by undermining their own defense against the criminal charge.<sup>313</sup> This bind itself established sufficient interest to confer standing under federal rules of evidence, as a contrary outcome would allow the government to enjoy “the advantage of contradictory positions as a basis for conviction.”<sup>314</sup>

Second, and more importantly for our purpose, the Court determined that “subtle distinctions” of “gossamer strength” in property law were not appropriate determinants of constitutional protections.<sup>315</sup> Instead, the Court held that anyone “legitimately on [the] premises” had standing while those who were wrongfully present did not, as the latter could not “invoke the privacy of the premises searched.”<sup>316</sup> In this way, the *Jones* Court forged a hybrid approach that acknowledged the important role that property played in establishing the individual’s privacy interest. That said, however, it was also clear that the Court viewed property (here, the defendant’s status as a non-trespasser) as, at best, secondary—a means of discerning the existence of a right to privacy rather than an end of the Fourth Amendment itself.<sup>317</sup>

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308. *Id.* at 751.

309. *See Jones v. United States*, 362 U.S. 257, 258 (1960).

310. *Id.* at 258–59.

311. *Id.* at 259.

312. *Id.* at 263–67. Justice Douglas, however, agreed on the standing question but differed on the warrant issue. *Id.* at 273 (Douglas, J., concurring in part and dissenting in part).

313. *Id.* at 261–62 (majority opinion).

314. *Id.* at 263.

315. *Id.* at 266. Justice Frankfurter’s majority opinion noted that lower courts based their standing decisions on the status of the defendant as, variously, a guest, invitee, licensee, lessee, owner, and one with dominion over the premises. *Id.* at 265–66.

316. *Id.* at 267.

317. It should be noted that at one point, the *Jones* Court did broadly proclaim: “The restrictions upon searches and seizures were obviously designed for protection against official invasion of privacy and the security of property.” *Id.* at 261. While this sentence, taken out of context, would suggest that property occupies a coequal status to privacy, a fair reading of the entire opinion indicates otherwise. As with all the cases discussed in this Article, I have tried to avoid relying on broad generalizations, and focused instead on the rationales given by the Court in reaching its holdings.

The following year, the Court finally answered the question that it had reserved in *On Lee* and *Goldman*—namely, whether a warrantless trespass by police officers violated the Fourth Amendment. The facts of *Silverman v. United States*<sup>318</sup> were similar to those of *Goldman*. Suspecting Silverman of conducting illegal gambling activities in a row house, officers received permission to occupy the adjoining flat and inserted a “spike mike” into the shared wall.<sup>319</sup> The microphone was able to pick up incriminating conversations after making contact with the heating duct that serviced the defendant’s home.<sup>320</sup> Finding a violation, the Court distinguished this case from *Goldman* because there, the officers used a detectaphone placed against the other side of a shared wall whereas here, the officers made “an unauthorized physical penetration into the premises occupied by the [defendant],”<sup>321</sup> thereby “usurping part of the [defendant]’s house or office.”<sup>322</sup> Although the Court disavowed reliance on “technical trespass under the local property law” and the “ancient niceties of tort or real property law,” its reasoning nonetheless appeared to be grounded in general concepts of property law, such as the right to exclude (“physical invasion”) and the right to possess and use (“usurp[ation]”).<sup>323</sup> Notably, unlike in so many other cases applying property concepts, Justice Stewart’s majority opinion did not at any point refer to privacy rights, explicitly or implicitly, and specifically declined to consider that technological advances soon threatened to make its exclusively property-focused analysis obsolete.<sup>324</sup> Accordingly, *Silverman* confirmed what many had suspected since *Goldman*—that a warrantless property trespass alone could run afoul of the Fourth Amendment. Yet, at the same time, *Silverman* did not forward a comprehensive property theory either; indeed, the opinion was workmanlike in its focus on the detailed facts of the case, fastidious adherence to relevant precedents, and blanket refusal to consider future applications of the rule.<sup>325</sup>

A month later, the Court announced its opinion in *Chapman v. United States*, where the government attempted to use the property doctrines of waste and nuisance to justify its warrantless entry into the defendant’s

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318. 365 U.S. 505 (1961).

319. *Id.* at 506.

320. *Id.* at 506–07.

321. *Id.* at 509.

322. *Id.* at 511.

323. *Id.* at 510–11.

324. *See id.* at 509. Silverman’s attorney asked the Court to overrule *Goldman* in light of new devices that obviated physical trespass, presumably because the court of appeals found no significant distinction between *Goldman* and the facts of this case (it determined that the difference between the use of the detectaphone and the spike mike was a mere matter of inches). *Id.* at 508–09, 512.

325. Justice Stewart did write that “[a]t 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.” *Id.* at 511 (citing *Entick v. Carrington* (1765) 95 Eng. Rep. 807 (KB), 19 Howell’s State Trials 1029, 1066). This statement about the Fourth Amendment’s purpose, however, is ambiguous as it could fit both the property and the privacy view of the Amendment.

rented house.<sup>326</sup> The case involved a landlord who had called the police upon suspicion that his renter was using the property to run an unregistered distillery.<sup>327</sup> The landlord's cooperation was key to the government's argument that the landlord's right to enter the premises "to view waste" was delegated to the police.<sup>328</sup> Alternatively, the government claimed that the defendant forfeited his property rights because his illegal activities constituted a nuisance.<sup>329</sup> The Court rejected both of these arguments, reiterating that "subtle distinctions" of private property law could not determine the scope of the defendant's protections under the Fourth Amendment,<sup>330</sup> and that in any case, the application of these state property laws to the facts of the case was flawed.<sup>331</sup>

Even as *Chapman* failed to clarify the relationship between property law and the Fourth Amendment, the Supreme Court added to the complexity of the analysis by resurrecting a long-dormant rationale: free speech.<sup>332</sup> In *Marcus v. Search Warrant*, decided the same year as *Silverman* and *Chapman*, the Court condemned the lack of particularity in a warrant to seize obscene materials from a magazine distributor, declaring: "The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression."<sup>333</sup> A year later, the Court returned to privacy-based reasoning in *Lanza v. New York*, when it held that unlike a house, hotel room, apartment, office, store, car, or occupied cab, the visitor's room of jail is not a protected area under the Fourth Amendment because although jails served as a home of sorts, they were defined by the opposite of privacy: surveillance.<sup>334</sup> Taking these four, relatively contemporaneous cases together, it is clear that the Court did not see itself as shifting to an exclusively property-based approach when it

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326. *See* *Chapman v. United States*, 365 U.S. 610 (1961).

327. *Id.* at 611.

328. *Id.* at 616.

329. *Id.* at 617.

330. *Id.*

331. As to the waste argument, the Court noted that no state cases allowed the landlord to enter without an express agreement, and that entry was not motivated by an intent to view waste. *Id.* at 616. As for the nuisance argument, the Court observed that nuisance was only discovered after entry, and the landlord did not abide by the procedures established for forfeiture. *Id.* at 617. Despite this discussion of property laws, the Court seemed to make clear that the absence of a trespass under applicable laws would be no defense against the defendant's constitutional claim. *Id.* at 618.

332. Justice Frankfurter made an argument on the Fourth Amendment's protection of thought and speech in his dissenting opinion in *Harris v. United States*, 331 U.S. 145, 163 (1947) (Frankfurter, J., dissenting), *overruled by* *Chimel v. California*, 395 U.S. 752, 768 (1969). But freedom of thought and speech was rarely cited in the Court's Fourth Amendment cases between 1886, when *Boyd* bound the Fourth and Fifth Amendments in common purpose, and the 1960s.

333. *Marcus v. Search Warrant*, 367 U.S. 717, 729 (1961). The "background of knowledge" that Justice Brennan was referring to, of course, was the influence of the *Entick* and *Wilkes* cases, which he described as finally placing limitations on the government's power to censor religious and political writings via the use of general search warrants. *See id.* at 724-29.

334. *Lanza v. New York*, 370 U.S. 139, 143 (1962).

decided *Silverman*. On the contrary, it quickly widened its lens by recognizing the continued need to protect free expression alongside the property and privacy interests that had hitherto grounded most of the Court's Fourth Amendment analysis.

After *Lanza*, the Court continued to allude to privacy, property, and free expression values as the animating forces behind the Fourth Amendment's proscription against unreasonable searches.<sup>335</sup> By and large, these values were treated as independent rather than interconnected. For example, in *Lopez v. United States*, a case involving testimonial evidence collected by a wired IRS agent who met with the defendant in his office, the Court noted that neither the property nor the privacy rights of the defendant were violated because the agent had valid consent to enter, and the defendant knowingly made the statements to him.<sup>336</sup> Yet, the Court also continued to reject the argument that actual property laws should govern the search analysis. In *Stoner v. California*, the Court once again affirmed *Chapman's* refusal to incorporate "subtle distinctions . . . of private property law" to circumscribe Fourth Amendment rights.<sup>337</sup> And it did so even as it discussed the various reasons why a hotel clerk's decision to allow police to enter the defendant's room and search it constituted an invalid consent.<sup>338</sup> To be sure, during this time period, the Court also used the term "constitutionally protected area" to refer to homes, offices, cars, and so forth where the Fourth Amendment protection lay, thereby suggesting the importance of property to its analysis.<sup>339</sup> Still, in light of the Court's repeated expressions of dissatisfaction with property rules, as well as its repudiation of that term just a year later in *Katz*, it would seem that the Court was rather ambivalent about the role of property in Fourth Amendment search analysis.<sup>340</sup>

Although the Court's reliance on property waxed and waned in this way, exhibiting a preference for general concepts rather than specific laws, its privacy analysis grew increasingly refined. In *Lewis v. United States*, where an undercover officer purchased narcotics at the defendant's home, the Court observed that the home had been effectively "converted into a commercial center" and thereby lost much of the privacy typically afforded to a person's residence.<sup>341</sup> This portion of *Lewis* was further proof of how far the Court had traveled from the general and absolutist "zone of privacy" approach in *Boyd* almost a century before. In

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335. See *Stanford v. Texas*, 379 U.S. 476, 485–86 (1965) (condemning a search for the papers of a suspected Communist Party member).

336. *Lopez v. United States*, 373 U.S. 427, 438 (1963).

337. *Stoner v. California*, 376 U.S. 483, 488 (1964).

338. See *id.* For example, the Court noted the absence of California law that would allow the hotel proprietor to give such consent. *Id.* It also found that the consent the defendant granted to maids or repairmen to enter the room did not cover the police activity at issue in the case. *Id.* at 489.

339. See, e.g., *Hoffa v. United States*, 385 U.S. 293, 301 (1966).

340. In *Katz*, the Court determined that the idea of "constitutionally protected areas" was unhelpful because "[t]he Fourth Amendment protects people, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967).

341. *Lewis v. United States*, 385 U.S. 206, 211 (1966).

a clear rejection of a narrow and literal reading of the Amendment, the Court refused to treat all homes the same, regardless of how they were used.<sup>342</sup>

Then, in *Warden v. Hayden*, the Court abandoned the mere evidence rule, finding that

[t]he premise that property interests control the right of the Government to search and seize has been discredited. . . . We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts.<sup>343</sup>

Accordingly, the clothing evidence discovered in that case was admissible despite the fact that it was neither contraband nor the fruit or instrumentality of a crime.<sup>344</sup>

Although *Warden* appeared to discard property as a valid rationale under the Fourth Amendment, it must be borne in mind that the case was addressing the interests attached to the evidence itself rather than the place where it was found. That is to say, the Court reasoned that the mere evidence rule lacked validity because the officers' taking of the "mere evidence" from the defendant's house did not invade his privacy any more than their taking of, say, a gun or stolen property from the house.<sup>345</sup> Put another way, the case—and the mere evidence rule itself—was concerned directly with seizures rather than searches.<sup>346</sup> Thus, even after *Warden* seemed to definitively reject the property rationale, the Court decided one month later in *Berger v. New York* that a New York eavesdropping statute violated the Fourth Amendment, in part because the law's "language permits a *trespassory* invasion of the home or office" without a valid warrant.<sup>347</sup>

It was not until six months later in *Katz*, that the Court turned toward what came to be understood (until recently) as an exclusively privacy-

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342. *Id.* In addition to limiting the privacy protections of the Fourth Amendment according to circumstances, the Court sometimes drew certain categorical lines about homes as well. See *supra* text accompanying note 334 (refusing to recognize Fourth Amendment protections in a jail).

343. *Warden v. Hayden*, 387 U.S. 294, 304 (1967).

344. *Id.* at 309–10.

345. *Id.*

346. *Id.* Of course, seizures are often preceded by searches and the mere evidence rule was understood to prohibit the *searches* for such evidence as well. The rule's restriction against searches was less principled than logical, however, in that it made no sense to allow the government to search for something it was not able to seize. The distinction was made clear in cases like *Harris v. United States* where the Court recognized that the mere evidence rule would not bar an otherwise valid search incident to arrest, but would condemn the seizure of certain evidence found in the course of that search. See 331 U.S. 145, 154 (1947).

347. *Berger v. New York*, 388 U.S. 41, 64 (1967) (emphasis added). The Court also criticized the statute for its failure to require probable cause, as well as its lack of particularity. See *id.* at 54–56.

based understanding of Fourth Amendment searches.<sup>348</sup> The *Katz* majority refused to analyze searches using the “constitutionally protected area” rubric, overruled *Goldman*’s trespass approach, and famously declared that the Fourth Amendment “protects people, not places,” from governmental intrusion into individual privacy.<sup>349</sup> It focused on the fact that the defendant “justifiably relied” on his right to have a private conversation when he entered a phone booth and paid the toll, notwithstanding that the phone booth was publicly accessible and no physical penetration of the space occurred.<sup>350</sup> The Court held that the government’s use of an electronic listening device attached to the exterior of the booth violated the defendant’s privacy, and thus, constituted a search.<sup>351</sup>

Of course, to say that a search occurred because the defendant’s reliance on his privacy was justifiable is a conclusion, not a rule or even reasoning. The rule of *Katz*, as students of criminal procedure well know, originated not from the majority opinion but from Justice Harlan’s concurrence. According to Justice Harlan, whether a person’s reliance on privacy is justified depends on their subjective, and objectively reasonable, expectation of privacy.<sup>352</sup> Justice Harlan recognized that, as a general matter, these expectations were tied to a “place” such as a home or an open field.<sup>353</sup> That he believed this was only generally true suggested that the person’s interest in privacy, rather than the character of the place where the individual sought it, would be controlling in the search analysis.

Justice Harlan’s opinion in *Katz*, as Justice Thomas observed in *Carpenter*, was indeed the first articulation of a formal test for a search that centered on privacy.<sup>354</sup> However, this was not the first time that the Court discussed the Fourth Amendment’s privacy interest in terms of an individual’s reliance or expectation. In fact, the Supreme Court’s very first significant discussion of the Amendment, in *Ex parte Jackson*, spoke about privacy along these lines when it distinguished between “letters and sealed packages” that are “intended to be kept free from inspection” and other mail items like newspapers and pamphlets that are not because they are “purposely left in a condition to be examined.”<sup>355</sup> “Intent” and “purpose” as found in *Ex parte Jackson* are not much different from the “reliance” and “expectation” used in *Katz*.

The Court also flirted with the concepts of subjective and reasonable expectations of privacy in *Olmstead*—that much-cited case among property proponents—when the majority noted that the “reasonable view” of the defendant’s use of his telephone to conduct criminal activities was

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348. See *Katz v. United States*, 389 U.S. 347 (1967). The majority did say that the Fourth Amendment protects other interests beyond privacy, but its examples of these other interests involved seizures rather than searches. See *id.* at 350 n.4.

349. *Id.* at 350–53.

350. *Id.*

351. *Id.* at 359.

352. *Id.* at 360–61 (Harlan, J., concurring).

353. *Id.* at 361.

354. *Carpenter v. United States*, 138 S. Ct. 2206, 2236 (2018) (Thomas, J., dissenting).

355. *Ex parte Jackson*, 96 U.S. 727, 733 (1877).

that he “intend[ed] to project his voice to those quite outside” because his voice was carried through wires located in public.<sup>356</sup> Surely a specious characterization of the scenario, and perhaps it was partly for that reason that in *Goldman*, the Court refused to consider such intent as “too nice for practical application.”<sup>357</sup> Ten years later in *On Lee*, however, the Court appeared to revisit the issue of individual expectations and their reasonableness when it observed that the government’s use of devices such as bifocals and binoculars would not constitute a “forbidden search or seizure,” even if it revealed “what one supposes to be private indiscretions.”<sup>358</sup> In the 1966 case of *Hoffa v. United States*, the Court also discussed the Fourth Amendment’s protections in terms of an individual’s reliance on the security provided within “constitutionally protected area[s]” such as a home, office, hotel room, and automobile.<sup>359</sup> Thus, the new “test” that Justice Harlan devised in *Katz* was not quite so new as many suppose.<sup>360</sup>

Indeed, while no explicit test for privacy had developed until *Katz*, cases show that the privacy basis for the Fourth Amendment was the dominant theme of the Supreme Court’s analysis of searches. The importance of personal privacy was often broadly asserted, though sometimes merely assumed in these cases, with outcomes explained in narrative fashion rather than through the application of a formal test. Problem-solving through narrative reasoning appears to have been the Court’s favored modus operandi: as Orin Kerr recently pointed out, *Katz* was, in fact, the first time that the Court attempted to articulate *any* legal test for a search, whether based on privacy, property, or free expression.<sup>361</sup> And while it is

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356. *Olmstead v. United States*, 277 U.S. 438, 466 (1928), *overruled by* *Katz v. United States*, 389 U.S. 347 (1967).

357. *Goldman v. United States*, 316 U.S. 129, 135 (1942), *overruled by* *Katz v. United States*, 389 U.S. 347 (1967).

358. *On Lee v. United States*, 343 U.S. 747, 754 (1952).

359. *Hoffa v. United States*, 385 U.S. 293, 301 (1966). In *Hoffa*, the Court held that the defendant did not subjectively rely on the privacy afforded to him in the hotel room because he chose to have conversations with an informant there. *Id.* at 302.

360. It is difficult to say whether Justice Harlan believed he was indeed articulating a test rather than describing the kind of privacy analysis that had been taking place before 1967. He certainly did not say so explicitly in *Katz*, and four years later in *United States v. White*, he explained that *Katz* broke no new ground but merely “establish[ed] sound general principles for application of the Fourth Amendment that were either dimly perceived or not fully worked out” before. *United States v. White*, 401 U.S. 745, 780–81 (1971) (Harlan, J., dissenting). In fact, Justice Harlan expressed grave reservation about elevating what he wrote in *Katz* to a formal rule or mantra that would “substitut[e] . . . words for analysis.” *Id.* at 786.

361. Kerr, *supra* note 17, at 68. Although some might argue that the Court articulated a trespass test for a search earlier in *Silverman*, one must consider the fact that the Court there (and elsewhere) explicitly rejected the application of local trespass law to determine whether a trespass occurred. See *Silverman v. United States*, 365 U.S. 505, 511 (1961). While the term “trespass” sounds more legal than “privacy,” the Court did not actually articulate a legal definition of trespass in *Silverman*, despite recognizing that the rule of trespass may well vary among localities. *Id.* at 512. Instead, it adopted a conceptual understanding of trespass, and explained how it occurred through a narrative description of the way that the government utilized the “spike mike.” *Id.* at 511–12. Not until 2013, in *Florida v. Jardines*, 569 U.S. 1, 5 (2013), did the Court finally declare a property-based definition of

fair to say that the Court did sometimes use overlapping rationales of privacy and property, a review of its search cases cannot sustain the contention that property was, at any sustained point in the Supreme Court's history, the primary interest at stake.

## VI. CONCLUSION

This Article sought to test the conventional claim, espoused by some commentators and Supreme Court Justices alike, that the Fourth Amendment was intended to protect mainly property rights and that property analysis was the exclusive mode of defining Fourth Amendment searches prior to *Katz*. A study of the Amendment's history, language, and Supreme Court interpretations shows that its protections have always been broader in scope and have consistently included at least a concern for individual privacy. Indeed, privacy appears to have a more solid track record than property, especially in the Supreme Court's cases. Thus, the call for a "return" to an exclusively property-based understanding of Fourth Amendment searches is a misleading one, and such a change would in fact constitute a novel and much-narrowed approach.

To be clear, it does not follow from the analysis in this Article that a property test should not be used, or that the *Katz* test should continue to be followed. The aim here was to identify underlying interests rather than to evaluate the effectiveness of any given legal test in advancing such interests. It may well be that what is needed to preserve the interests underlying the Fourth Amendment is to revise or replace the *Katz* test and to continue to develop (at last) an effective property test. In doing so, it is important to be clear-eyed about the distinction between criticizing the *Katz* test and jettisoning the Fourth Amendment's protection of privacy.

Nor does this article necessarily support limiting the interests contemplated within the "right . . . to be secure" to only property and privacy. As described above, the Fourth Amendment developed from multiple harms arising out of general searches. Freedom of thought and speech certainly had an important role in animating the Amendment, and there is precedent in Supreme Court cases that supports continued protection of that right. The Amendment's history also includes what might today be called dignitary concerns.<sup>362</sup> To be sure, such concerns were often expressed early on in terms of class privilege and status, but by the time the Fourth Amendment was adopted, it may be said that dignitary concerns, like many others, became—at least conceptually—democratic.

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a search as a physical intrusion on persons, houses, papers and effects by government to obtain information. Not too precise, to be sure, but it is at least a start.

362. Cf. Linda Ross Meyer, *Unruly Rights*, 22 *CARDOZO L. REV.* 1, 35–44 (2000) (criticizing Fourth Amendment rules that fail to account for dignitary harms). See generally Margaret Jane Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957 (1982) (explaining how property rights are linked to our conceptions of personhood).



The broadness of the Fourth Amendment is reflected from its earliest development to the Court's current embrace of both privacy and property. Fidelity to this history may well mean that there must be multiple tests and models of the Fourth Amendment to fully protect the individual's right to be secure. Such a system will no doubt be more complicated, more demanding. But to do otherwise and narrow the Amendment's scope to property only, or to demote privacy (and other interests) to a mere byproduct of property protection, would be both a departure from the past and the diminishment of an important personal right.