STANDING IN THE SHADOWS OF THE NEW FOURTH AMENDMENT TRADITIONALISM

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Abstract

In the past decade, the Supreme Court of the United States has revived an originalist, property-based approach to evaluating Fourth Amendment problems. The Court has used this approach to broaden its understanding of the sorts of governmental conduct that qualify as Fourth Amendment searches. So far, however, neither the Court nor scholars have offered a comprehensive assessment of the implications of this new Fourth Amendment traditionalism for what is known as Fourth Amendment standing, a doctrine reflecting the Court's longstanding determination that only one whose own Fourth Amendment interests are implicated by government conduct is entitled to raise a Fourth Amendment challenge to such conduct. This Article, which provides the first sustained treatment of the issue, concludes that the logical consequence of the new traditionalism will be a significant expansion of the class of people entitled to make Fourth Amendment claims, including in cases involving the kinds of quotidian, physical searches and seizures that have long been the focus of complaints about law enforcement abuse of vulnerable communities.

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INTRODUCTION

Over the course of the last decade, the Supreme Court has dramatically altered its interpretation of the Fourth Amendment, primarily in ways that have favored individual rights against government overreach. Most significantly, the Court adopted a more expansive view of the kinds of conduct that constitute a Fourth Amendment search, first by rehabilitating an older, property-based framework while preserving the option to use the more recent privacy rubric,[1] and second, in *Carpenter v. United States*,[2] by limiting the scope of the third-party doctrine to protect some forms of digital data individuals inevitably must share with third parties to participate in twenty-first century society.[3] Only rarely in the last decade, however, has the Court explicitly addressed so-called Fourth Amendment standing doctrine, a doctrine reflecting the Court's longstanding determination that only one whose own Fourth Amendment interests are implicated by government conduct is entitled to raise a Fourth Amendment challenge to such conduct.[4]

This lack of attention has been, in part, merely semantic; although the Court described its recent qualification of third-party doctrine in terms of the kinds of government activity that constitute a Fourth Amendment search, the actual significance of *Carpenter* is an expansion of the rights of individuals to challenge activity that undoubtedly and uncontroversially involves searching the records of the third party with whom the individual shared information. *Carpenter* has dramatic and widely recognized potential to expand the rights of individuals to contest government acquisition of troves of digital data that can reveal the intimacies of life.[5] The focus of this Article, however, is on the largely unrecognized potential of what this Article refers to as the new Fourth Amendment traditionalism (the renewed, originalist emphasis on property rights as a lodestar for identifying Fourth Amendment intrusions) to expand Fourth Amendment standing doctrine, including in run-of-the-mill cases involving physical intrusions to gather

1. *See* United States v. Jones, 565 U.S. 400, 409 (2012).

2. 138 S. Ct. 2206 (2018).

3. *Id.* at 2222.

4. The concept of Fourth Amendment standing shares with Article III standing the requirement that the claim proponent allege injury in fact and that she assert her own rights rather than those of another. Rakas v. Illinois, 439 U.S. 128, 139 (1978). However, "[b]ecause Fourth Amendment standing is subsumed under substantive Fourth Amendment doctrine," it "should not be confused with Article III standing, which is jurisdictional and must be assessed before reaching the merits." Byrd v. United States, 138 S. Ct. 1518, 1530 (2018).

5. *See, e.g.*, ORIN S. KERR, *Implementing* Carpenter, *in* THE DIGITAL FOURTH AMENDMENT (forthcoming); Paul Ohm, *The Many Revolutions of* Carpenter, 32 HARV. J.L. & TECH. 357, 385 (2019).

information.[6] The doctrine could thus serve as a useful shield against abusive, workaday tactics about which vulnerable, minority communities have long complained.

In Part I, this Article will trace the history of Fourth Amendment standing doctrine through to the present day. The Article will contextualize the Court's standing decisions within its evolving jurisprudence on the defining characteristics of a Fourth Amendment search or seizure and the development of the exclusionary remedy for Fourth Amendment violations. Part II will describe the origins of the new Fourth Amendment traditionalism. Part III will assess the implications of the new Fourth Amendment traditionalism for Fourth Amendment standing doctrine and, ultimately, as a mechanism for exclusion of evidence at criminal trials. Part IV will conclude the Article.

I. A HISTORY OF FOURTH AMENDMENT STANDING DOCTRINE AND THE EXCLUSIONARY RULE

The history of Fourth Amendment standing doctrine is inextricably intertwined with the evolution of the definitions of Fourth Amendment searches and seizures and with the development of the exclusionary rule. This section, therefore, will discuss the overlapping histories of each of these principles. *Olmstead v. United States*[7] is the paradigmatic expression of the Court's early approach to deciding whether government conduct implicates the Fourth Amendment (i.e., whether the government's activities constitute a search or a seizure).[8] The *Olmstead* petitioners appealed their convictions for conspiracy to violate the National Prohibition Act, which depended on evidence the government

6. What this Article refers to as "the new Fourth Amendment traditionalism" is different from what Professor David Sklansky has labelled "the new Fourth Amendment originalism" and what Professor Donald Dripps has called "specific practice originalism." Professors Sklansky and Dripps described a tendency of the Court, beginning in the late 1990s, to tie questions of Fourth Amendment reasonableness to whether the specific conduct would have been considered reasonable under late eighteenth-century common law principles. *See* David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1739 (2000); Donald A. Dripps, *Responding to the Challenges of Contextual Change and Legal Dynamism in Interpreting the Fourth Amendment*, 81 MISS. L.J. 1085, 1090–94 (2012). Although proponents of the new Fourth Amendment traditionalism espouse a form of originalist thought as well, the precepts of the doctrine (in some iterations, at least) allow for expansive application of the Amendment, including to items not enumerated in its text but which, instead, are merely analogous to those things, and including identification of property rights through sources other than positive law, such as analogy to eighteenth-century common law. *See Carpenter*, 138 S. Ct. at 2268 (Gorsuch, J., dissenting). This Article derives the term from Justice Gorsuch's reference to the "traditional approach" to Fourth Amendment interpretation in his dissent in *Carpenter*. *Id.* at 2267–68.

7. 277 U.S. 438 (1928), *overruled by* Katz v. United States, 389 U.S. 347 (1967), *and* Berger v. New York, 388 U.S. 41 (1967).

8. *See id.* at 464.

obtained by placing wiretaps on telephone lines in the basement of a building where the conspirators had offices and in the streets near their homes.[9] The petitioners claimed that the wiretapping violated their Fourth Amendment rights to be free from unreasonable searches and seizures,[10] but the Court concluded that the government's eavesdropping was neither a search nor a seizure for Fourth Amendment purposes.[11] In reaching its conclusion, the Court focused on the lack of interference with the defendants' property rights. As the Court observed, the government placed its wiretaps "without trespass upon any property of the defendants."[12] Because the text of the Amendment refers to "material things—the person, the house, his papers or his effects," and the "description of the warrant necessary to make the proceeding lawful[] is that it must specify the place to be searched and the person or things to be seized,"[13] Chief Justice William Howard Taft's majority opinion proclaimed that "[t]here was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants."[14]

Olmstead itself was representative of a spate of new Fourth Amendment litigation that had been spurred by the Court's adoption of the exclusionary rule fourteen years earlier.[15] In *Weeks v. United States*,[16] the Court abandoned the common law rule that government illegality in obtaining evidence has no bearing on the admissibility of the evidence at trial.[17] Instead, for the first time, the Court held that the consequence of a

9. *Id.* at 456–57.

10. *Id.* at 455; *see* U.S. CONST. amend. IV ("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.").

11. *Olmstead*, 277 U.S. at 464.

12. *Id.* at 457.

13. *Id.* at 464.

14. *Id.*

15. *See, e.g.*, California v. Acevedo, 500 U.S. 565, 582 (1991) (Scalia, J., concurring) (describing the "(still continuing) explosion in Fourth Amendment litigation that followed our announcement of the exclusionary rule").

16. 232 U.S. 383 (1914), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

17. *See, e.g.*, United States v. Blue, 384 U.S. 251, 255 (1966) (stating that "the general common-law practice is to admit evidence despite its illegal origins"); *Olmstead*, 277 U.S. at 462–63 (observing that before *Weeks*, "many had supposed that under the ordinary common law rules, if the tendered evidence was pertinent, the method of obtaining it was unimportant"). In 1822, Justice Story observed that he was unaware of any case in which evidence had been excluded merely because "it may have been obtained by a trespass upon the person, or by any other forcible and illegal means." United States v. La Jeune Eugenie, 26 F. Cas. 832, 844 (C.C.D. Mass. 1822) (No. 15,551); *see also* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV.

Fourth Amendment violation would be a prohibition on the prosecution's use of unconstitutionally obtained evidence in federal criminal prosecutions.[18] For the first time, then, federal criminal defendants had an incentive to raise Fourth Amendment claims in court;[19] the adoption of the exclusionary rule, combined with the dramatic increase in federal prosecutions associated with prohibition and the rise of the administrative state, facilitated the explosion of exclusionary rule litigation at the federal level.[20] Decades later, the Court would conclude that the Fourth Amendment and the exclusionary rule were fully incorporated into the Fourteenth Amendment's Due Process Clause and, therefore, applicable to state as well as federal conduct.[21]

In the years after *Weeks* and the adoption of prohibition, lower federal courts began developing Fourth Amendment standing doctrine. The principles these courts established allowed them to evade the strictures of the new exclusionary rule. In *Chicco v. United States*,[22] for example, the U.S. Court of Appeals for the Fourth Circuit held that there was no basis for suppressing evidence against either of two appellants, both of whom had been convicted of illegal possession and transportation of intoxicating liquors, because neither one had claimed any property interest in either the seized evidence or the buildings law enforcement officers searched to find the evidence.[23] Likewise, in *Goldberg v. United States*,[24] the U.S. Court of Appeals for the Fifth Circuit determined that the appellant lacked authority to challenge the search and seizure that led to his conviction for conspiracy to violate the National Prohibition Act because he "did not claim to have any right either to possession of the

757, 786–87 (1994) (explaining Justice Story's reasoning that an officer's illegal seizure is "no good reason for excluding" the evidence).

18. *Weeks*, 232 U.S. at 398.

19. The *Weeks* Court specifically held that its rule was inapplicable to searches or seizures conducted by state or municipal law enforcement officers. *Id.* This was an inevitable consequence of the prevailing rule throughout the eighteenth, nineteenth, and early twentieth centuries that the Bill of Rights restricted only the federal government's authority and was inapplicable to the states. *See* Barron v. Baltimore, 32 U.S. 243, 250–51 (1833).

20. *See* Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 3 (2006) ("The brief constitutionalization of prohibition . . . forced Justices on both the right and the left to stop debating whether there should be an American administrative state, and required them instead to reconstruct their judicial philosophy on the assumption that the administrative state was an unalterable reality. . . . Prohibition also forced . . . fundamental developments in the meaning of Fourth Amendment limitations on law enforcement.").

21. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961).

22. 284 F. 434 (4th Cir. 1922).

23. *Id.* at 435–37.

24. 297 F. 98 (5th Cir. 1924).

truck [that the government searched] or the liquor" that was seized.[25] And in *Shields v. United States*,[26] the U.S. Court of Appeals for the District of Columbia Circuit rejected Shields's argument that the trial court should have suppressed evidence against him because the affidavit for the warrant authorizing a search of his office (which he shared with the company of which he was the president) and seizure of documents was deficient.[27] The court concluded that his motion was "fatally defective, in that appellant fail[ed] to assert any interest in the property seized."[28]

Each of these cases laid out principles consistent with the close connection between Fourth Amendment doctrine and property rights evinced in *Olmstead* a few years later. While *Olmstead* concluded that eavesdropping without any trespass on a person, house, paper, or effect was not a Fourth Amendment search or seizure, these lower court opinions held that defendants who failed to assert relevant property interests lacked authority to challenge searches and seizures that had undoubtedly occurred.

When the Supreme Court finally addressed standing directly in 1951, it would largely confirm the sufficiency of a property interest as a basis for raising a Fourth Amendment challenge. In *United States v. Jeffers*,[29] a District of Columbia police officer entered a hotel room that Jesse Jeffers's aunts had rented in search of narcotics that an informant had claimed Jeffers was storing there.[30] The officer and a house detective found cocaine and codeine in the closet, which led to Jeffers's conviction for violation of narcotics laws.[31] Although the government conceded that the warrantless search and seizure violated the Fourth Amendment rights of Jeffers's aunts, it claimed that because the search did not invade Jeffers's privacy, he lacked standing to contest the admission of the seized evidence.[32] The Court, however, found that the search of the hotel room and the seizure of the narcotics were not "so easily isolable."[33] Rather, the Court held, the search and seizure were "bound together by one sole purpose—to locate and seize the narcotics of respondent."[34]

25. *Id.* at 101.
26. 26 F.2d 993 (D.C. Cir. 1928).
27. *Id.* at 996.
28. *Id.*
29. 342 U.S. 48 (1951).
30. *Id.* at 49–50.
31. *Id.*
32. *Id.* at 51–52. The prosecution made this assertion despite the facts that Jeffers's aunts had given him "a key to their room, that he had their permission to use the room at will, and that he often entered the room for various purposes." *Id.* at 50.
33. *Id.* at 52.
34. *Id.*

Therefore, the Court concluded, Jeffers "unquestionably had standing to object to the seizure made without warrant or arrest unless the contraband nature of the narcotics seized precluded his assertion, for purposes of the exclusionary rule, of a property interest therein."[35] Although the prosecution argued that Congress's declaration that "no property rights shall exist" in contraband deprived Jeffers of the opportunity to object to the seizure of his narcotics, the Court believed that Congress intended merely to facilitate the forfeiture of contraband and that, for purposes of the exclusionary rule, the narcotics remained Jeffers's property.[36]

Nine years later, in *Jones v. United States*,[37] the Court would confirm once more the adequacy of a property interest to confer Fourth Amendment standing.[38] The prosecution challenged Jones's standing to contest the search of a friend's apartment, where Jones had been staying for "maybe a night," because Jones asserted neither ownership of the narcotics police found as a result of the search "nor an interest in the apartment greater than that of an 'invitee' or 'guest.'"[39] In an opinion by Justice Felix Frankfurter, the Court noted that courts of appeals had generally required defendants to establish Fourth Amendment standing by claiming either "to have owned or possessed the seized property or to have had a substantial possessory interest in the premises searched."[40] This conventional approach to standing, however, often put defendants in an untenable position; to demonstrate standing to contest a Fourth Amendment intrusion, such defendants would often have to concede possession of contraband, which, in turn, would be incriminating and potentially sufficient for conviction of the charged offense.[41] Moreover, this framework would encourage an innocent defendant to perjure herself by claiming a possessory interest in contraband to prove that she had standing while denying possession to defend against the underlying charge.[42]

Refusing to sanction the continuation of a doctrine under which the government could simultaneously prosecute a defendant for a possessory offense while depriving the defendant of the opportunity to contest a potential Fourth Amendment violation based on her denial of such possession, the Court created the so-called automatic-standing doctrine,

35. *Id.*
36. *Id.* at 52–54.
37. 362 U.S. 257 (1960), *overruled by* United States v. Salvucci, 448 U.S. 83 (1980).
38. *Id.* at 264.
39. *Id.* at 259.
40. *Id.* at 261.
41. *Id.* at 261–62.
42. *See id.* at 262.

under which charging a defendant with a possessory offense would suffice in and of itself to confer standing on the defendant to contest a Fourth Amendment intrusion leading to the seizure of the contraband.[43] Ultimately, then, the effect of *Jones* was to confirm the adequacy of a possessory interest in seized property as a basis for standing while eliminating an unjustifiable dilemma that lower court precedent had imposed on defendants accused of possessory offenses.[44]

The *Jones* Court went further, however. In addition to its articulation of the automatic-standing rule, it held, alternatively, that Jones's legitimate presence on the premises of his friend's apartment at the time of the search was adequate to provide Jones with standing to contest the admissibility of evidence derived from the search.[45] The Court rejected the prosecution's proposed distinction between "guests" or "invitees" on the one hand, and "lessees" or "licensees" on the other.[46] Such "subtle distinctions," the Court proclaimed, were "developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical."[47] This expansive delineation of standing doctrine thus demonstrated that property interests would be sufficient, but not necessary, to establish the right to argue for the exclusion of evidence derived from Fourth Amendment violations.

Seven years after *Jones*, the Court dramatically altered its approach to Fourth Amendment interpretation. In *Katz v. United States*,[48] the government positioned a listening and recording device on the outside of a public telephone booth from which Katz placed bets in violation of federal law.[49] Katz challenged his conviction by arguing that the government's use of the eavesdropping device violated his Fourth Amendment rights, but the U.S. Court of Appeals for the Ninth Circuit rejected his claim because the use of the device involved "'no physical entrance into the area occupied by' [the] petitioner."[50] In so ruling, the

43. *See id.* at 264.

44. *See, e.g.*, United States v. Salvucci, 448 U.S. 83, 90 (1980) (acknowledging that *Jones I*'s automatic-standing rule depended on the "unexamined assumption that a defendant's possession of a seized good sufficient to establish criminal culpability was also sufficient to establish Fourth Amendment 'standing'").

45. *Jones*, 362 U.S. at 267.

46. *Id.* at 265–67.

47. *Id.* at 266.

48. 389 U.S. 347 (1967).

49. *Id.* at 354 n.14.

50. *Id.* at 348–49 (citing Katz v. United States, 369 F.2d 130, 134 (9th Cir. 1966), *rev'd*, 389 U.S. 347 (1967)).

Ninth Circuit invoked the *Olmstead*-era property rubric that had long defined the scope of Fourth Amendment protection.[51]

In a majority opinion by Justice Potter Stewart, the Court abandoned its property-based framework for evaluating the applicability of the Fourth Amendment.[52] Although the Court acknowledged that the *Olmstead* rubric would have led to the conclusion that the government's conduct was neither a search nor a seizure for Fourth Amendment purposes, it stated that "[t]he premise that property interests control the right of the Government to search and seize has been discredited."[53] Instead, because the electronic surveillance of Katz's conversations "violated the privacy upon which he justifiably relied while using the telephone booth," it qualified as "a 'search and seizure' within the meaning of the Fourth Amendment," and the absence of any physical intrusion into the telephone booth had "no constitutional significance."[54]

In a concurring opinion that the Court later came to accept as the true holding of *Katz*, Justice John Marshall Harlan articulated a two-part test for assessing whether government activity constitutes a Fourth Amendment search.[55] First, Justice Harlan declared that one who claims the government has conducted a search must "have exhibited an actual (subjective) expectation of privacy."[56] Therefore, although a home is generally a place where people expect privacy, if a person, even in her own home, exposes evidence to the plain view of outsiders, she cannot invoke the protection of the Fourth Amendment, for she has not exhibited an expectation of privacy with respect to such evidence.[57] Second, Justice Harlan stated that the expectation must be one that "society is prepared to recognize as 'reasonable.'"[58]

Although the *Katz* majority disavowed any suggestion that the Fourth Amendment protects a generalized right to privacy,[59] most observers view *Katz* largely as an endorsement of Justice Louis Brandeis's

51. *Katz*, 369 F.2d at 133 (first citing Goldman v. United States, 316 U.S. 129, 135 (1942); and then Olmstead v. United States, 277 U.S. 438, 466 (1928)).

52. *Katz*, 389 U.S. at 352–53.

53. *Id.* (quoting Warden v. Hayden, 387 U.S. 294, 304 (1967)).

54. *Id.* at 353.

55. *Id.* at 361 (Harlan, J., concurring); *see, e.g.*, Smith v. Maryland, 442 U.S. 735, 740–46 (1979) (summarizing and applying Justice Harlan's test to conclude that the use of a pen register to record dialed telephone numbers does not qualify as a Fourth Amendment search).

56. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

57. *Id.*

58. *Id.*

59. *Id.* at 350 (majority opinion).

dissenting perspective in *Olmstead*.[60] In that dissent, Justice Brandeis critiqued the majority's narrow focus on physical intrusions and tangible property, claiming instead that the framers were concerned with "man's spiritual nature . . . his feelings . . . his intellect," and that "[t]hey knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things."[61] Instead, for Justice Brandeis, the essence of the Fourth Amendment was "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."[62] For Justice Brandeis, this meant that "every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment."[63]

Justice Brandeis's reference to "unjustifiable intrusion[s]" on privacy, of course, closely parallels Justice Stewart's invocation of the "privacy upon which [Katz] justifiably relied while using the telephone booth"[64] and Justice Harlan's test for identifying a Fourth Amendment search, which requires a government intrusion on an expectation of privacy that "society is prepared to recognize as 'reasonable.'"[65] Additionally, *Katz* certainly vindicated Justice Brandeis's concerns about the consequences of leaving wiretapping and other electronic

60. *See, e.g.*, LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE 116 (1999); Ricardo J. Bascuas, *The Fourth Amendment in the Information Age*, 1 VA. J. CRIM. L. 481, 498 (2013); Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1366; Scott E. Sundby, *"Everyman"'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1756 (1994). *But see, e.g.*, Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 817–18 (2004) (acknowledging the general understanding that *Katz* adopted Justice Brandeis's privacy emphasis but concluding that *Katz* actually represented the endorsement of a loose property framework for Fourth Amendment interpretation); Carol S. Steiker, *Brandeis in* Olmstead*: "Our Government is the Potent, the Omnipresent Teacher*,*"* 79 MISS. L.J. 149, 160–63 (2009) (describing *Katz* as a vindication of Justice Brandeis's dissent, but arguing that Justice Brandeis's triumph was less "neat or complete" than it might seem, in part because post-*Katz* assessment of which expectations of privacy are reasonable has "tended to be narrow and bound by conventional understandings of property and place"); *see also* Russell L. Weaver, *The Fourth Amendment, Privacy and Advancing Technology*, 80 MISS. L.J. 1131, 1154 (2011) ("Post-*Katz* decisions continued to reveal many of the fault lines evident in the Court's pre-*Katz* Fourth Amendment jurisprudence as some Justices viewed the *Katz* test expansively and aspirationally, in the spirit of the Justice Brandeis, Justice Pierce Butler, and Justice Frank Murphy dissents in *Olmstead* and *Goldman*, whereas other Justices viewed the *Katz* test more narrowly and restrictively.").

61. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled by* Katz v. United States, 389 U.S. 347 (1967), *and* Berger v. New York, 388 U.S. 41 (1967).

62. *Id.*

63. *Id.*

64. *Katz*, 389 U.S. at 353.

65. *Id.* at 361 (Harlan, J., concurring).

eavesdropping exempt from any and all constitutional limitations.[66] Nonetheless, despite *Katz*'s apparent potential for dramatic expansion of the scope of Fourth Amendment protection beyond the trespassory model, the decades after the decision evinced a parsimonious approach that often reaffirmed narrow, pro-government readings from the previous regime.[67] In *Oliver v. United States*,[68] for example, the Court proclaimed the continuing vitality of the open-fields doctrine, under which government entry into an open field is deemed a non-search for Fourth Amendment purposes.[69] In 1924, the Court had first addressed the issue in *Hester v. United States*,[70] a two-paragraph opinion in which Justice Oliver Wendell Holmes Jr. declared simply that an open field was neither a person, house, paper, nor effect, and, as such, was unprotected by the Fourth Amendment.[71] Though *Katz* had ostensibly untethered Fourth Amendment hermeneutics from the prior, strict association with the things enumerated in the Amendment's text,[72] the *Oliver* Court concluded that application of the "reasonable expectation of privacy" test would lead to the same conclusion the *Hester* Court had reached.[73] Likewise, in

66. The consequence of the *Katz* Court's determination that the government's eavesdropping was a Fourth Amendment search was that the Fourth Amendment prohibition on "unreasonable searches" would apply to that conduct and, in general, that the government would need a warrant to render its search reasonable. *See id.* at 356–57.

67. *See, e.g.*, Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 537–38 (2011) ("The Supreme Court's adoption of the 'reasonable expectation of privacy' test has had a surprisingly minor impact on the Fourth Amendment's application-layer rules. When the Supreme Court adopted the 'reasonable expectation of privacy' test, it was expected that the new test would have a major impact on how the Fourth Amendment applied. Instead, the Supreme Court ended up reaffirming many pre-*Katz* doctrines under the new test: time and again, the interpretation of the new test just happened to match prior law."); Luke M. Milligan, *Concreteness Drift and the Fourth Amendment*, 82 MISS. L.J. 891, 892 (2013) ("Of course the hope of *Katz* would prove hollow. In forty-five years, *Katz* has had only a marginal impact on the Court's 'search' decision-making. Put more directly, *Katz* has failed to direct judges to evaluate the term 'search' based on contextual and evolving privacy norms."); David A. Sklansky, *Back to the Future:* Kyllo*,* Katz*, and Common Law*, 72 MISS. L.J. 143, 160 (2002) ("The decision in *Katz* seemed to promise a Fourth Amendment that was less tied to specific locations, and therefore somehow more modern. The Justices keep renewing that promise, but they have never figured out how to make good on it.").

68. 466 U.S. 170 (1984).

69. *Id.* at 176–78.

70. 265 U.S. 57 (1924).

71. *See id.* at 59.

72. *Oliver*, 466 U.S. at 187 (Marshall, J., dissenting) ("[W]e have repudiated the proposition that the Fourth Amendment applies only to a limited set of locales or kinds of property. In *Katz v. United States*, we expressly rejected a proffered locational theory of the coverage of the Amendment, holding that it 'protects people, not places.'" (quoting *Katz*, 389 U.S. at 351)).

73. *Id.* at 177.

United States v. White,[74] the Court held that application of *Katz* would result in affirmation of the pre-*Katz* rule that government use of an undercover informant who records or transmits conversations with a suspect is outside the scope of the Fourth Amendment's protection.[75]

As this Article will describe below, *Katz* would eventually lead not merely to a reaffirmation of preexisting standing rules but to a contraction of the authority of criminal defendants to make Fourth Amendment claims. In the years immediately after *Katz*, however, the Court maintained its commitment to the principle that property interests were sufficient for Fourth Amendment standing. In *Simmons v. United States*,[76] for example, Federal Bureau of Investigation agents searched the basement of the mother of Garrett's co-defendant for evidence related to a bank robbery.[77] They found a suitcase containing a gun holster, coin cards and bill wrappers from the bank that had been robbed, and a sack that resembled one the perpetrators had used during the robbery.[78] To establish standing to contest the search and seizure, Garrett claimed ownership of the suitcase.[79] Lower courts allowed the prosecution to use this testimony against Garrett to prove his guilt.[80] In assessing the constitutional permissibility of the use of such evidence, the Supreme Court observed that, because Garrett was absent from the home of his co-defendant's mother at the time of the search, "[t]he only, or at least the most natural" way for him to demonstrate his standing was to admit ownership of the suitcase.[81] In so doing, the Court cited *Jones* with approval.[82] Because Garrett faced nonpossessory charges, however, *Jones*'s automatic-standing rule was inapplicable, which meant that Garrett's testimony admitting ownership of the suitcase was necessary to prove standing.[83] The Court noted the tension this created between Garrett's Fourth and Fifth Amendment rights: "Garrett was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination."[84] Finding this tension constitutionally intolerable, the Court ruled that the government cannot

74. 401 U.S. 745 (1971).
75. *Id.* at 748–54.
76. 390 U.S. 377 (1968).
77. *Id.* at 380.
78. *Id.*
79. *Id.* at 389.
80. *Id.*
81. *Id.* at 391.
82. *Id.* at 390.
83. *Id.* at 390–91.
84. *Id.* at 394.

use testimony of a defendant in support of a motion for exclusion of evidence on Fourth Amendment grounds to establish the defendant's guilt.[85] Thus, the *Simmons* Court both reaffirmed the sufficiency of property interests for Fourth Amendment standing, consistent with *Jones* and earlier cases, and expanded the ability of defendants to prove Fourth Amendment standing beyond the *Jones* framework.

In its development of third-party doctrine, however, the Court would reveal *Katz*'s potential as a conservative force regarding standing principles. In *United States v. Miller*,[86] Miller challenged the government's procurement of records of his financial transactions from banks with which he had accounts.[87] The Court began its analysis with reference to the Fourth Amendment's text and to the property principles the *Katz* Court had ostensibly jettisoned in favor of a more flexible, privacy-based scheme. Because "there was no intrusion into any area in which respondent had a protected Fourth Amendment interest," and because Miller had "neither ownership nor possession" of the records in question, which were the banks' business records rather than Miller's "private papers," Miller lacked standing to argue for suppression of the evidence.[88] This analysis would have been perfectly comprehensible to lawyers and judges of the pre-*Katz* regime. Miller argued, nonetheless, that the records the government viewed were mere copies of personal records he had provided to the banks.[89] Those records, of course, were literally Miller's papers, but the Court invoked *Katz*'s declaration that what a person knowingly exposes to the public is exempt from the Fourth Amendment's coverage.[90] Thus, for the Supreme Court, even if the government had obtained Miller's original checks and deposit slips from the bank, Miller would have lacked any reasonable expectation of privacy against the intrusion because he had voluntarily shared the information with his banks.[91] Ultimately, then, regardless of whether the government's use of allegedly defective subpoenas might have violated the banks' rights, it did not implicate Miller's Fourth Amendment interests.[92] This was the case regardless of whether Miller had disclosed his financial information to the banks based on an understanding that it would "be used only for a limited purpose" and that "the confidence

85. *Id.*
86. 425 U.S. 435 (1976).
87. *Id.* at 436.
88. *Id.* at 440.
89. *Id.* at 442.
90. *Id.* (citing Katz v. United States, 389 U.S. 347, 351 (1967)).
91. *Id.*
92. *Id.* at 444.

placed in the [bank]" would "not be betrayed,"[93] regardless of the impossibility of participating in modern life without having a bank account, and regardless of the "virtual current biography" obtainable from examination of the totality of a person's financial records.[94]

The Supreme Court definitively retreated from the broadest pre-*Katz* view of Fourth Amendment standing doctrine in its 1978 decision in *Rakas v. Illinois*.[95] In *Rakas*, the defendants were passengers in a car that police searched for evidence linking them to a recent armed robbery.[96] Inside, officers found a box of rifle shells in the locked glove compartment and a sawed-off rifle under the front passenger seat.[97] After rejecting the defendants' argument that anyone "at whom a search was 'directed'" should have standing to challenge its constitutionality—the so-called "target" theory of standing[98]—the Court jettisoned "standing" terminology altogether; instead, it held that issues it had previously addressed under the rubric of "standing" were "more properly subsumed under substantive Fourth Amendment doctrine."[99] Later, the Court explained that "the question is whether the challenged search or seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it."[100] Thus, the essential issue was simply whether a "disputed search and seizure . . . infringed an interest of the defendant which the Fourth Amendment was designed to protect."[101] In light of *Katz*, this inquiry, in turn, depended on whether the "person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place."[102] For the *Rakas* Court, therefore, it was necessary to abandon the *Jones* rule that anyone "legitimately on the premises" may challenge a Fourth Amendment search or seizure, given that some people legitimately at the site of a

93. *Id.* at 443.

94. *Id.* at 451 (Brennan, J., dissenting) (citing Burrows v. Superior Court, 529 P.2d 590, 596 (Cal. 1974)).

95. 439 U.S. 128 (1978).

96. *Id.* at 130.

97. *Id.*

98. *Id.* at 132–38. The *Rakas* defendants based their "target theory" of standing on language from *Jones*, which the *Rakas* Court interpreted merely as a "parenthetical equivalent" of the requirement that one be the victim of a search or seizure to raise a Fourth Amendment claim. *Id.* at 135. Alternatively, the *Rakas* Court concluded that if "one against whom the search was directed" could be read more broadly, it was merely dicta. *Id.*

99. *Id.* at 139.

100. *Id.* at 140.

101. *Id.*

102. *Id.* at 143.

Fourth Amendment intrusion would have no reasonable expectation of privacy in the place in question.[103]

By eliminating lawful presence on the premises as a foundation for challenging a search, the *Rakas* Court undeniably restricted the class of people able to bring Fourth Amendment claims as compared to the pre-*Katz* approach. However, this aspect of *Jones* had been more permissive than the property-based principles of the era required.[104] And although the *Rakas* Court concluded that neither defendant in the case had shown a reasonable expectation of privacy in the parts of the car the police searched,[105] the Court's analysis also suggested that its privacy rubric for Fourth Amendment standing might lead to results consistent with the older, property-based approach and that a property interest might remain an adequate basis for standing independent of any privacy interest. First, in the course of repudiating the "legitimately on the premises" rule, the Court emphasized that it was not suggesting that casual visitors with little connection to searched premises "could not contest the lawfulness of the seizure of evidence or the search if their own property were seized during the search."[106] Second, in explaining the application of *Katz*'s privacy model, the Court stated that it would determine the legitimacy of an expectation of privacy "either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society."[107] If a person "owns or lawfully possesses or controls property," that person would likely have a reasonable expectation of privacy by virtue of her right to exclude others, the Court claimed.[108] Ultimately, the Court emphasized that neither of the *Rakas* defendants asserted any property or possessory interest either in the car itself or in the weapon or ammunition the police seized from it.[109]

Two years after *Rakas*, however, the Court made clear that application of *Katz* to assess Fourth Amendment standing would lead to the prohibition of Fourth Amendment claims by many individuals who would have been empowered to make such arguments under the property principles of the previous era. In two cases the Court decided on the same day, it eliminated the automatic-standing rule and concluded that

103. *Id.* at 142.

104. Allowing anyone legitimately on the premises to contest any Fourth Amendment intrusion on such premises necessarily conferred standing on some defendants who had no property interest in either the place searched or the property seized.

105. *Rakas*, 439 U.S. at 148–49.

106. *Id.* at 142 n.11.

107. *Id.* at 143 n.12.

108. *Id.*

109. *Id.* at 148.

ownership of seized property was insufficient to establish standing in the absence of a reasonable expectation of privacy in the place searched.[110] In *United States v. Salvucci*,[111] the defendants faced charges of possession of stolen mail.[112] Law enforcement officers discovered the crucial evidence during a search of an apartment that one of the defendants' mothers rented.[113] Although lower courts agreed that the evidence should be suppressed based on the automatic-standing rule, the Court decided that, like *Jones*'s "legitimately on the premises" doctrine, the automatic-standing rule "create[d] too broad a gauge for measurement of Fourth Amendment rights."[114] That was so, the Court stated, in part because *Simmons* eliminated the testimonial dilemma for defendants seeking to establish Fourth Amendment standing at a pre-trial suppression hearing,[115] and in part because the *Katz* privacy model reduced the tension between the prosecution's simultaneous claims that a defendant possessed contraband and that the defendant lacked standing to contest the admission of the evidence at trial.[116] The latter conclusion flowed from the Court's determination in *Salvucci* and in *Rawlings v. Kentucky*[117] that "standing" depends only on whether the individual had a reasonable expectation of privacy in the place searched, not on whether the person had a possessory interest in any items seized.[118] Because of

110. United States v. Salvucci, 448 U.S. 83, 85 (1980); Rawlings v. Kentucky, 448 U.S. 98, 105–06 (1980).

111. 448 U.S. 83 (1980).

112. *Id.* at 85.

113. *Id.*

114. *Id.* at 92–93 (quoting Rakas v. Illinois, 439 U.S. 128, 142 (1978)).

115. *Id.* at 88–90.

116. *Id.* at 90–92.

117. 448 U.S. 98 (1980).

118. *Salvucci*, 448 U.S. at 90–92; *Rawlings*, 448 U.S. at 104–06. Thus, *Rawlings* and *Salvucci* rejected the suggestion in *Rakas* that a property interest in seized goods would continue to suffice to establish Fourth Amendment standing to contest a search that led to the seizure. *See Rawlings*, 448 U.S. at 114–15 (Marshall, J., dissenting). As Justice Marshall noted in his *Rawlings* dissent:

> Contrary to the Court's assertion, however, *Rakas* did not establish that the Fourth Amendment protects individuals against unreasonable searches and seizures only if they have a privacy interest in the place searched. . . . No Fourth Amendment claim based on an interest in the property seized was before the Court, and, consequently, the Court did not and could not have decided whether such a claim could be maintained. In fact, the Court expressly disavowed any intention to foreclose such a claim ("This is not to say that such [casual] visitors could not contest the lawfulness of the seizure of evidence or the search if their own property were seized during the search"), and suggested its continuing

that shift in emphasis, a prosecutor could argue that a defendant was in possession of contraband to establish guilt but would not have to deny possession to argue against standing; instead, she could claim merely that the defendant lacked a reasonable expectation of privacy in the place the government searched.

In *Rawlings*, the defendant contested the admissibility of drugs that police found when they searched the purse of his acquaintance.[119] The prosecution conceded that the search was a Fourth Amendment violation,[120] but it argued that because Rawlings lacked a reasonable expectation of privacy in the purse, he also lacked standing to argue for suppression.[121] The Court agreed that Rawlings lacked a reasonable expectation of privacy in the purse; the precipitous nature of Rawlings's deposit of the drugs in his companion's purse, the fact that he had known the owner of the purse for only a few days, his lack of a right to exclude others from the purse, and his admission that he lacked a subjective expectation that the purse would be free from government intrusion supported the Court's conclusion.[122] Although the Court allowed that Rawlings's ownership of the drugs was a factor to consider in assessing his eligibility to make a Fourth Amendment claim, that fact was not dispositive of the ultimate question of whether he had a legitimate expectation of privacy in the purse.[123] Under the conventional property approach, Rawlings would certainly have had standing, as even the *Rawlings* Court conceded,[124] yet the privacy framework deprived him of the opportunity to contest the government's conduct.

Over the course of the next several decades, the Court revisited Fourth Amendment standing principles under the *Katz* test only occasionally. In 1990, the Court held in *Minnesota v. Olson*[125] that an overnight guest in another's home has the capacity to claim the protection of the Fourth Amendment against a search of the home.[126] Eight years later, in

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> validity ("[P]etitioners' claims must fail. They asserted neither a property nor a possessory interest in the automobile, *nor an interest in the property seized*.").

Id. (alterations in original) (citations omitted) (quoting *Rakas*, 439 U.S. at 142); *see also* Nadia B. Soree, *The Demise of Fourth Amendment Standing: From Standing Room to Center Orchestra*, 8 NEV. L.J. 570, 604 (2008) (arguing that *Rawlings* "virtually erased" effects "from the Fourth Amendment").

119. *Rawlings*, 448 U.S. at 100–01.
120. *Id.* at 114 (Marshall, J., dissenting).
121. *See id.* at 102–06 (majority opinion).
122. *Id.* at 104–06.
123. *Id.* at 105–06.
124. *Id.* at 106.
125. 495 U.S. 91 (1990).
126. *Id.* at 95–100.

Minnesota v. Carter,[127] the Court held that two defendants whom an officer observed packaging cocaine through the window of an acquaintance's apartment lacked a legitimate expectation of privacy against any Fourth Amendment search that might have occurred.[128] This was so because of the purely commercial nature of the transaction, because the defendants were in the apartment for only two and a half hours, and because the defendants had no prior relationship with the resident.[129] In May of 2018, the Court determined in *Byrd v. United States*[130] that an unauthorized driver of a rental car can, in some instances, have a reasonable expectation of privacy against searches of the car.[131] The *Byrd* Court also conceded for the first time since pre-*Rakas* cases that "standing" terminology could be "a useful shorthand for capturing the idea that a person must have a cognizable Fourth Amendment interest in the place searched before seeking relief for an unconstitutional search."[132]

This acknowledgment by the *Byrd* Court of the independent significance of Fourth Amendment standing has the potential to clarify the Court's treatment of Fourth Amendment problems; the *Rakas* Court's assertion that "standing" merges with substantive Fourth Amendment analysis oversimplifies—in several ways—the disparate inquiries necessary to assess a Fourth Amendment claim.[133] First, one might have an interest in a place or an effect adequate to make any search or seizure involving that place or effect a search or seizure that implicates her Fourth Amendment interests, but a court might nonetheless conclude that no search or seizure occurred.[134] Here, the substantive question of whether a search or seizure occurred is distinct from the question of whether an

127. 525 U.S. 83 (1998).

128. *Id.* at 85, 91.

129. *Id.* at 90–91.

130. 138 S. Ct. 1518 (2018).

131. *Id.* at 1531.

132. *Id.* at 1530.

133. In a concurring opinion in *Rawlings*, Justice Blackmun recognized that *Rakas*'s statement that what was previously called standing was now subsumed under substantive Fourth Amendment analysis could cause confusion if it led courts to elide separate components of the inquiry. Rawlings v. Kentucky, 448 U.S. 98, 112 (1980) (Blackmun, J., concurring). Instead, he argued, it was proper "to treat these inquiries as distinct components of a Fourth Amendment claim," for it would "invite confusion to hold otherwise." *Id.*

134. This was precisely what Justice Breyer concluded in his concurrence in *Carter*. *See Carter*, 525 U.S. at 103 (Breyer, J., concurring). Justice Breyer believed the defendants had a reasonable expectation of privacy in their acquaintance's apartment, but he contended that a police officer's observation through the apartment window from a public vantage point outside the curtilage was not a Fourth Amendment search. *Id.* at 103–06. Likewise, because the *Carter* majority concluded that the defendants lacked a reasonable expectation of privacy in the apartment, it declined to decide whether the officer's observation was a Fourth Amendment search. *Id.* at 91 (majority opinion).

individual has sufficient interests in a place or effect to *challenge* any search or seizure that might have occurred. Second, one might have a sufficient interest in a place or effect, and a court might conclude that a search or seizure implicating the place or effect occurred, but the court might also conclude that the search or seizure was a reasonable one, either because the government had a valid warrant or some exception to the warrant requirement made the Fourth Amendment intrusion reasonable without one.[135] This possibility demonstrates the potential for lost nuance in the *Rakas* Court's assertion that what had been called "standing" boiled down simply to a question of whether the government violated the defendant's Fourth Amendment rights.[136] In fact, in *Rakas* itself, even if the Court had found that the defendants had a reasonable expectation of privacy in the parts of the car the police searched, it would not have meant their rights were violated; because the Court concluded that the defendants lacked a legitimate expectation of privacy, it was unnecessary to decide whether the police had probable cause that would have made the search of the car reasonable in any case.[137] And, of course, a court might conclude that a search or a seizure occurred and that it was unreasonable, but that the defendant failed to show enough of a connection to the place searched or an item seized to demonstrate that her own rights were implicated.[138]

Ultimately, in June of 2018, the Court dramatically limited third-party doctrine in *Carpenter v. United States*.[139] The *Carpenter* Court ruled that seismic advancements in digital technology necessitated Fourth Amendment protection for some forms of shared digital data, especially when sharing the data is necessary to function in modern society, is automatic rather than the result of a conscious choice, is deeply revealing of the intimacies of life, and when the government can easily use the technology to surveil broad swaths of the population.[140] The *Carpenter* Court characterized its holding that the Fourth Amendment regulates government collection of historical cell-site location information as a determination that acquisition of such records *is* a Fourth Amendment search.[141] Nonetheless, as noted, the true significance of *Carpenter* is an

135. *See Rawlings*, 448 U.S. at 112 (Blackmun, J., concurring) (stating that "[i]t remains possible for a defendant to prove that his legitimate interest of privacy was invaded, and yet fail to prove that the police acted illegally in doing so").

136. *See* Rakas v. Illinois, 439 U.S. 128, 140 (1978).

137. *Id.* at 130–31.

138. *Rawlings*, 448 U.S. at 112 (Blackmun, J., concurring).

139. 138 S. Ct. 2206 (2018).

140. *Id.* at 2217–20.

141. *Id.* at 2217, 2220.

expansion of the class of people entitled to challenge searches of digital data—a question, that is, of Fourth Amendment standing.[142] Even before *Carpenter*, no one would have argued that, for example, a police officer breaking into a cellular company's offices and examining customer data failed to qualify as a Fourth Amendment search. The consequence of *Carpenter* is the newly recognized authority of the cellular customer to contest the search that undoubtedly occurred. The *Carpenter* majority based its analysis on *Katz*'s reasonable expectation of privacy test[143] (the standard approach to standing after *Rakas*), and a wealth of commentary has appeared over the last few years speculating on the revolutionary potential of the decision to afford new protections against government inspection of shared digital data.[144]

This Article, however, focuses on the generally overlooked potential of the recent resurgence of traditionalist Fourth Amendment interpretation to restore the broad Fourth Amendment standing rights that prevailed before *Katz*. In particular, this new Fourth Amendment traditionalism could reinstate the pre-*Katz* rights of defendants in cases involving conventional, physical searches. Such searches are often critical components of heavily critiqued techniques for policing vulnerable populations, and expanding the authority of the targets of such searches to contest their validity could prove to be a valuable tool in curbing potentially abusive practices.

II. THE NEW FOURTH AMENDMENT TRADITIONALISM

Criticism of *Katz*'s privacy framework began with the publication of *Katz* itself. Justice Hugo Black, in dissent, opined that neither the text of the Fourth Amendment nor the intent of the framers could support the majority's conclusion that eavesdropping could constitute a search or a seizure.[145] Justice Black also warned—presciently, it turned out—that the Court's disregard for the text and history of the Fourth Amendment could lead to a contraction, rather than an expansion, of individual rights.[146] The framers, he suggested, "did not intend to grant this Court such omnipotent lawmaking authority as that. The history of governments proves that it is

142. *See supra* text accompanying note 5; *see also* Lucas Issacharoff & Kyle Wirshba, *Restoring Reason to the Third Party Doctrine*, 100 MINN. L. REV. 985, 1038 (2016) ("Under current Fourth Amendment jurisprudence, individuals who provide their information to third parties cannot dispute the collection of their information based on a lack of standing under the Fourth Amendment.").

143. *Carpenter*, 138 S. Ct. at 2217–20.

144. *See, e.g.*, KERR, *supra* note 5, at 22–26; Ohm, *supra* note 5, at 385–89.

145. Katz v. United States, 389 U.S. 347, 364–67 (1967) (Black, J., dissenting).

146. *Id.* at 374.

dangerous to freedom to repose such powers in courts."[147] As this Article has discussed, in the years after *Katz*, the Court regularly failed to use the new privacy rubric to expand constitutional privacy protections beyond the previous regime, and it sometimes eliminated protections it had recognized under the older, property-based rules.[148] Although scholars noted these failures[149] and, for decades, critiqued the *Katz* test as incoherent, unpredictable,[150] and inconsistent with Fourth Amendment text, history, and values,[151] such arguments gained traction with the Court only through the persistent efforts of Justice Antonin Scalia.

Justice Scalia offered his most passionate early critique of *Katz* in a concurring opinion in *Minnesota v. Carter*.[152] Justice Scalia joined the majority opinion, which concluded that the defendants lacked standing to contest any search of their acquaintance's apartment that might have occurred,[153] because it was consistent with the Court's recent precedent.[154] Nonetheless, he disparaged *Katz*'s "reasonable expectations of privacy" framework as "self-indulgent," inconsistent with the Amendment's text and history, and "notoriously unhelpful."[155] Ultimately, he found the *Katz* test so unprincipled that, in his estimation, the only conclusion one could draw about the past three decades of its application was that the expectations "society" is prepared to recognize as reasonable "bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable."[156] Instead, Justice Scalia argued that the text and original understanding of the Fourth Amendment made clear that one had a right to be secure against unreasonable searches and seizures related to one's *own* person, house, papers, or effects.[157] Because there was no sense in which the surveilled premises could be

147. *Id.*

148. *See supra* notes 67–75, 95–123 and accompanying text.

149. *See supra* note 67.

150. *See, e.g.*, Amar, *supra* note 17, at 757; Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468 (1985); William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1825 (2016); Kerr, *supra* note 67, at 479–80 (describing others' critiques); Wayne R. LaFave, *Foreword: Fourth Amendment Vagaries (of Improbable Cause, Imperceptible Plain View, Notorious Privacy, and Balancing Askew)*, 74 J. CRIM. L. & CRIMINOLOGY 1171, 1174 (1983); David E. Steinberg, *Restoring the Fourth Amendment: The Original Understanding Revisited*, 33 HASTINGS CONST. L.Q. 47, 47 (2005).

151. *See, e.g.*, Amar, *supra* note 17, at 757.

152. 525 U.S. 83, 91–99 (1998) (Scalia, J., concurring).

153. *Id.* at 91 (majority opinion).

154. *Id.* (Scalia, J., concurring).

155. *Id.* at 97–98.

156. *Id.* at 97.

157. *Id.* at 92.

viewed as the defendants' house, they lacked authority to contest any search of it.[158]

Three years later, Justice Scalia again noted that *Katz* had "often been criticized as circular, and hence subjective and unpredictable."[159] At the same time, he seemed to yearn for a simpler test for identifying Fourth Amendment searches. At the time of the framing, he stated, as now, "to 'search' meant '[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.'"[160] Nonetheless, his majority opinion in *Kyllo v. United States*[161] "refine[d]" *Katz* rather than presenting a completely alternative framework.[162] In ruling that the use of a thermal imaging device from a public street to detect the temperature inside of a home was a Fourth Amendment search, Justice Scalia's majority opinion stated that the use of sense-enhancing technology to gather information about the interior of a home that would otherwise have been inaccessible without a physical intrusion into a constitutionally protected area qualifies as a search, at least when "the technology in question is not in general public use."[163]

Finally, in 2012, Justice Scalia achieved his longstanding goal of rehabilitating the traditionalist alternative to *Katz*—the *Olmstead* framework that the *Katz* Court had disavowed. In *United States v. Jones*[164] (*Jones II*), the government placed a GPS device on a Jeep used by Antoine Jones during its investigation of Jones for narcotics trafficking.[165] The government then tracked the Jeep for twenty-eight days.[166] Using *Katz*'s "reasonable expectations of privacy" framework, the Court had previously determined that employment of an electronic beeper to monitor the location of a container of chloroform in a car and in an open field was not a Fourth Amendment search; because a driver on public roads voluntarily exposes himself to public view, the Court had held, the driver has no right to expect that the government will refrain from scrutinizing his movements.[167] Justice Scalia declined to decide whether the longer-term tracking in *Jones II* might infringe a person's

158. *Id.* at 97.

159. *See* Kyllo v. United States, 533 U.S. 27, 34 (2001).

160. *Id.* at 32 n.1 (alteration in original) (quoting NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 66 (reprt. 6th ed. 1989) (1828)).

161. 533 U.S. 27 (2001).

162. *Id.* at 34.

163. *Id.*

164. 565 U.S. 400 (2012).

165. *Id.* at 403.

166. *Id.*

167. *See* United States v. Knotts, 460 U.S. 276, 282 (1983).

reasonable expectation of privacy.[168] Instead, he argued that *Katz* had never replaced the older, property-based formula for determining the applicability of the Fourth Amendment.[169] Rather, *Katz* had merely supplemented the previous regime.[170] Therefore, Justice Scalia invoked the theoretically straightforward rule that physical intrusion onto a constitutionally protected area to gather information qualifies as a Fourth Amendment search.[171] This formula, Justice Scalia would later assert, has the benefit of "keep[ing] easy cases easy,"[172] as compared with the unpredictable, and, in Justice Scalia's estimation, unprincipled assessment of which expectations of privacy "society is prepared to recognize . . . as reasonable."[173] In *Jones II*, the government's placement of the GPS on the Jeep was a physical intrusion onto an effect for the purpose of gathering information.[174] Thus, it constituted a Fourth Amendment search.[175]

The year after *Jones II*, the Court, in another majority opinion by Justice Scalia, once again applied the rehabilitated trespass test to conclude that bringing a drug sniffing dog onto the defendant's curtilage (his front porch) was a Fourth Amendment search.[176] This was so despite the Court's having twice before concluded that the use of a narcotics dog was not a search, once in a case involving a dog sniffing a suspect's luggage at an airport,[177] and once in a case in which the police used a dog to locate narcotics in a car at a traffic stop.[178] In *Florida v. Jardines*,[179] however, the use of the dog involved a physical intrusion onto a constitutionally protected area (the curtilage) to gather information.[180] Because the use of the conceptually straightforward, newly revitalized trespass test showed that the police conduct was a search, Justice Scalia asserted that engagement with the complicated machinery of *Katz* was unnecessary.[181]

168. *Jones*, 565 U.S. at 412.
169. *Id.* at 405–07.
170. *Id.* at 406–08.
171. *Id.* at 406–07 n.3.
172. Florida v. Jardines, 569 U.S. 1, 11 (2013).
173. *Id.* at 25 (Alito, J., dissenting).
174. *Jones*, 565 U.S. at 410.
175. *Id.* at 406–07 n.3.
176. *See Jardines*, 569 U.S. at 11.
177. *See* United States v. Place, 462 U.S. 696, 707 (1983).
178. *See* Illinois v. Caballes, 543 U.S. 405, 409–10 (2005).
179. 569 U.S. 1 (2013).
180. *Id.* at 7–9.
181. *Id.* at 11.

III. THE NEW FOURTH AMENDMENT TRADITIONALISM AND STANDING

Although Justice Scalia devoted the bulk of the majority opinion in *Jones II* to the question of whether the government's conduct qualified as a Fourth Amendment search, he briefly addressed Jones's standing to contest that conduct.[182] In a footnote toward the beginning of the majority opinion, Justice Scalia observed that the Jeep was registered to Jones's wife but that Jones "had at least the property rights of a bailee."[183] Ultimately, the prosecution left uncontested the lower court's determination that the Jeep's registration in Jones's wife's name did not impair Jones's ability to contest the government's conduct.[184] Thus, the Court deemed it unnecessary to make a definitive determination on the issue.[185] Nonetheless, *Jones II* has significant implications for Fourth Amendment standing doctrine.

The *Byrd* Court based its determination that an unauthorized driver of a rental car will, in some circumstances, have Fourth Amendment standing to contest a search of the vehicle on *Katz*'s privacy test.[186] But Justice Anthony Kennedy's opinion for a unanimous court also observed that the recent recognition that *Katz* merely added to *Olmstead*'s property-based model—rather than displacing it—could suggest that Byrd's property interest in the car was adequate to establish his Fourth Amendment standing, regardless of any privacy interest he might have had.[187] Because Byrd had failed to raise the argument below, however, the Court declined to resolve the question.[188]

In a separate concurrence, Justice Clarence Thomas, joined by Justice Neil Gorsuch, expressed skepticism of the *Katz* test and urged the adoption of a standing analysis based on Justice Scalia's assertion in his *Carter* concurrence that the inquiry depends on whether a search or seizure involved one's own person, house, papers, or effects.[189] Justice Thomas agreed with the majority's decision not to resolve Byrd's property-based arguments and lamented the parties' failure to raise and brief the "vitally important" issues of the kinds of property interests that could make something one's effect, the sources of relevant law to which the Court might look, and whether illegal or wrongful use of the effect

182. *Jones*, 565 U.S. at 404 n.2.
183. *Id.*
184. *Id.*
185. *Id.*
186. Byrd v. United States, 138 S. Ct. 1518, 1531 (2018).
187. *Id.* at 1526.
188. *Id.* at 1526–27.
189. *Id.* at 1531 (Thomas, J., concurring).

might affect the Fourth Amendment analysis.[190] He concluded by urging future litigants to raise these issues.[191]

Finally, Justice Gorsuch's dissent in *Carpenter* offered somewhat more extensive thoughts on a potentially expansive traditionalist framework for evaluating Fourth Amendment standing.[192] Justice Gorsuch began his dissent, which often reads more like a concurrence, by cataloguing *Katz*'s failings; like others before him, he argued that *Katz* is inconsistent with the Fourth Amendment's text and history,[193] confusing and unpredictable,[194] and insufficiently protective of the right of the people to be secure in their persons, houses, papers, and effects.[195] Returning, then, to the textualist, property-based rules that Justice Scalia had espoused in *Carter*, *Jones*, and *Jardines*, Justice Gorsuch offered a reminder: "There is another way."[196] This "traditional approach," which persisted "[f]rom the founding until the 1960s," required inquiry only as to whether "a house, paper or effect was *yours* under law. No more was needed to trigger the Fourth Amendment."[197]

Justice Gorsuch then outlined tentative precepts to guide the future application of this traditionalist rubric. Of particular relevance here, he argued for the importance of bailment law to the ascertainment of Fourth Amendment interests.[198] The mere fact that you have given possession of your papers or effects to a third party is insufficient to eliminate your interest in that property, Justice Gorsuch observed.[199] "Entrusting your stuff to others is a *bailment*," he said, and when the bailee breaches her obligation to keep bailed property safe, she is liable to the bailor for conversion.[200] Thus, while the seminal cases on third-party doctrine used *Katz*'s privacy test to "extinguish Fourth Amendment interests once records are given to a third party, property law may preserve them."[201] As in *Byrd*, unfortunately, Carpenter had failed to raise property-based arguments at trial or on appeal to the U.S. Court of Appeals for the Sixth Circuit, and had addressed them in only a cursory fashion before the

190. *Id.*
191. *Id.*
192. Carpenter v. United States, 138 S. Ct. 2206, 2261–72 (2018) (Gorsuch, J., dissenting).
193. *Id.* at 2264.
194. *Id.* at 2265–67.
195. *Id.* at 2262–64, 2266.
196. *Id.* at 2267.
197. *Id.* at 2267–68.
198. *Id.* at 2268.
199. *Id.*
200. *Id.* at 2268–69.
201. *Id.* at 2269.

Court.[202] Justice Gorsuch thus reluctantly concluded that Carpenter had forfeited such arguments.[203] Like Justice Gorsuch, Justice Kennedy expressed openness to the possibility that a bailor might retain Fourth Amendment interests in bailed property,[204] and Justices Samuel Alito and Thomas also declined to rule out that possibility.[205]

What do all these new traditionalist cases mean for pre-*Jones II* standing doctrine? At first blush, the *Jones II* Court's observation that Jones had at least the property interests of a bailee might seem to be a routine assertion of longstanding principles; even the *Rawlings* Court acknowledged that property interests remained a relevant factor to consider in standing analysis.[206] Yet, by delineating a bright-line, property-based rule for ascertaining whether government activity qualifies as a search without purporting to abandon the *Rakas* Court's holding that so-called standing questions are "properly subsumed under substantive Fourth Amendment doctrine,"[207] one can fairly read *Jones II* as suggesting that a property interest in a house, paper, or effect is sufficient to establish standing to contest a Fourth Amendment search or seizure implicating the property in question. Likewise, the *Byrd* majority opinion, Justice Thomas's *Byrd* concurrence, and the *Carpenter* dissents accepted that a property interest in a paper or effect might alone establish one's standing to contest a search or seizure implicating that property.

In fact, one could potentially read *Soldal v. Cook County*,[208] a case that preceded *Jones* by twenty years, as undermining the logic of the *Rawlings* Court's conclusion that only a reasonable expectation of privacy in the place searched would confer standing to contest the search or a resulting seizure of property.[209] In *Soldal*, the plaintiffs challenged what they asserted was the illegal seizure of their mobile home, but the U.S. Court of Appeals for the Seventh Circuit held that there was no

202. *Id.* at 2272.

203. *Id.*

204. *Id.* at 2230 (Kennedy, J., dissenting) (accepting that an individual might retain Fourth Amendment interests in papers or effects held by a third party).

205. *Id.* at 2259 & n.6 (Alito, J., dissenting) (concluding that Carpenter's cell-site location information was neither his papers nor his effects and, thus, that *Carpenter* was "not a case in which someone has entrusted papers that he or she owns to the safekeeping of another, and it does not involve a bailment").

206. Rawlings v. Kentucky, 448 U.S. 98, 105 (1980).

207. Rakas v. Illinois, 439 U.S. 128, 139 (1978).

208. 506 U.S. 56 (1992).

209. *See, e.g.*, Maureen E. Brady, *The Lost "Effects" of the Fourth Amendment: Giving Personal Property Due Protection*, 125 YALE L.J. 946, 949 n.6 (2016) (positing that *Rawlings*'s suggestion that one who lacks a reasonable expectation of privacy in the area searched lacks standing to contest the search or the resulting seizure of his or her property may no longer be viable in light of *Soldal*, but declining to "delve into" the issue).

Fourth Amendment seizure, in part because the government conduct had not invaded the plaintiffs' privacy.[210] The Supreme Court declared, however, that while cases such as *Katz* concluded that property rights were no longer the exclusive metric for evaluating Fourth Amendment interests, "[t]here was no suggestion" that the "shift in emphasis" from property to privacy "had snuffed out the previously recognized protection for property under the Fourth Amendment."[211] Justice Scalia relied on *Soldal* in *Jones* to support his argument that *Katz* merely supplemented rather than supplanted *Olmstead*'s property framework for deciding whether government conduct qualifies as a search.[212]

It may be fruitful to consider the potential implications of the new traditionalism by assessing a range of property interests and Fourth Amendment intrusions that any given case might present. This Article, in turn, assesses the potential impact of the new traditionalism on the standing rights of bailors, bailees, and owners of property that might have been deemed abandoned under the privacy framework. This Article also discusses whether a shift in standing theory would have a practical impact on the interests of criminal defendants or, alternatively, would represent merely a conceptual reframing without actual benefits to those seeking the suppression of evidence.

One of the most significant potential effects of the new traditionalism for both standing and, ultimately, exclusion of tainted evidence, is that it could advance the interests of bailors of property who lack a reasonable expectation of privacy in the area where the bailee stores the property. In fact, as described, the application of bailment law to Fourth Amendment problems was a major component of Justice Gorsuch's dissent in *Carpenter*.[213] Yet, while Justice Gorsuch was primarily concerned with digital data (given the facts of the case), the principles he delineated have significant import in cases involving more conventional, physical searches and seizures. As Justice Gorsuch declared, under the traditional approach, if one could determine that a house, paper, or effect "was *yours* under law," then "[n]o more was needed to trigger the Fourth

210. Soldal v. County of Cook, 942 F.2d 1073, 1076–79 (7th Cir. 1991) (en banc), *rev'd*, 506 U.S. 56 (1992).

211. *Soldal*, 506 U.S. at 64.

212. United States v. Jones, 565 U.S. 400, 407 (2012). On the other hand, Justice Alito argued in his *Jones II* concurrence that *Soldal* established only that privacy interests were unnecessary to show that a seizure had occurred and that the case was irrelevant to the identification of a Fourth Amendment search. *Id.* at 423–24 (Alito, J., concurring). Yet, the *Carter* Court cited *Rawlings* with approval six years after *Soldal*, reiterating that the right to assert a Fourth Amendment claim depends on whether one "has a legitimate expectation of privacy in the invaded place." Minnesota v. Carter, 525 U.S. 83, 88 (1998) (quoting *Rakas*, 439 U.S. at 143).

213. Carpenter v. United States, 138 S. Ct. 2206, 2268 (2018) (Gorsuch, J., dissenting).

Amendment."[214] Moreover, although Justice Gorsuch focused much of his analysis on the question of whether cell-site location information might be a modern analogue of physical papers and effects,[215] and whether cellular customers might have property rights in such data,[216] the precepts he described unquestionably apply with at least equal force to the sorts of physical property that formed the basis of Gorsuch's analogies.[217] Consequently, the new traditionalism could prove to be a weapon against the sort of run-of-the-mill street tactics that vulnerable communities have long critiqued as susceptible to abuse by law enforcement.

The notion that a bailor, as the owner of bailed property, retains a Fourth Amendment interest in papers or effects in the custody of a bailee should appeal to other justices with originalist sympathies, and even to conservative incrementalists, given *Jones II*'s precedential force and the implications for Fourth Amendment standing of its revival of property-based Fourth Amendment interpretation as an alternative to the privacy model. Similarly, liberals on the Court are likely to embrace the opportunity for individuals to make Fourth Amendment arguments based on property rights. Among the Court's liberals, only Justice Sonia Sotomayor joined Justice Scalia's majority opinion in *Jones II*.[218] Yet, by the following year, Justice Sotomayor, Justice Elena Kagan, and Justice

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214. *Id.*

215. *Id.* at 2267–68. As Justice Gorsuch stated, "Judges are supposed to decide cases based on 'democratically legitimate sources of law'—like positive law or *analogies* to items protected by the enacted Constitution—rather than 'their own biases or personal policy preferences.'" *Id.* (emphasis added) (quoting Todd E. Pettys, *Judicial Discretion in Constitutional Cases*, 26 J.L. & POL. 123, 127 (2011)). After discussing the potential relevance of bailment law, Justice Gorsuch then speculated, "These ancient principles may help us address modern data cases *too*. Just because you entrust your data—in some cases your modern-day papers and effects—to a third party may not mean you lose any Fourth Amendment interest in its contents." *Id.* at 2269 (emphasis added).

216. *Id.* at 2270, 2272.

217. Indeed, the foundation of Justice Gorsuch's speculation that Carpenter's data might be the equivalent of his papers or effects and that the law of bailment might provide a basis for protecting such data, even when held by a cellular company, was that conventional papers or effects clearly do remain yours under law even when you have entrusted them to a bailee. Justice Gorsuch asked,

> Ever hand a private document to a friend to be returned? Toss your keys to a valet at a restaurant? Ask your neighbor to look after your dog while you travel? You would not expect the friend to share the document with others; the valet to lend your car to his buddy; or the neighbor to put Fido up for adoption.

Id. at 2268.

218. *Jones*, 565 U.S. at 401.

Ruth Bader Ginsberg joined the majority in *Jardines*.[219] It is reasonable to conclude that these civil libertarians recognized that, in light of Justice Scalia's insistence in *Jones II* that both *Katz* and *Olmstead* were viable alternatives for identifying Fourth Amendment searches, the rehabilitation of the property model could act only as a ratchet favoring individual rights. If application of property principles leads to the conclusion that the government conducted a Fourth Amendment search, the inquiry ends. If, on the other hand, the property framework fails to show that a search occurred, a criminal defendant can move on to *Katz* and attempt to show that the government's conduct infringed her reasonable expectation of privacy.[220] Similarly, in determining who retains authority to contest a search or seizure that *has* occurred (that is, who has Fourth Amendment standing), the addition of a property model to the current privacy framework gives individuals contesting a search or seizure two bites at the apple. If a person has a property interest in a place searched or effects seized, she has standing. If not, the person will still have Fourth Amendment standing under *Katz* if she had a reasonable expectation of privacy in the place searched.

The logical consequence for standing doctrine of the resurgence of the Fourth Amendment property framework should be the revitalization of the property-based standing principles that prevailed before *Katz*. That should mean, at least, overturning *Rawlings* and the portion of *Rakas* that might be read to have held that Fourth Amendment standing depends only on whether a Fourth Amendment claimant had a reasonable expectation of privacy in the place searched.[221] Just as *Jones II* held that *Katz* merely

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219. Florida v. Jardines, 569 U.S. 1, 2 (2013).

220. As Justice Scalia stated in *Jones II*:

> The concurrence faults our approach for "present[ing] particularly vexing problems" in cases that do not involve physical contact, such as those that involve the transmission of electronic signals. We entirely fail to understand that point. For unlike the concurrence, which would make *Katz* the *exclusive* test, we do not make trespass the exclusive test. Situations involving merely the transmission of electronic signals without trespass would *remain* subject to *Katz* analysis.

Jones, 565 U.S. at 411 (citation omitted).

221. This was, of course, how the *Rawlings* and *Salvucci* Courts interpreted *Rakas*. United States v. Salvucci, 448 U.S. 83, 91–92 (1980) (stating that a "person in legal possession of a good seized during an illegal search has not necessarily been subject to a Fourth Amendment deprivation" and that *Rakas* held that "an illegal search only violates the rights of those who have a 'legitimate expectation of privacy in the invaded place'" (quoting Rakas v. Illinois, 439 U.S. 128, 140 (1978))); Rawlings v. Kentucky, 448 U.S. 98, 104–06 (1980) (stating that under *Rakas* the standing inquiry had been abandoned "in favor of an inquiry that focused directly on the

added to the property rubric and did not eliminate previously recognized Fourth Amendment protection of property in the context of defining searches or seizures,[222] the logical implication of *Jones II* is that *Katz* likewise preserved previously recognized protections for property in the context of standing inquiries. That should mean, then, a return to the assumption of *Jones I*, the implicit rule of *Jeffers*, and the early appellate court standing decisions that a property interest in a place searched *or* in seized property gives a defendant standing to make Fourth Amendment arguments. As even the *Rawlings* Court conceded, prior to *Rakas*'s adoption of the *Katz* test as a tool for identifying which people have standing to contest a Fourth Amendment intrusion (as opposed to merely deciding whether a search occurred), Rawlings would have had standing to argue against the admissibility of the bailed goods (his drugs) found in his acquaintance's purse.[223] This, of course, would have been perfectly consistent with Jeffers's right to contest the seizure of his drugs from his aunts' hotel room.

There is some room for argument on the above points in light of the Court's attempts in *Rawlings*, *Salvucci*, and *Rakas* to recharacterize older, property-based standing opinions. In *Rawlings*, the Court objected to the defendant's argument that his ownership of the seized drugs gave him standing by referring to *Rakas*'s quotation from *Jones I*'s repudiation of the notion that "arcane" property interests should control Fourth Amendment standing rights.[224] Yet the *Jones I* Court rejected the notion that such concepts should control standing jurisprudence not because it believed that a property interest in a place searched or an item seized was insufficient to establish standing, but because it chose to *expand* standing rights even to those without property rights by granting standing to

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substance of the defendant's claim that he or she possessed a 'legitimate expectation of privacy' in the area searched"). As discussed above, however, the *Rakas* Court suggested that if either defendant in the case had asserted a property interest in the seized gun or ammunition, he would have had standing to make Fourth Amendment arguments for the suppression of the seized evidence. *Rakas*, 439 U.S. at 142 n.11 (stating that the Court was not suggesting that a person without a reasonable expectation of privacy in a place searched would lack standing to contest the seizure of his own property as a result of the search); *see also* Soree, *supra* note 118, at 606 ("Read narrowly, and in my view correctly, *Rakas* held that being 'legitimately on the premises' in the absence of other factors (such as a ownership of premises searched or property seized) is not sufficient grounds for claiming a violation of one's Fourth Amendment rights and that a claimant must at the very least demonstrate 'a legitimate expectation of privacy in the invaded place.'" (quoting *Rakas*, 439 U.S. at 143)).

222. *See Jones*, 565 U.S. at 405–07; *id.* at 414 (Sotomayor, J., concurring) ("As the majority's opinion makes clear, however, *Katz*'s 'reasonable expectation of privacy' test augmented, but did not displace or diminish, the common-law trespassory test that preceded it.").

223. *Rawlings*, 448 U.S. at 106.

224. *Id.* at 105.

anyone "legitimately on [the] premises" of the place searched.[225] Even the *Salvucci* Court acknowledged that an "underlying assumption of *Jones*" was "that possession of a seized good is the equivalent of Fourth Amendment 'standing' to challenge the search."[226] This was obviously the case, for the automatic-standing rule was necessarily premised on the notion that a possessory interest in seized contraband was an adequate basis for standing; the Court, in fashioning the rule, sought merely to deprive the prosecution of the authority, which lower courts had often granted, to make the contradictory arguments that a defendant possessed contraband for the purpose of proving guilt but that the defendant was not the possessor of the contraband for the purpose of rebutting the defendant's standing argument.[227] In other words, if the prosecution charged a defendant with a possessory offense, the defendant would be entitled to take the prosecution at its word and would, on the basis of the charged possession, have the authority to contest a search that led to seizure of the contraband.[228] As the *Jones I* Court stated, "The same element in this prosecution which has caused a dilemma, *i.e.*, that possession both convicts and confers standing, eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized, which ordinarily is required when standing is challenged."[229]

Similarly, the *Salvucci* Court reinterpreted the significance of *Jeffers* to suggest that Jeffers had standing to contest the search of his aunts'

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225. Jones v. United States, 362 U.S. 257, 267 (1960) (stating that "[n]o just interest of the Government" in the pursuit of enforcing criminal law "will be hampered by recognizing" this right), *overruled by Salvucci*, 448 U.S. 83. Again, moreover, even the *Rakas* Court suggested that the owner of seized property would have the right to contest a search that led to the seizure, regardless of whether the owner of the property had a reasonable expectation of privacy in the place searched. *See* Albert W. Alschuler, *Interpersonal Privacy and the Fourth Amendment*, 4 N. ILL. U. L. REV. 1, 15 (1983). Professor Albert Alschuler has noted the perversity of the *Rawlings* Court's response to Rawlings, in light of *Rakas*'s suggestion. Professor Alschuler remarked:

> *Rakas* had emphasized the defendants' failure to allege ownership of the property seized, and it had said that an owner of property would "in all likelihood" have standing to challenge its search or seizure . . . . Accordingly, the defendant in *Rawlings* said to the Supreme Court, "I am the owner." And the Court responded, "Mr. Rawlings, don't be arcane."

Id. (footnote omitted) (quoting *Rakas*, 439 U.S. at 143 n.12); *see also* Soree, *supra* note 118, at 604 (observing that *Jones I* rejected the use of arcane property rules that were used to *limit* standing "where the 'arcane' property distinctions of 'gossamer strength' were those 'between "lessee," "licensee," "invitee" and "guest"'" (quoting *Jones*, 362 U.S. at 265–66)).

226. *Salvucci*, 448 U.S. at 93.

227. *Jones*, 362 U.S. at 261–64.

228. *Id.* at 263–64.

229. *Id.* at 263.

hotel room and the seizure of his drugs only because Jeffers had possessory interests in both the room and the drugs.[230] This reimagination of *Jeffers* eased the way for the *Salvucci* and *Rawlings* Courts to declare that possession of seized effects was inadequate to confer Fourth Amendment standing. However, the *Salvucci* Court based its assertion not on examination of *Jeffers* itself but on an offhand comment the *Rakas* Court had made in rejecting the defendants' "target theory" of standing.[231] In fact, as discussed, the *Rakas* Court implied that ownership of seized property *would* establish standing, even in the absence of a reasonable expectation of privacy or a property interest in the place searched.[232] This implication was perfectly consistent with *Jeffers*'s conclusion that whether Jeffers had standing depended entirely on whether he had a property interest in the seized narcotics.[233] In concluding that Jeffers did have property rights in the drugs, the Court never argued that Jeffers had a possessory interest in the room, nor did it imply that such an interest was necessary.[234] In fact, the Court began its discussion by observing that the case involved "troublesome questions" about how to deal with a situation in which a defendant claimed ownership of narcotics "which were seized on the premises of other persons."[235]

Like the *Salvucci* Court, Fourth Amendment commentators have sometimes reinterpreted *Jeffers*, often in attempts to reconcile the decision with the Court's later shift to a privacy-based standing inquiry.[236] Nonetheless, *Jeffers* itself was based on property rules. As

230. *Salvucci*, 448 U.S. at 90–91 n.5 (citing *Rakas*, 439 U.S. at 136).

231. *Id.*; *see also* Soree, *supra* note 118, at 605–06 (acknowledging that instead of reexamining *Jeffers* directly, the *Salvucci* Court used *Rakas*'s re-interpretation of *Jeffers* to reject the defendant's reliance on *Jeffers*).

232. *See supra* text accompanying notes 105–09.

233. United States v. Jeffers, 342 U.S. 48, 52 (1951) (declaring that Jeffers "unquestionably had standing to object to the seizure made without warrant or arrest unless the contraband nature of the narcotics seized precluded his assertion, for purposes of the exclusionary rule, of a property interest therein").

234. The Court did, however, note in passing that Jeffers's aunts had given him a key to the room and access to it, though they were unaware that he was storing narcotics there. *Id.* at 50. Nonetheless, the Court never devoted any analysis to Jeffers's access to the room or suggested that it was necessary to its conclusion that he had standing. *But see* Christopher Slobogin, *Capacity to Contest a Search and Seizure: The Passing of Old Rules and Some Suggestions for New Ones*, 18 AM. CRIM. L. REV. 387, 405 (1981) (describing the *Jeffers* rationale as being premised on "access to the premises akin to that enjoyed by Jeffers, plus a possessory interest in the item seized from those premises").

235. *Jeffers*, 342 U.S. at 49.

236. *See, e.g.*, WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.3(c) (6th ed. 2020) (asserting that "the unstated premise in *Jeffers* was that the

noted above, the prosecution in *Jeffers* argued that Jeffers lacked standing because "the search did not invade [his] privacy."[237] Without contradicting the assertion that the search invaded no privacy interest of Jeffers, however, the Court concluded that his standing depended on whether he had a property interest in the seized narcotics.[238] Ultimately, the most likely reason for the *Jones I* Court's "unexamined assumption"[239] that a possessory interest in seized property was enough to demonstrate Fourth Amendment standing was that the Court believed that *Jeffers* had already established the rule, a rule the *Jones I* Court described as "the conventional standing requirement."[240] Likewise, the *Simmons* Court noted that before the *Jones I* Court's expansion of standing rights even to those without a property interest in the place searched or items seized, "a defendant who wished to assert a Fourth Amendment objection was required to show that he was the owner or possessor of the seized property *or* that he had a possessory interest in the searched premises."[241]

In a prescient dissenting opinion in *Rawlings* that bears a remarkable resemblance to Justice Scalia's argument in *Jones II* (that *Katz* merely added Fourth Amendment protection of privacy without eliminating previously recognized protection of property interests), Justice Thurgood Marshall contended that the *Rawlings* majority "turned the development of the law of search and seizure on its head."[242] "The history of the Fourth Amendment," he observed, "shows that it was designed to protect property interests as well as privacy interests."[243] That history included the Court's pre-*Katz* standing decisions, which made clear that a property interest either in the place searched or items seized was enough to provide a defendant with Fourth Amendment standing.[244] Thus, although *Katz*

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defendant had an expectation of privacy in his personal property under the circumstances there presented"); WARRANTLESS SEARCH LAW DESKBOOK § 28:3 (2021) (arguing that "the most comfortable explanation of *Jeffers* is actually one based on the *Katz* analysis" and that "[i]t seems clear that, while having no possessory interest in the hotel room, the circumstances of his use of it . . . indicated a sufficient privacy interest in the room to challenge a search of it").

237. *Jeffers*, 342 U.S. at 52.

238. *Id.*

239. United States v. Salvucci, 448 U.S. 83, 90 (1980).

240. Jones v. United States, 362 U.S. 257, 261–62 (1960), *overruled by Salvucci*, 448 U.S. 83.

241. Simmons v. United States, 390 U.S. 377, 389–90 (1968) (emphasis added).

242. Rawlings v. Kentucky, 448 U.S. 98, 118–19 (1980) (Marshall, J., dissenting).

243. *Id.* at 119.

244. *Id.* at 114–17. Writing shortly after the *Rawlings* decision, Professor Christopher Slobogin stated that "no decision of the Supreme Court, as interpreted by the present Court, directly supports" Justice Marshall's claim that "a long tradition" established that a property

recognized "that privacy interests are protected even if they do not arise from property rights . . . that recognition was never intended to exclude interests that had been historically sheltered by the Fourth Amendment from its protection."[245] This argument, which Justice Marshall made in the context of a Fourth Amendment standing inquiry, was precisely the same argument Justice Scalia made over three decades later in *Jones II* in the context of determining what sorts of government conduct qualify as Fourth Amendment searches.[246] Given the ultimate vindication of Justice Marshall's perspective by the new Fourth Amendment traditionalists, the Court should now conclude that an individual has standing to make a Fourth Amendment argument when she has either a property interest in a seized effect, a property interest in the place searched, or a reasonable expectation of privacy in the place searched.[247]

This becomes especially clear when one thinks of Fourth Amendment standing as involving the question of whether a defendant has a sufficient connection to or interest in a place or an effect that a court could conclude that any search or seizure of the place or effect is one that *implicates* the defendant's Fourth Amendment rights, as opposed to the less nuanced reduction of "theoretically separate"[248] issues in *Rakas* to the single question of whether challenged government conduct *violated* a defendant's rights.[249] Certainly, for example, a seizure of an owner's effects is a Fourth Amendment intrusion that *implicates* an owner's Fourth Amendment rights, even if the owner lacks a reasonable

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interest in a seized effect "enables one to contest a search and seizure." Slobogin, *supra* note 234, at 414. It is, of course, true, as I have described, that the Burger Court used *Katz* to withdraw Fourth Amendment protections associated with the property regime and that, in doing so, it reinterpreted older decisions to suit its preferences.

245. *Rawlings*, 448 U.S. at 119.

246. United States v. Jones, 565 U.S. 400, 405–08 (2012) (stating that although *Katz* recognized that the Fourth Amendment sometimes protects privacy interests even in the absence of a trespass onto a constitutionally protected area to gather information, *Katz* "'did not snuf[f] out the previously recognized protection for property'" (citation omitted)).

247. *But see* Carpenter v. United States, 138 S. Ct. 2206, 2235–46 (2018) (Thomas, J., dissenting) (arguing that *Katz*'s privacy test should be discarded as inconsistent with text and history and "unworkable in practice"); *id.* at 2261–72 (Gorsuch, J., dissenting) (critiquing *Katz* but allowing that "*Katz* may still supply one way to prove a Fourth Amendment interest").

248. Rakas v. Illinois, 439 U.S. 128, 139 (1978).

249. *Id.* at 140.

expectation of privacy in the place where the effects were found.[250] The plain meaning of the text leads ineluctably to this conclusion.[251]

Even if *Soldal, Jones*, Justice Thomas's concurrence in *Byrd*, and Justice Gorsuch's dissent in *Carpenter* do have implications for Fourth Amendment standing doctrine, one might question whether the shift in emphasis will have practical implications for individuals asserting Fourth Amendment claims. After all, a search or seizure that involves Fourth Amendment interests might nonetheless be a reasonable search or seizure with respect to those same interests, i.e., one that does not violate your Fourth Amendment rights, even if it might have been unreasonable with regard to someone else. In addressing Rawlings's argument that his ownership of the drugs in his companion's purse gave him standing to contest the government's conduct, the *Rawlings* Court suggested that accepting Rawlings's assertion might be academic:

> Had petitioner placed his drugs in plain view, he would still have owned them, but he could not claim any legitimate expectation of privacy. Prior to *Rakas*, petitioner might have been given "standing" in such a case to challenge a "search" that netted those drugs but probably would have lost his claim on the merits. After *Rakas*, the two inquiries merge into one: whether governmental officials violated any legitimate expectation of privacy held by petitioner.[252]

The implication of this passage is that if the Court had concluded that Rawlings had standing to contest the government's confiscation of his contraband, the result would have been the same. That is, although the seizure of the pills would then have implicated Rawlings's Fourth Amendment interests, the Court would have found, nonetheless, that the search and seizure were reasonable (at least with respect to Rawlings). To see why this might be so, one must consider the nature of the plain-view doctrine, which is based on the principle that an officer's observation of an object in plain view involves no intrusion on Fourth

250. *See, e.g.*, Slobogin, *supra* note 234, at 414 (noting that "[b]oth *Rakas* and *Rawlings* fail to differentiate between searches and seizures" and arguing that "Justice Marshall rightly emphasized" in his *Rawlings* dissent "that the [F]ourth [A]mendment speaks of both searches and seizures").

251. Founding-era history also reveals a concern for the protection against "interferences with another's possession of personal property, including dispossession, damage, and unwanted manipulation," which reflected "the recognition that when agents of the government examine and handle personal items, they threaten the privacy, security, and dignitary interests inherent in ownership." Brady, *supra* note 209, at 951–52, 987–94.

252. Rawlings v. Kentucky, 448 U.S. 98, 105–06 (1980).

Amendment privacy interests.[253] It follows from this that if a law enforcement official sees an object in plain view that is immediately apparent as contraband or evidence of crime, she may seize the object.[254] This authority, however, is negated if the officer violated the Fourth Amendment to arrive at the place where she could plainly view the object in question, or if she must violate the Fourth Amendment in order to access the object after viewing it.[255] Thus, the plain-view doctrine would be inapplicable if a police officer broke into a home without a warrant and then found contraband in "plain view" on a table in an interior room.[256] Likewise, if an officer standing on a public sidewalk saw contraband in plain view through the front window of a home, she would be unauthorized to enter the home to seize it without a warrant or a recognized exception to the warrant requirement.[257] One might interpret the *Rawlings* Court's analogy to the plain-view doctrine as a suggestion that even if Rawlings had standing to contest the government's seizure of his contraband, the seizure would have been reasonable because, regardless of whether the search of the purse was unreasonable for Fourth Amendment purposes, that search would not have impinged on Rawlings's Fourth Amendment interests. From his perspective, that is, the government committed no Fourth Amendment violation to acquire a plain view of his contraband, even if the search of the purse violated his acquaintance's rights.

Thus, even if *Soldal* undermined *Rawlings*'s standing arguments, the *Soldal* plaintiffs were likely to get relief only because their rights were probably violated: it is unreasonable for Fourth Amendment purposes to seize a person's effects without probable cause or, in *Soldal* itself, a lawful eviction order justifying the removal of the plaintiffs' trailer.[258]

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253. *See, e.g.*, Horton v. California, 496 U.S. 128, 133 (1990). This idea, in turn, traces its roots to *Katz*, in which Justice Stewart's majority opinion stated that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." Katz v. United States, 389 U.S. 347, 351 (1967). Likewise, in Justice Harlan's ultimately more influential *Katz* concurrence, he proclaimed that "a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited." *Id.* at 361 (Harlan, J., concurring).

254. *Horton*, 496 U.S. at 136.

255. *Id.* at 136–37.

256. *See, e.g.*, Soldal v. Cook County, 506 U.S. 56, 66 (1992) (stating that "in the absence of consent or a warrant permitting the seizure of the items in question, [plain-view] seizures can be justified only if they meet the probable-cause standard . . . and if they are unaccompanied by unlawful trespass").

257. *See id.*

258. *Id.* at 59 (stating that law enforcement officers were aware that trailer park owner "did not have an eviction order and that its actions were unlawful").

People like Rawlings, on the other hand, while now having standing, would nonetheless go without relief because their rights were not violated according to this reasoning. There are, however, several reasons to believe that the new Fourth Amendment traditionalism will have practical as well as conceptual import.

First, the plain meaning of the word "search," its context in the text of the Fourth Amendment, and historical and recent traditionalist opinions suggest that an unreasonable search *for* a defendant's effects, as opposed to merely a search *of* a defendant's property, is a violation of the defendant's Fourth Amendment rights, regardless of whether the defendant had a reasonable expectation of privacy in the place searched. As discussed, Justice Scalia first argued in *Kyllo* that the meaning of "search," both at the time of the framing and now, was straightforward.[259] As he explained, "to 'search' meant '[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.'"[260] Additionally, the text of the Fourth Amendment prohibits not only unreasonable searches *of* one's person, house, papers, or effects, but also "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[261] Thus, it is sensible to conclude that an unreasonable search *for* one's effects would undermine one's sense of security against unreasonable searches and seizures, regardless of one's expectation of privacy in the place in which the effects were located.[262] Under this line of reasoning, Rawlings was

259. *See supra* text accompanying note 160 (citing Kyllo v. United States, 533 U.S. 27, 32 n.1 (2001)).

260. *Supra* text accompanying note 160 (quoting *Kyllo*, 533 U.S. at 32 n.1); Carpenter v. United States, 138 S. Ct. 2206, 2238 (2018) (Thomas, J., dissenting) (quoting *Kyllo*, 533 U.S. at 32 n.1).

261. U.S. CONST. amend. IV.

262. Several authors have argued that the Court has failed to take seriously the Fourth Amendment's guarantee of the "right to be secure." Professor Jed Rubenfeld has speculated about the consequences of reading the Amendment as written:

> Grant, then, if only provisionally and for the sake of argument, that we ought to read the Fourth Amendment as written. Stipulate that the people's right "to be *secure* in their persons, houses, papers, and effects" is a thing of independent meaning and value, and that guaranteeing it was and is the amendment's whole point. A different command then emerges from the Fourth Amendment's text.

Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 122 (2008); *see also* Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security*, 33 WAKE FOREST L. REV. 307, 308 (1998) (arguing that the right to be secure protects only against actual intrusions that violate the right to exclude); Luke M. Milligan, *The Forgotten Right to be Secure*,

subject not to a reasonable, plain-view seizure of his drugs but to an unreasonable search *for* his drugs.

This logic is also consistent with *Jeffers*, in which the government conceded that the search of the hotel room violated the rights of Jeffers's aunts but claimed that both the search and seizure were lawful with respect to Jeffers.[263] The Court responded that the search and seizure were "bound together by one sole purpose—to locate and seize the narcotics of respondent," and it asserted that "[t]o hold that this search and seizure were lawful as to the respondent would permit a quibbling distinction to overturn a principle which was designed to protect a fundamental right."[264] The Court found, that is, not only that Jeffers had standing but also that the government's conduct violated his rights.[265] The government did so by conducting an unreasonable search *for* his narcotics.[266] Ultimately, this led the Court to decide that Jeffers was entitled to suppression of the evidence.[267] Recall that this was so despite the government's uncontested claim that Jeffers lacked a privacy interest in the room and despite the absence of any finding that he had a possessory interest in the room.[268]

In his *Rawlings* dissent, Justice Marshall considered the issue and observed the potentially devastating consequences of the *Rawlings* Court's narrowing of the class of people properly considered victims of Fourth Amendment violations. In denying redress to Rawlings, Justice Marshall contended, "[t]he Court misreads the guarantee of security '*in* their persons, houses, papers, and effects, *against* unreasonable searches and seizures' to afford protection only against unreasonable searches and seizures *of* persons and places."[269] According to Justice Marshall, however, the Fourth Amendment provided "in plain language that if one's security in one's 'effects' is disturbed by an unreasonable search and seizure, one has been the victim of a constitutional violation; and so it has always been understood."[270]

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65 HASTINGS L.J. 713, 718 (2014) (asserting that framing-era sources defined "secure" to include being "free from fear").

263. United States v. Jeffers, 342 U.S. 48, 51–52 (1951).

264. *Id.* at 52.

265. *Id.*

266. Perhaps it is possible, on the other hand, to view the *Jeffers* Court's conclusion on suppression as largely unexamined and based on the idea, at the time of the decision, that exclusion would be the consequence of any constitutional violation.

267. *Jeffers*, 342 U.S. at 54.

268. *Id.* at 52–54.

269. Rawlings v. Kentucky, 448 U.S. 98, 117 (1980) (Marshall, J., dissenting) (quoting U.S. CONST. amend. IV).

270. *Id.* at 117–18.

Although the Court has not, since *Rawlings*, explicitly vindicated Justice Marshall's perspective, the *Jones II* holding implicitly does so. *Jones II* held that the government's physical intrusion onto Jones's wife's Jeep to gather information was a search under the original meaning of the Fourth Amendment.[271] Under the trespass theory, this conduct was a search regardless of how long it lasted, and regardless of the fact that, at least for short-term tracking, Jones likely lacked a reasonable expectation of privacy in his location on public roads.[272] Yet, it is impossible under ordinary understandings of the English language to conclude that the government's use of the GPS device to track the movement of the Jeep on public roads was a search *of* the vehicle; rather, this clearly constituted a search *for* the Jeep. Moreover, although the Court did not rule on the matter,[273] searches involving vehicles are often considered unreasonable without probable cause,[274] or, in the case of GPS tracking, a warrant.[275] Finally, Justice Gorsuch's broader Fourth Amendment traditionalism necessarily contemplates Fourth Amendment searches without finding a reasonable expectation of privacy and without any physical intrusion onto a constitutionally protected area, for he concluded that digital property—the modern-day equivalent of a person's papers or effects—likely merits Fourth Amendment protection against government acquisition under the "traditional" approach.[276]

Perhaps this line of reasoning could create too broad a gauge for the measurement of Fourth Amendment rights. Surely, even if one were to accept that "search" is not a term of art and, thus, that mere visual observation of a public place to locate, for example, a vehicle is a Fourth Amendment search, most would find it an undue hindrance to legitimate law enforcement work to conclude that such a search is unreasonable

271. United States v. Jones, 565 U.S. 400, 406 n.3 (2012).

272. *Id.* at 430 (Alito, J., concurring) (arguing that "relatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable").

273. *Id.* at 413 (stating that the government had forfeited its argument that probable cause made the search reasonable because the government failed to raise the argument below).

274. *See, e.g.*, California v. Acevedo, 500 U.S. 565, 580 (1991); Chambers v. Maroney, 399 U.S. 42, 48 (1970); Carroll v. United States, 267 U.S. 132, 149 (1925).

275. *See, e.g.*, United States v. Katzin, 732 F.3d 187, 203 (3d Cir. 2013), *rev'd en banc*, 769 F.3d 163 (3d Cir. 2014) (finding the automobile exception to the warrant requirement inapplicable because "a GPS search extends the police intrusion well past the time it would normally take officers to enter a target vehicle and locate, extract, or examine the then-existing evidence"); *cf.* Carpenter v. United States, 138 S. Ct. 2206, 2221–23 (2018) (requiring a warrant to render collection of historical cell-site location information reasonable).

276. *Carpenter*, 138 S. Ct. at 2269 (Gorsuch, J., dissenting).

without probable cause, let alone a warrant.[277] To consider such conduct a reasonable search would be consistent with both the text of the Amendment and with historical understandings of the appropriate scope of governmental investigative authority.[278]

Accepting all the potential implications of the traditional approach may create too broad a gauge for measurement of Fourth Amendment rights, though, even in cases in which all would agree that a seizure resulted from an unreasonable search. Imagine, for example, a variation on the facts of *Jeffers* in which Jeffers had instead broken into a stranger's hotel room and hidden his narcotics in the closet. If law enforcement officers then entered the room without a warrant or any exception to the warrant requirement and seized the narcotics, the seizure would still be the product of an unreasonable search. Under these circumstances, however, suppression of the evidence would vindicate not only traditional standing principles but would also treat a more expansive class of people as victims of unreasonable searches than text, history,[279] or common conceptions of reasonableness would allow. To say that the government violated this hypothetical Jeffers's rights notwithstanding his lack of a reasonable expectation of privacy in the room, his lack of a possessory interest in the room, his lack of legitimate access to the room, and his having violated the rights of the room's occupants, would certainly strike many as extravagant.

An appealing limiting principle here may be to invoke the law of bailment, as Justice Gorsuch did in his *Carpenter* dissent.[280] As Justice Gorsuch stated, a bailor who entrusts her property to a bailee retains an interest in the bailed goods.[281] Likewise, he averred that while the

277. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 32 (2001) (acknowledging that it might make sense to consider visual observation of the portion of a house in public view to be a Fourth Amendment search, but to consider it a reasonable search); Boyd v. United States, 116 U.S. 616, 628 (1886) (accepting that visual observation alone cannot violate the Fourth Amendment, for "the eye cannot by the laws of England be guilty of a trespass" (quoting Entick v. Carrington (1765) 95 Eng. Rep. 807 (KB))); Brief of Scholars of the History and Original Meaning of the Fourth Amendment as Amici Curiae in Support of Petitioner at 13, *Carpenter*, 138 S. Ct. 2206 (No. 16–402) (arguing that the plain meaning of the text suggests that visual observation is a search, but such a search should be considered reasonable).

278. *See Boyd*, 116 U.S. at 628; Brief of Scholars of the History and Original Meaning of the Fourth Amendment as Amici Curiae in Support of Petitioner, *supra* note 277, at 13–14.

279. *Cf.* Semayne's Case (1604) 77 Eng. Rep. 194, 198; 5 Co. Rep. 91 a, 93 a (stating that "the house of any one is not a castle or privilege but for himself, and shall not extend to any person who flies to his house" (footnote omitted)); Oystead v. Shed, 13 Mass. 520, 523 (1816) (asserting that "the house shall not be made a sanctuary for . . . a stranger . . . [who] upon a pursuit, take[s] refuge in the house of another").

280. *Carpenter*, 138 S. Ct. at 2268–69 (Gorsuch, J., dissenting).

281. *Id.* at 2269.

"reasonable expectations of privacy" test may "extinguish Fourth Amendment interests once [papers or effects] are given to a third party, property law may preserve them."[282] And although part of Justice Gorsuch's argument certainly involved Fourth Amendment standing, his reasoning also suggested that an unreasonable government search for bailed papers or effects leading to their seizure *violates* the rights of the bailor, regardless of whether she had a reasonable expectation of privacy in the place searched. This conclusion follows not only from Justice Gorsuch's suggestion that someone other than the bailee taking possession of the bailed property would infringe the rights of the bailor,[283] but also from his overarching criticism of *Katz* as insufficiently protective of interests that the Fourth Amendment was meant to safeguard.[284]

Following this approach would mean the exclusion of incriminating evidence for defendants like Rawlings, who lacked a reasonable expectation of privacy in his companion's purse. The same result would follow any time the government unreasonably searches the person or property of anyone holding papers or effects for another, leading to their discovery or seizure. Nor would this create particular administrative difficulty for law enforcement officers: objective standards would continue to guide determination of whether their conduct is unreasonable for Fourth Amendment purposes, and it has always been the case, under both property and privacy models, that officers are unlikely to know in advance precisely whose rights their conduct might implicate or violate.[285]

Critically, while this approach would offer protection for digital property, as did the *Carpenter* majority's privacy-based analysis, it would also safeguard the rights of owners of property in more quotidian interactions between police and civilians, including, as in *Rawlings* itself, those involving physical searches and seizures. Thus, for example, when police conduct an unlawful *Terry* stop-and-frisk leading to the discovery of evidence of crime, anyone with a property interest in the evidence

282. *Id.*

283. *Id.* at 2268.

284. *See id.* at 2264–68, 2272 (arguing that the *Katz* test is unclear, leaves too much to judicial interpretation, and results in unpredictable jurisprudence).

285. *See, e.g.*, Rakas v. Illinois, 439 U.S. 128, 168 (1978) (White, J., dissenting) (arguing that "[o]nly rarely will police know whether one private party has or has not been granted a sufficient possessory or other interest by another private party" to have Fourth Amendment standing); *see also* Sherry F. Colb, *Standing Room Only: Why Fourth Amendment Exclusion and Standing Can No Longer Logically Coexist*, 28 CARDOZO L. REV. 1663, 1664–65 (2007) (noting that questions of Fourth Amendment reasonableness depend on ex ante assessment of what an officer knew or should have known at the time of a Fourth Amendment intrusion, while Fourth Amendment standing depends on "an omniscient or *ex post* perspective").

could have the evidence excluded at trial, not merely the person subjected to the stop-and-frisk. Likewise, for example, any time the owner or driver of an automobile holds a friend's or associate's incriminating property that police discover during an unlawful search of the vehicle, the friend or associate could have the evidence suppressed. This doctrine would thus serve as a useful shield against employment of the sorts of abusive, run-of-the-mill tactics about which vulnerable, minority communities have long complained.[286]

For those subject to unreasonable searches *of* their property, the analysis is more straightforward. Even before the rise of the new Fourth Amendment traditionalism, courts have often held *Rawlings* inapplicable in cases where the bailed effects were opaque, closed containers.[287] It was

286. *See, e.g.*, Illinois v. Wardlow, 528 U.S. 119, 132–34 (2000) (Stevens, J., concurring in part and dissenting in part) (noting the "pervasive" evidence supporting the reasonableness of the belief by "minorities and those residing in high crime areas . . . that contact with the police can itself be dangerous, apart from any criminal activity associated with the officer's sudden presence"); Terry v. Ohio, 392 U.S. 1, 14 (1968) (acknowledging the "wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain"); David A. Harris, *When Success Breeds Attack: The Coming Backlash Against Racial Profiling Studies*, 6 MICH. J. RACE L. 237, 238 (2001) (citing evidence suggesting that the "disproportionate use of traffic stops against minorities is not just a bunch of stories, or a chain of anecdotes strung together into the latest social trend," but "is a real, measurable phenomenon"); Christo Lassiter, *Eliminating Consent from the Lexicon of Traffic Stop Interrogations*, 27 CAP. U. L. REV. 79, 114–24 (1998) (citing numerous sources of evidence from all over the country of racially discriminatory traffic stops and subsequent searches and arrests); Nancy Leong, *The Open Road and the Traffic Stop: Narratives and Counter-Narratives of the American Dream*, 64 FLA. L. REV. 305, 338 (2012) ("Just as the open road is, in practice, affiliated with whiteness, the traffic stop is raced black."); Kami Chavis Simmons, *The Legacy of Stop and Frisk: Addressing the Vestiges of a Violent Police Culture*, 49 WAKE FOREST L. REV. 849, 851 (2014) ("New York's stop-and-frisk policy has evolved into a tactic whose purpose is to intimidate and harass vulnerable classes of individuals—poor, racial, and ethnic minorities.").

287. *See, e.g.*, United States v. Most, 876 F.2d 191, 197–99 (D.C. Cir. 1989) (finding that the defendant had a reasonable expectation of privacy in a bag checked with a clerk and that search of the bag violated the defendant's Fourth Amendment rights); United States v. Alberts, 721 F.2d 636, 639–40 (8th Cir. 1983) (holding that the defendant retained a reasonable expectation of privacy in closed, opaque containers stored at another's home with the resident's permission). Professor Wayne LaFave has interpreted cases like these as evidence that courts have given *Rawlings* "little weight" and that judges have continued to treat "ordinary bailment relationships . . . as establishing a justified expectation of privacy." LAFAVE, *supra* note 236, § 11.3(c); *see also, e.g.*, United States v. Edwards, 632 F.3d 633, 641–42 (10th Cir. 2001) (holding that the defendant had standing to challenge the search of his luggage even though he lacked standing to contest the search of the vehicle in which it was found); United States v. Salazar, 805 F.2d 1394, 1396 (9th Cir. 1986) (concluding that the defendant had standing to contest search of his bag although he was a mere passenger in the car in which the bag was found). However, in circumstances like *Rawlings* itself, where the defendant's effects were immediately apparent as evidence of crime without further examination of the effects, courts have often continued to follow *Rawlings*'s conclusion that any invasion of the third party's privacy nonetheless violated no rights

easy to conclude that defendants in such cases had reasonable expectations of privacy in the interior of their closed containers, whether or not they had such expectations in the places where that property was found. In other cases, however, application of *Katz* has often led courts to conclude that a property owner lacked standing to contest a search of her property in another's possession. For example, judges have frequently ruled that landlords lack a reasonable expectation of privacy in leased premises and, therefore, cannot challenge searches of homes that they themselves own.[288] This position would be untenable under the traditionalist rubric; ownership of premises both confers standing to contest a search of those premises and requires suppression of evidence gathered if the search was unreasonable.[289]

Similarly, the "traditional approach" might require the reversal of cases like *California v. Greenwood*,[290] which held that those who leave garbage in opaque bags for collection outside the curtilage of their homes lack a reasonable expectation of privacy against government searches of the garbage and thus cannot claim Fourth Amendment protection.[291] In fact, Justice Gorsuch devoted part of his criticism of *Katz* in his *Carpenter* dissent to what he considered the bizarre holding of *Greenwood*: Justice Gorsuch doubted the *Greenwood* Court's assessment of the habits of the country in its privacy analysis, and he opined that "[m]aking the decision all the stranger, California state law expressly *protected* a homeowner's property rights in discarded trash."[292] The Iowa Supreme Court has already adopted traditionalist logic to protect, under the state constitution, garbage left out for collection against government

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of the defendant. *See, e.g.*, Ordway v. Commonwealth, 352 S.W.3d 584, 587, 591–92 (Ky. 2011) (finding that the defendant lacked standing to contest a search of his girlfriend's apartment leading to the discovery of a gun, a wallet with identification, dark clothing, ammunition, bolt cutters, a sledgehammer, and keys).

288. *E.g.*, Shamaeizadeh v. Cunigan, 338 F.3d 535, 545 (6th Cir. 2003); Greater New Haven Prop. Owners Ass'n v. City of New Haven, 951 A.2d 551, 561 (Conn. 2008); Trepal v. State, 621 So. 2d 1361, 1365 (Fla. 1993) (per curiam); City of Vincennes v. Emmons, 841 N.E. 2d 155, 158, 160–61 (Ind. 2006) (deciding that landlords had Article III standing but that they lacked Fourth Amendment standing because they had no reasonable expectation of privacy in leased premises); *see also* United States v. Rios, 611 F.2d 1335, 1345 (10th Cir. 1979) (concluding that a defendant's "bare legal ownership" was insufficient to confer Fourth Amendment standing to contest a search of a mobile home he had agreed to sell to another, given his lack of a reasonable expectation of privacy).

289. *See, e.g.*, *Carpenter*, 138 S. Ct. at 2267–68 (Gorsuch, J., dissenting) (describing the traditional approach as asking merely whether "a house, paper or effect was *yours* under law").

290. 486 U.S. 35 (1988).

291. *Id.* at 39–41.

292. *Carpenter*, 138 S. Ct. at 2266 (Gorsuch, J., dissenting).

search and seizure.[293] Interpreting the strictures of Iowa's counterpart to the Fourth Amendment, the court determined that the defendant's garbage bags were effects and that their contents included papers.[294] Additionally, the bags and their contents were *his* papers and effects because, under state property law, he had not abandoned them.[295] As the court explained, abandonment "entails a relinquishment of ownership interests without regard for who becomes the next owner, such that the items in question can be considered '*bona vacantia*'—a property law term meaning 'unowned'—and available for the taking by any finder."[296] A person who puts his trash out for collection, however, agrees merely to "convey his property to a licensed collector," not to allow anyone else to rummage through it at will.[297] Finally, the search, which involved a trespass onto a constitutionally protected area, was unconstitutional in the absence of a warrant or recognized exception to the warrant requirement.[298]

A traditional approach to standing should also protect the interests of bailees in possession of property in which they might lack any reasonable expectation of privacy and, thus, would have been without protection under the *Katz* model. Although both the *Jones II* and *Byrd* Courts declined to definitively resolve the issue, the majority opinions in each case expressed openness to the argument that a possessory interest in bailed effects would be enough to confer standing on the bailee.[299] This result clearly follows from the traditional approach to Fourth Amendment standing, under which, as discussed, a property interest in either the place searched or items seized established the right to make a Fourth

293. State v. Wright, 961 N.W.2d 396, 419 (Iowa 2021).

294. *Id.* at 414.

295. *Id.* at 415 (citing Tanner M. Russo, Note, *Garbage Pulls Under the Physical Trespass Test*, 105 VA. L. REV. 1217, 1246–47 (2019)).

296. *Id.*

297. *Id. But see id.* at 459 (Mansfield, J., dissenting) ("I agree that reasonable expectations can be a squishy concept. But reverting to traditional principles of property law leads to the same result. Trash that you've abandoned is no longer your property. When you turn it over to the trash collector, this isn't a bailment, it's an abandonment.").

298. *See id.* at 417. Although the *Wright* court relied, in part, on municipal law prohibiting people other than authorized garbage collectors from taking others' trash, it also invoked Justice Gorsuch's *Carpenter* dissent to suggest that, even in the absence of such laws, it might have reached the same conclusion. Just as Justice Gorsuch invoked analogies to papers and effects to protect digital property, he speculated that, for Fourth Amendment purposes, people may retain property interests in houses, papers, or effects notwithstanding positive law purporting to strip individuals of traditionally recognized property rights. *Id.* at 416–17 (citing Carpenter v. United States, 138 S. Ct. 2206, 2270–71 (2018) (Gorsuch, J., dissenting)).

299. *See* Byrd v. United States, 138 S. Ct. 1518, 1526–27 (2018); United States v. Jones, 565 U.S. 400, 404 n.2 (2012).

Amendment claim. Thus, a person holding a closed container for another should have the authority to contest a seizure of the container or a search of its interior, even if the bailee has never had access to its contents. Under *Katz*, such a bailee would likely be out of luck,[300] but the property framework restores the rights she would have had before the rise of the privacy regime. Moreover, an unreasonable search of such effects makes anyone with a property interest in them a victim of the constitutional violation.

Given the mainstream view of Fourth Amendment standing doctrine as a mechanism for limiting the effects of the exclusionary rule,[301] one might question the willingness of the Court's Fourth Amendment traditionalists to accept the full implications of the new Fourth Amendment traditionalism in this context. Like more conventional conservatives of the Burger Court,[302] originalist justices of the twenty-first century have also expressed consistent skepticism of the exclusionary rule,[303] a twentieth-century judicial innovation rather than a

300. *See, e.g.*, United States v. Carlisle, 614 F.3d 750, 759–60 (7th Cir. 2010) (finding that the defendant lacked standing to contest a search of a closed backpack despite his being "legitimately in possession of the property," because "he did not know what was in the bag or who was using the bag immediately prior to his taking it" and there was no evidence that he "had any subjective expectation that the bag would remain free from governmental invasion"); United States v. Monie, 907 F.2d 793, 794–95 (8th Cir. 1990) (finding that a defendant hired to drive a car across the country lacked standing to contest the search of locked suitcases, to which he lacked keys, in the trunk of the car); *cf.* Marganet v. State, 927 So. 2d 52, 61 (Fla. Dist. Ct. App. 2006) (determining that the girlfriend of the defendant lacked authority to consent to a search of his shaving kit in their hotel room because she was unaware of its contents and lacked permission to access its interior).

301. *See, e.g.*, Rakas v. Illinois, 439 U.S. 128, 137 (1978) (stating that "[c]onferring standing to raise vicarious Fourth Amendment claims would necessarily mean a more widespread invocation of the exclusionary rule during criminal trials," and arguing that "[e]ach time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights" because "[r]elevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected"); Colb, *supra* note 285, at 1666 ("Existing liberal appraisals of the standing requirement tend to place it in the same category as other exceptions to the Fourth Amendment exclusionary rule, suggesting that such exceptions undermine deterrence and judicial integrity by permitting the fruit of illegal searches to enter our courtrooms.").

302. *See, e.g.*, United States v. Leon, 468 U.S. 897, 908–09 (1984) (stating that overuse of the exclusionary rule may engender disrespect for the law and create an exception when law enforcement officers rely in good faith on a warrant later deemed invalid); Nix v. Williams, 467 U.S. 431, 440–41, 448 (1984) (creating an exception to the exclusionary rule when unconstitutionally obtained evidence would inevitably have been found by the government absent the violation); Brown v. Illinois, 422 U.S. 590, 591–92, 603–04 (1975) (concluding that an examination of flagrancy of violation, passage of time, and intervening circumstances can lead to a determination that taint of constitutional violation is attenuated and evidence admissible).

303. *See, e.g.*, Hudson v. Michigan, 547 U.S. 586, 591 (2006) (concluding that the exclusionary remedy "has always been our last resort, not our first impulse," invoking an

framing-era remedy.[304] Yet these justices now have numerous tools for limiting suppression of evidence.[305] Additionally, they have been willing to follow their originalist impulses to their logical conclusions to uphold Fourth Amendment rights in the past.[306] Finally, although Fourth Amendment standing issues are crucial for criminal defendants, they are also necessary to the pursuit of civil claims, the context in which Fourth Amendment litigation arose most frequently in the early years of the republic.[307]

CONCLUSION

This Article has offered the first sustained examination of the implications of the new Fourth Amendment traditionalism for Fourth Amendment standing doctrine. Although recent developments in the privacy framework for assessing Fourth Amendment claims have the potential to dramatically expand protection of digital data, the new Fourth Amendment traditionalism's property emphasis has the potential to safeguard individual rights against more run-of-the-mill searches and seizures, including those involving physical intrusions. So far, the Supreme Court has avoided a comprehensive examination of standing doctrine under the revived property rubric. When it does have occasion to explore the issue in detail, though, a faithful application of that framework should lead to more robust protection against government intrusions that violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.

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expansive view of the attenuation doctrine, and deciding that exclusion is inappropriate where costs outweigh deterrence benefits); Herring v. United States, 555 U.S. 135, 141, 144 (2009) (holding that deterrence benefits must outweigh costs to justify suppression of evidence and that exclusionary remedy is primarily for deliberate or reckless misconduct or systemic negligence rather than for isolated acts of negligence attenuated from a violation).

304. *See, e.g.*, *Herring*, 555 U.S. at 141 (stating that the exclusionary rule is not an individual right); United States v. Calandra, 414 U.S. 338, 348 (1974) (arguing that the exclusionary rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally . . . rather than a personal constitutional right of the party aggrieved").

305. *See, e.g.*, *supra* notes 302–04; *see also, e.g.*, Davis v. United States, 564 U.S. 229, 241 (2011) (applying the good-faith exception to reliance on appellate precedent); Illinois v. Krull, 480 U.S. 340, 355–57 (1987) (applying the good-faith exception to reliance on an unconstitutional statute); Murray v. United States, 487 U.S. 533, 541–42 (1988) (developing the independent-source exception to the exclusionary rule).

306. *See supra* text accompanying note 299.

307. *See, e.g.*, Amar, *supra* note 17, at 774–78, 786.